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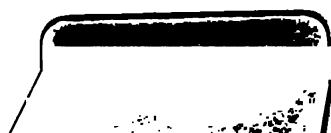


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THE COURT OF SESSION,

FROM

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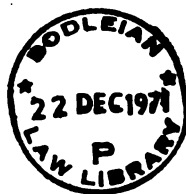
**PATRICK SHAW, ALEXANDER DUNLOP, AND
J. M. BELL, ESQUIRES, ADVOCATES.**

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1834.



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J U D G E S

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

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Lord CRAIGIE.*

Lord BALGRAY.

Lord GILLIES.

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Lord COREHOUSE.

Lord FULLERTON.

SECOND DIVISION.

Lord Justice-Clerk BOYLE.

Lord GLENLEE.

Lord CRINGLETIE.

Lord MEADOWBANK.

^{*} *On his death Lord Mackenzie took his seat in the Inner-House, First Division.*

[†] *On his death Lord Fullerton was removed from the Second to the First Division.*

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LORD ORDINARY ON THE BILLS.

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JOHN HOPE, Esquire, Dean of Faculty.

FRANCIS JEFFREY, Esquire, Lord Advocate.§

HENRY COCKBURN, Esquire, Solicitor-General.

* His Lordship, on the death of Lord Craigie, took his seat in the Inner-House, First Division.

† On the death of Lord Newton his Lordship was transferred to the First Division.

‡ On Lord Mackenzie taking his seat in the Inner-House, Lord Moncreiff became a Lord Ordinary of the Second Division, and Lord Jeffrey Lord Ordinary on the Bills.

§ On the promotion of Mr Jeffrey to the Bench, John Archibald Murray, Esq. was appointed Lord Advocate.

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James Macdonald Murray

CASES

DECIDED IN

THE COURT OF SESSION,

WINTER 1833—34.

MRS WEATHERSTONE and Others, Claimants.—*Skene—A. Murray, jun.*

MARQUIS OF TWEEDDALE and Others, Respondents.—*D. F. Hope—*

W. P. Dundas.

No. 1.

Nov. 12, 1833
Weatherstone
v. Marquis of
Tweeddale.

Teinds—Process.—1. A decree of reduction, obtained by one of several heritors, of a final decret of locality, has the effect to convert it into an interim decret as to all the heritors.

2. A decree of approbation of a sub-valuation, obtained during the currency of an interim scheme of locality, and made the basis of allocation in the final scheme, has the same effect, as a rule of adjustment among the co-heritors, as a decree of valuation pronounced by the High Commission, and, in either case, it draws back to the date of the preceding final decret of locality.

3. A petition against a judgment by a Lord Ordinary under a remit from the Court, in a process of locality in 1794, which was not presented for more than forty days, but was ordered to be answered—held to keep the judgment open.

Prescription—Bona Fides.—If payments of stipend are made under an interim decret of locality, there is an implied judicial contract, that when the legal obligations of the heritors are determined by final decret, their several interests shall be adjusted from the commencement of the process according to the true state of their rights and obligations; and therefore the claims of relief, thus arising, cannot be affected by the length of time during which the settlement of a final scheme and decret may have been delayed; nor is the plea of bona fide consumption a defence against such claims of relief.

Title to Pursue—Executor—Process—Record.—1. Where parties are called and appear as heritors, in a process of locality, and make over-payments of stipend under an interim decret, it is not necessary for them, in adjusting their claims of relief, in that process, to produce the title-deeds of their lands, to entitle them to repetition from the under-paying heritors, parties to the same process; but if any of the

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- No. 1.** original parties are dead, or have sold their lands, the parties who were sisted in their room must produce either a confirmation before extract, or a special assignation. 2. Judgment pronounced without a closed record.
- Nov. 12, 1833.** *Weatherstone v. Marquis of Tweeddale.* *Proof.*—Where a mutual accounting among heritors, who had made payments under an interim decree, drew back for forty-nine years, held that the parties claiming repetition must still produce reasonable evidence of their having actually made the over-payments; and question, what facts and presumptions amount to such evidence.
- Interest.*—Question, in regard to claims of relief among heritors, what interest is due on over-payments of stipend.

Nov. 12, 1833. *1st Division. Ld. Moncreiff. Teinds.* IN 1778, the minister of the parish of Channelkirk raised an action of augmentation and modification, and in 1779 he obtained decree of augmentation, to commence for crop and year 1778. In 1781 a remit was made to the clerk who prepared a scheme of locality, which was allowed to be seen and objected to on 6th March, 1782; objections were lodged by many of the heritors, and it was not till 1789 that a decree was pronounced approving of the locality as a final scheme. In February, 1792, the Earl of Lauderdale, an heritor, raised a reduction of the decree, in respect, 1st, that it was obtained in absence of him, and that he had never been cited; 2d, that he had an heritable right to his teinds, and as there was a sufficiency of free teind in the parish for the augmentation, he should not have been localled upon; and, 3d, that supposing he were liable to be localled on, he held a decret of valuation by the High Commission, dated 22d July, 1631, and the stipend allocated on him exceeded the amount of that valuation. He therefore concluded that “the said pretended decret of modification and locality ought and should be reduced and set aside, in so far as respects the locality in manner before-mentioned, and the pursuer reponed and restored thereagainst; and further, a new allocation of the stipend of the said parish of Channelkirk ought and should be settled and established by decret of our said Lords, as commissioners foressaid, according to the rights and interests of the pursuers, and the other heritors of the said parish; and the same being so done, the said new allocation ought and should be decerned and declared, by decret of our said Lords, to take place as for crop and year 1778, and in all time thereafter.”

The Court, in June, 1792, “reduced the decret of locality, and decerned; and remitted to Lord Ankerville, Ordinary, to hear parties on the other conclusions of the libel.” His Lordship in consequence remitted to the clerk “to rectify the locality, according to the interests now produced.” An entirely new scheme of locality was prepared, inter alia, relieving Lord Lauderdale of the augmentation. Objections to the scheme were lodged by Mr Borthwick of Crookston, who contended that, in place of having any farther burden laid on his teinds, he ought to be allocated on only to the amount paid prior to 1778. His objections were repelled, and the new scheme was approved of by the Court in 1793. Mrs Wea-

therstone, an heritor, petitioned against the judgment, and, after some intermediate procedure, the Court remitted to the Lord Ordinary to hear parties. On 14th May, 1794, his Lordship refused the petition; and above forty days thereafter, she presented a petition to the Court against this judgment. The Court allowed "all concerned to see and answer the same, betwixt and the first sederunt day of November next." In the intermediate time, the minister obtained a new augmentation, to commence with crop and year 1793, and no answers to Mrs Weatherstone's petition were ever lodged. A new scheme of locality was put into process in 1796, to which objections were lodged by Mrs Weatherstone. Several of the heritors also raised processes of approbation of sub-valuations of their teinds, and, in particular, Mr Murray of Heriotshall, raised such a process in 1797, and, after some delay, obtained decree in 1808. He sold the lands to Mr Shepperd, who surrendered his teinds in 1811; and in that year the scheme prepared in 1796, was approved as an interim scheme, "ay and until the debates and contentions among the heritors be settled, and a final locality established," after which the process fell asleep. In 1811, a third process of augmentation was raised by the minister, and in 1814 decree was obtained, to commence with crop and year 1811. In the same year (1814) the minister, after some years of litigation, obtained decree of reduction of the approbated sub-valuations of three of the heritors, but failed to reduce Mr Murray's. The two processes of locality and augmentation were conjoined, and an interim locality was approved of in 1815. Thereafter all the heritors not already possessing decrees of valuation, led a proving of the tenor of a decree of the High Commission, dated July 22, 1831, valuing the teinds of nearly the whole parish, and surrendered their teinds; and a final scheme of locality was approved of in 1827, founded upon the valued teinds of the whole parish. It now appeared, that, assuming the final scheme of 1827 as the standard of comparison, Mrs Weatherstone, Mr Murray, and some of the other heritors, had been overpaying their just proportion of stipend, and that the Marquis of Tweeddale and others had been underpaying theirs. The overpaying heritors therefore contended that from 1778 downwards, they should be held liable to the minister for no more than the valued teind as surrendered, and made the basis of the final decree of locality, and they claimed repetition from the underpaying heritors, of each annual surplus payment from 1778 downwards. They also claimed simple interest, and interest upon annual accumulations of principal and interest.

A remit being made to the Teind clerk, he prepared a report, by which it appeared that the under-payment amounted to £1701 of principal, and £2138 of interest.

The Lord Ordinary, "in respect the respondents (the under-paying heritors) agree to waive all objections to the competency of discussing, in this locality, the right of the claimants (the over-paying heritors), to obtain an adjustment of accounts arising out of payments made under the

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No. 1. interim localities, that subsisted previous to the approval of the final locality in 1827, of consent, appointed the over-paying heritors to condescend particularly upon their titles, and the sums due to them respectively."*

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A record was prepared, but not closed, in which the over-paying heritors gave a special condescendence of the titles to the lands, in virtue of which they alleged that over-payments had been localled on them.

Pleaded by the Respondents (under-paying heritors)—

1. During parts of the interval between 1778 and 1827, some of the lands were possessed by heritors now dead, others by heritors who had sold their lands to the claimants. There is no title to claim for these periods, unless a confirmation be produced, in the case of an executor, or a special assignation in the case of a singular successor.

* "NOTE.—It may be doubtful whether a record should be closed or not. On the one hand, it might be desirable that, in a matter which has been so very long protracted, the parties were bound to specific statements. But on the other, the nature of the details is necessarily such, that they do not appear to form the proper subject of a record, on the principle of the statute. The Lord Ordinary even thinks that the case would have been much clearer if the papers had been prepared in the old form. Farther, it appears impossible to close a record, without first deciding the preliminary question, whether the claimants are bound to prove their titles, as representing former proprietors of their lands, and to prove the payments of stipend, because otherwise it would be rather sharp to foreclose them from producing such documents as may be in their own possession, though it may require a search to find them.

"It will be necessary that the case be debated on the points of law:—1st, The preliminary question already mentioned. Though the titles of the claimants as heritors may be assumed, it is not evident how they can be entitled to claim repetition of money paid by other persons, without showing that they represent them otherwise than as purchasers of the lands. 2d, The question, whether Lord Lauderdale's reduction of the locality 1789 opened it up entirely. This may depend on some facts as to which the parties differ. But it is to be considered, that the locality could hardly be altered, as to Lord Lauderdale, without being also altered as to all or most of the other heritors. 3d, The question whether the decree of 1793 was kept open by the petition, which is said not to have been presented till above forty days after the date of the Lord Ordinary's interlocutor. Here the parties will attend to two points not adverted to. Though a petition against an interlocutor of the Court, approving of the locality, was remitted to the Lord Ordinary, it is very doubtful whether in the Teind-Court any interlocutor of a Lord Ordinary, refusing such a petition, would make a conclusive decree, unless either it was confirmed by the Court, or at least the locality had been of new approved of by the Court. And farther, as the interlocutors of a Lord Ordinary in the Teind-Court were properly only reports, he having no power to give decree, it is believed that, in practice, there was no fixed rule as to reclaiming days, and that petitions were given in against his decisions, which were held to be competent long after the reclaiming days of the Court of Session had expired. 4th, The question as to the causes and effect of the delay of the process, and the plea of bona fide consumption. 5th, The special plea as to those parties who found on sub-valuations only approved of in 1808. 6th, The question of interest. The Lord Ordinary wishes to get all these points discussed at once."

2. Evidence must be produced that the full amount now claimed had actually been paid to the minister by the claimants or their authors; at least, *prima facie* evidence of this should be produced.

3. All the annual payments, anterior to forty years, are prescribed.¹

4. Until discovery of the adminicles, recently before the action of proving the tenor of the decree of valuation, the respondents had no reason to believe that their liability for stipend was to be adjusted on such a basis. The plea of bona fide consumption was therefore sufficient to protect them from any claim of repetition which was based on that discovery.²

5. The accounting could not, under any view, go back farther than 1789, when a final decree of locality was pronounced in the first augmentation. The reduction of that decree by Lord Lauderdale could not open it up farther than to the extent of his Lordship's own interest, and he was not one of the claimants. It remained a standing decree³ *quoad ultra*, and therefore continued final as to all the other heritors, except to the limited effect of allowing a farther distribution amongst them, of that portion of stipend which had been erroneously allocated on Lord Lauderdale's teinds. And separately, a rectified scheme having been approved of by the Court, and Mrs Weatherstone's reclaiming petition being remitted to the Lord Ordinary, and refused by him, the judgment of the Court could not be prevented from becoming final by the subsequent petition of Mrs Weatherstone, which was incompetent, as it was not presented to the Court for more than forty days after the date of the judgment.

6. Mr Murray of Heriotshall did not obtain decree of approbation of the sub-valuation of his teinds till 1808. The sub-valuation was of no authority till approved;⁴ and thus Mr Murray was liable, as for unvalued teind, until 1808. He was not entitled therefore to claim repetition, for prior years, in respect of payments, no part of which was surplus so long as the teinds remained unvalued.

7. The claim of interest is untenable.*

Pleaded by the Claimants (over-paying heritors)—

1. The claimants, or their authors, having been called and having appeared as heritors, during each process of locality, and having made over-

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¹ 3 Ersk. 7, 11, and 13.

² Haldane, Dec. 11, 1804, (Morr. Bo. et Ma. Fides, App. No. 3); Oliphant, Nov. 30, 1790 (1721); Leslie, Feb. 2, 1827 (ante, V. 284).

³ Dow, May 25, 1825 (ante, Teind Cases, No. 30).

⁴ 1 Connell, 235; 3 Connell, 96; 3 Jurid. Styles, 479; Maxwell, July 3, 1816 (F. C.)

* The respondents also founded upon specialties, alleging that there was blame in the conduct of the over-paying heritors from having hung up the final decree of locality by their unnecessary litigation. This was met, in point of fact, by the statement that the litigation, and consequent delay, was imputable to some of the respondents as much as to the claimants; and apparently this had been the case.

No. 1. payments under interim decrees, were not obliged, in a question with other parties to the process, to instruct their titles to the lands. In those cases where an ancestor had died, the claimant would produce a confirmation before extract; and where a claimant was a singular successor, he was ready to instruct an assignation from the previous party to the process.

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2. The minister could have recovered his stipend according to each successive interim scheme, as it subsisted for the time, and it must now be presumed that he had done so. The stipend was awarded to him as necessary for his maintenance, and its arrears were liable to the quinquennial prescription. In these circumstances, there was *prima facie* proof of payment, and full proof could not be required.

3. Prescription cannot commence, until a final decree of locality be pronounced. Till then, no overpaying heritor could know what amount of relief he was entitled to, or from whom he was entitled to demand it.

4. There is no room for the plea of bona fide consumption as to under-payments made, in virtue of an interim scheme of locality.¹ Such interim arrangement was necessary for the convenience of the clergyman, and as being generally an approximation towards a just allocation according to the rights of the parties. But there is a judicial contract implied in every such arrangement, by which the heritors hold themselves mutually liable to account to each other after the approval of the final scheme, and upon the basis of liability thereby fixed.

5. From the nature of the process of locality, it necessarily followed in principle, and it was recognised in practice, that a reduction of any final decree by one heritor threw open the locality as to all the heritors, and converted the final scheme into an interim one. Lord Lauderdale's reduction had therefore the effect of converting the decree of locality of 1789 into an interim scheme, and also of opening up the whole locality back to the year 1778, the date of the augmentation. The petition of Mrs Weatherstone was competently presented, though beyond the forty days, as the judgment of the Lord Ordinary was at that time a mere report; and the competency of presenting the petition was to be presumed, from the deliverance of the Court ordering it to be answered.

6. According to the invariable practice of the Teind Court, when any decree of approbation of sub-valuation is led, during the dependence of a process of locality, or when any decree of valuation is then led, such decree is made the basis of ultimately adjusting the final scheme of locality, and such final scheme is allowed to draw back, as a rule of adjustment among the heritors, till the date of the last final locality.² This practice is well founded in principle, as the interim schemes should be laid out of view in this question, and as the decree of valuation is the best evidence of the true teind due out of the land; accordingly, the

¹ 2 *Ersk.* 1. 28.

² *Lament*, June 7, 1797 (15706).

stipend fell to be localled upon that basis, as far back as to the last final locality. No. 1.

7. As the claimants had actually paid money which the respondents ought in law to have paid, such payments must bear interest from their date;¹ and the claimants would not be indemnified, unless they received interest also upon annual accumulations.

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The Lord Ordinary pronounced this interlocutor: " Finds, that, prior to the final decret of locality in 1827, there was no standing final locality posterior to that for which decret was given in 1778, in respect that the decret which had been pronounced in 1789 was effectually set aside as to all parties, by the reduction at the instance of the Earl of Lauderdale, and the entirely new scheme of locality prepared under it in 1793; and in respect that that new locality never was finally approved of, finds, that where payments of stipend are made under interim decreets of locality, there is an implied judicial contract among all the parties, that when the legal obligations of the heritors shall be determined by final decret, their several interests shall be adjusted from the commencement of the process or processes, according to the true state of their rights and obligations, and that the claims of relief thus arising, cannot be affected by the length of time during which the settlement of a final locality may have been delayed: finds it admitted on the record, ' that the condescenders or their authors were parties to the proceedings,' in the several processes of locality referred to; finds, that though no party, being a singular successor in lands, could claim relief in respect of over-payments made by his authors, unless he held a special assignation thereto, the claimants in this case have sufficiently condescended, by the statement in Articles 25, 32, and intervening numbers, on their several rights and interests, for the different periods specified, and that their titles to insist are thereby sufficiently established, they being always bound, where they claim in right of others, whom they represent, to produce confirmations before extract: finds, that in so far as the final decret of locality may have proceeded as to any particular lands, on a decret of approbation of a sub-valuation, the interests of the parties, in regard to the period preceding the date of such decret of approbation, must be adjusted on the footing of the teinds of those lands having been unvalued: but that, where decreets of approbation or of valuation by the High Commission, prior in date to 1778, have been produced, the allocation by the final decret giving effect to them, must be the rule; finds, that the immediate obligations for payment of the particular portions of the stipend modified to the minister, having been fixed by interim decreets of locality, and there being no claim alleged to exist by any minister or his representatives for arrears of stipend unpaid, nor any positive statement made, that any part of the sums of stipend exigible from the claimants or their predecessors, were not in fact

¹ *Dawson, June 15, 1808 (Mor. v. Ann. Rent, App. No. 5); 2 Bell, 648.*

No. 1. paid to the ministers, there is ground for a presumption of fact and law, post tantum temporis, and having regard to the statutory prescription, that all such sums of stipend were duly paid by the parties liable in payment of them, in terms of the interim decreets; therefore, finds that it is not necessary for the claimants to produce evidence, by receipts or otherwise, of the successive particular payments made to the minister for the time, unless it shall be averred by the respondents, that, with reference to any particular sum or sums, the payment was either not made at all, or was made by some of the said respondents themselves: remits of new to the Teind Clerk to revise his reports with reference to the points determined by this interlocutor; and, farther, to report specially the precise sum due to each of the several claimants, according to the specification of their interests, in the articles of the condescendence above referred to, reserving for future consideration the claim of interest; and finds no expenses due to either party, so far as hitherto incurred.*

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Both parties reclaimed. Mrs Weatherstone and others, the claimants, prayed the Court to find, "that in the case of lands, where the final decret of locality proceeded on decreets of approbation of sub-valuations, such decreets form the proper rule for adjusting the interests of the parties (as well before as after their dates) during the whole period of the subsistence of interim localities, and embraced by the present accounting; and to find the claimants entitled to the expenses of the previous discussion."

The Marquis of Tweeddale and others, respondents, reclaimed generally against all the remaining findings of the interlocutor.

The Court, "before answer, remitted to the Teind Clerk to examine and report as to the effect practically given to approbations of sub-valuations, and also to valuations of teinds brought and obtained during the currency of processes of locality, in altering the allocation of the stipend on the teinds in the final locality, and to hear parties thereon."

The Teind Clerk having returned a short report, the Court, "before answer, remitted to the Teind Clerk to report more fully upon the mat-

* "NOTE.—It may be right to keep in view, that any doubt which might exist as to the competency of adjusting these claims of relief in this process, was early removed by the minute of the parties waiving every such objection, and consenting to the matter being so discussed.

"The doubtful question is, whether the respondents are entitled to receive some reasonable evidence of the payments, though not strict evidence by receipts. But the Lord Ordinary is inclined to think that the grounds of legal and fair presumption are sufficient in such a question, unless a positive averment against it were made; and that to require evidence would, in many cases, defeat the most just claims. Instances have no doubt occurred, where sums of stipend, awarded by interim decreets, have not been paid for years. But these cases are very rare, and an instance can scarcely be shown, where the minister did not claim them after the locality was finally settled,"

ters already reported on by him, and also upon the practice in regard to any other matters at issue in the cause which may be suggested to him by the parties, he hearing the parties thereon before closing his report."

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The clerk returned the subjoined report, after which, the parties were allowed to lodge additional cases in reference to the bearing of that report upon their respective pleas.*

* "The reporter shall first answer the points noted to him by the parties, and then conclude with what has occurred to himself, as pertinent to the cause.

"ARTICLE I.—Respondents' note to the clerk.—'1st, The respondents have to suggest that the report now to be given in should bear, whether the statement contained in the former report, as to approbations of sub-valuations, and to valuations of teinds brought and obtained during the currency of processes of locality, is intended to apply equally to decrees of the High Commission, in like manner.

" 'Vide respondents' sixth plea in law, revised case, p. 22.'

"ANSWER.—So far as the reporter comprehends this query, an explicit answer to it is given in the first and second articles of his first report, thus,—

" '1st, The benefit of decrees of approbation of sub-valuations, brought and obtained during the dependence of processes of locality, has, in practice, been extended backwards to the commencement of the proceedings, however many processes there may be unsettled, or not subjected to final locality; and the same is the case as regards decrees of proving the tenor of old valuations.

" '2d, The benefit of a decree of valuation obtained during the currency of processes of locality, and produced therein, is extended practically to the more immediate process (that is, the locality of the last augmentation), and not to the other previous processes, unless—which is not often the case—the valuation tends to diminish the teind produced from the proven rental.'

"To the second of these articles there was attached, in the original draft submitted to the parties, the following note, but, having been objected to, it was withdrawn:

" 'NOTE.—The reason of this is not grounded in the object of relief to the heritor alone, but also, and more decidedly, for preventing an allocation which, in certain circumstances, might exceed the teinds, as contained in the decree of valuation produced in the after-process.'

"ARTICLE II.—Claimants' Note, 3. 'What is the effect of a decree of reduction of a previous final locality, obtained in the name of one or two heritors against the other heritors? Has it, in practice, the effect of reducing and setting aside the locality, both quoad the pursuers of the reduction, and all the heritors, or does it alone expose the locality to the objections of the pursuers?'

" 'Claimants' Note, 4. 'When a reduction of a final locality is repeated in a subsequent process of locality, and decree of reduction is obtained, is not the locality reduced or opened up, at the same time declared to be an interim rule of payment till a new locality is obtained; and is it not henceforward held to be the same as if it had never been a final locality?'

" 'Vide the claimants' 1st plea in law on the merits. Appendix to reclaiming note, p. 50.

" 'Vide also revised case for claimants, p. 14, et seq.'

"Respondents' Note, 2. 'After a final scheme of locality has been arranged, what is the effect of a reduction brought by one out of several heritors, where the conclusion of the summons is merely, that the pursuer should be set free from a

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LORD BALGRAY.—I have had some experience in processes of this sort when I was at the bar, and the Court have now been aided by a report from the Teind Clerk as to the practice. There are two leading questions here; first, what is the effect of a reduction of a final locality, by a single heritor, as regards his co-heri-

portion of the stipend allocated upon him, with the view of its being laid upon the rest?

“ ‘Vide 1st respondents’ pleas in law upon the merits, revised case, pp. 9, 10, 29, 30.’

“ Respondents’ Note, 3. ‘When a scheme of locality has been opened up in the manner proposed, what is the mode of proceeding observed in framing a new one? Is not the old scheme retained, and the amount of teind which has been set free distributed among the other heritors, exactly in accordance with their rights and interests, as ascertained under the previous locality?’

“ ANSWERS.—The original draft of the first report, which was submitted to the parties, contained the following articles, which might perhaps have rendered the above queries unnecessary, but they were withdrawn in consequence of objections that they were not required by the remit:

“ ‘The reporter, who was present when the case was before the Court, and the remit made, and heard what passed, takes the liberty of further submitting certain practical points, about which the parties do not seem to be agreed.

“ ‘1. A previous locality, when a reduction of it is repeated in the subsequent process of locality, and decret of reduction obtained, is, by the same interlocutor, declared to stand as an interim rule of payment till a new locality is obtained; and thenceforth it is held the same as if it had never been a final locality.

“ ‘2. A reduction, though only at the instance of one party, has in practice the effect of exposing the locality to the objections of all parties.’

“ The above seems to be perfectly sufficient in answer to the queries now put, with this qualification as to the second article, namely, that betwixt pursuers and defenders, all parties must be in the field. If no other objection to the locality existed than that brought forward by the pursuer of the reduction himself, the mode of rectifying alluded to by the respondents might properly be adopted, but it is not the common one where the respective funds to be allocated upon are distinctly apparent.

“ NOTE.—In practice, the reporter has endeavoured to satisfy his own mind of the nature and foundation of the rules adopted, and where he could not do this, he has been in the habit of appending notes, expressive of his doubts of the consistency. He has no doubt that the rule of opening up localities generally, when any reduction of them is brought, in which all parties interested are cited, is founded in the non-expediency of putting parties already in the field to trouble and expense in repeating separate reductions; for localities may be considered as amicable suits for settling, in a just and equitable way, the rights and preferences of the heritors openly brought forward and attested by evidence produced; though points of law, already specially considered and settled in the locality, would not be touched, except by reduction on special grounds.

“ ARTICLE III.—Respondents’ Note, 4.—‘At what period was it that the practice of appointing common agents in localities was introduced, and does it appear that any alteration in regard to the effect given in practice to interim localities has taken place subsequent to the change alluded to?’

“ ANSWER.—The reporter has not been able, after diligent enquiry, to ascertain

tors? and, second, what is the true nature and effect of an interim locality? As to the first point, I conceive that the reduction throws open the decree as to all the heritors; and in this case, the conclusions of the summons of Lord Lauderdale were of a very general nature. It is also reported to be the practice in such a case, that

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any fixed period when the practice of appointing common agents became a general rule. The occurrence is not frequent prior to 1790, and in the locality now in question, a common agent was not named till 1783, though the proceedings commenced in 1778. One was then appointed on the application of Lord Tweeddale, whose object, as expressed in a minute, was to get a rule settled, in order to relieve him of the whole augmentation, which he had been paying for some years back. By the Act of Sederunt 1809, the heritors, at the starting of the locality, are appointed to meet and resolve upon a person to be suggested as common agent. After confirmation of his appointment, and the expiry of a period granted for production of the rights and interests of the heritors, it became his duty to furnish the incumbent with a locality, to form the rule of payment, till a final and correct locality should be obtained, and decree pronounced. Prior to the Act of Sederunt 1809, a common agent seems only to have been named on the application of an heritor or heritors, in order that they might be relieved from excessive burden upon their teinds, through the operation of the minister's decret of modification, or on the application of the minister in order to free him from the obloquy of partial attachment of the teinds; and it was generally the person applying who proposed the common agent, who was accordingly appointed, if no objection was made; but if this happened, then a meeting of the heritors was appointed to be held for having one named by them. In this way, an heritor's agent, or the agent for the minister, usually became the constituted common agent. The subsequent Act of Sederunt 1825 adheres to the rules of the act 1809, as to the appointment of a common agent, but requires him, after the lapse of three months given to the heritors for production, to procure a remit to the clerk to prepare a locality according to the rights and interests produced,—which locality so prepared, should be immediately approved of as an interim rule of payment. This was found to be necessary, on account of the expense, as well as delay, which had previously taken place in discussing the merits of interim localities, and the alterations thereon, consequent on objections supported by new productions.

"ARTICLE IV.—Respondents' Note, 5.—'Does it appear to have always been common for heritors to lead valuations of their teinds during the dependence of processes of locality; and if not, at what period was it that the practice seems to have been general?'

"So far as the reporter's experience goes, it has been the practice to admit decrees of valuation, led during the dependence of current processes, nay, localities are frequently delayed till such are, tempestive, gone on with and finished. The reporter was admitted to office in the early part of 1818, and had considerable practice for some years previous, as assisting the late Mr Miller, his predecessor, and as he was in office several years before Mr Miller's death, he had access to his advice in difficult practical occurrences.

"ARTICLE V.—The reporter having answered the points specially remitted, and those put to him by the parties, thinks himself warranted,—by the terms of the remit, and in consequence of what is stated by the claimants (see their Case, p. 43), regarding the practice of the Teind-Office in such matters as the present,—in farther adding, that he considers the present case as a peculiar one, not so much on account of the long subsistence of the localities, as the unusual circumstances which occurred towards their conclusion. The practice of applying to the Judge for

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the locality, when a reduction of it is obtained, "is, by the same interlocutor, declared to stand as an interim rule of payment till a new locality is obtained, and thenceforth it is held the same as if there had never been a final locality." I apprehend, therefore, that after the reduction by Lord Lauderdale, the final locality of 1789 was converted into an interim locality, and must be so dealt with.

As to the second point, the nature of an interim locality, it is a temporary arrangement, introduced, *inter alia*, for the convenience of the minister. It fixes nothing irrevocably as to questions of accounting among the heritors themselves. An heritor paying, in virtue of an interim locality, does so under the legal warrant of this Court, whereby he is authorized to look forward to redress, if he overpays. And I see no room for any distinction as to this, between a decree of approbation of a sub-valuation, and a decree of valuation by the High Court. A sub-valuation, so soon as approved, has all the force of a decree originating in the High Court, and both should receive equal effect, when obtained before the final scheme of locality is fixed.

ascertainment of accounts among parties, is not above ten or twelve years' standing. How such matters were settled previously the reporter does not know; but he supposes settlements must have taken place pretty generally, either judicially or amicably, otherwise it is obvious that great sacrifice of pecuniary interest must have been the consequence. It consists with the reporter's personal knowledge, that some cases were attended to, for he was long before the period above alluded to, employed to prepare such states. The mode pursued, and indeed it appears to be the only one practicable, is to contrast the interim and final localities, and to show the differences *pro* and *con*, and their value; and there could no other rule have existed at any time in order to produce a correct extrication.

"It is believed that the anxiety of men of business to get such matters concluded in this Court now, springs from their nature, which being very complicated, could nowhere else be so well understood. They are certainly more complicated now than they were formerly, and this arises from the number of parties *pro* and *con* being much increased, and the alterations in their respective positions in the interim and final locality greater and more perplexed, especially where surrenders of teinds occur. This is the effect produced by the greater narrowness of the fund for augmentation,—that fund being now, in many cases, so nearly exhausted, as to make the extent of available augmentation very dubious, and in almost every case it is necessary to supply it from the teinds of such heritors as, by having heritable rights, were formerly exempted.

"The reporter may remark, as bearing upon the present case, that the practice in regard to the admission of such decreets of valuation as are obtained during the currency of the process, as extending back to the commencement of the immediate process, and that of extending decreets of proving the tenor, and decreets of approbation of sub-valuations back to the origin of all the current localities, although it has a just effect, in regard to the ultimate position of the party, yet it certainly has an injurious one as to the intermediate position, when a count and reckoning takes place, if (as has been found by the Lord Ordinary, in regard to decreets of approbation of sub-valuations, and as may be the case with proving the tenors and modern valuations) the practice is inconsistent with the legal interpretation of the individual's right. It is very probable that the practice has originated in the object of avoiding the multiplied schemes, which attention to those occurrences would occasion, and leaving out of view the more important effect of such a practice, in regard to a future adjustment of the arrears incident upon the interim locality."

In regard to the evidence of payment to the minister of the sums claimed, I have some doubt whether adequate evidence has been produced. It often happens that a minister, after getting an augmentation, does not immediately enforce it to its full extent, and I should wish to see whether farther evidence of payment can be produced.

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LORD PRESIDENT.—I am quite satisfied, that from the position of parties who pay under an interim decret, there can be no room for the plea of bona fide consumption. Every heritor pays under the full knowledge that he must abide a final accounting; and it would be very unjust to him who over-pays, in the interim, under an arrangement which has chiefly the convenience of the minister in view, if he were to be debarred from obtaining repetition at the final adjustment of the heritors' rights and liabilities. I have the same doubt, however, which Lord Balgray has expressed, as to the evidence of all the over-payments having been actually made to the minister; and I concur with his Lordship also in regard to the effect due to decrees of approbation of a sub-valuation of teinds. Perhaps it may be contrary to strict principle, and contrary to the maxim, pendente lite nil innovandum, to allow any decree of valuation to draw back, anterior to its own date, and affect the interests of all parties as far back as to the date of the last final decree of locality, supposing that there is an interim locality current when the decree of valuation is obtained. But if this effect be allowed to one decree of valuation, it should also be allowed to another, and I think it due to a decree of approbation of a sub-valuation as much as to a decree of valuation deduced wholly in the High Court.

LORD GILLIES.—I concur generally in the results of your Lordship's opinion, and I also think it desirable to have some farther evidence that the over-payments were made, and by the parties, or the authors of parties who now claim repetition. Reasonable evidence should be adduced on this subject.

LORD CRAIGIE.—I concur in the opinion of the Court as to the other points, and I think the claimants cannot be called on to produce regular receipts for the over-payments. The presumptions in their favour I conceive to be sufficient in the circumstances to support their claim.

The claimants intimated that they had farther evidence on the subject of payment, and asked a remit to the Lord Ordinary to receive such evidence, and to decide the question of interest.

THE COURT pronounced this interlocutor: "Adhere to the interlocutor of the Lord Ordinary reclaimed against, excepting in so far as it 'finds that in so far as the final decret of locality may have proceeded as to any particular lands, on a decret of approbation of a sub-valuation, the interests of the parties, in regard to the period preceding the date of such decret of approbation, must be adjusted on the footing of the teinds of those lands having been unvalued:' alter this finding, and find that decreets of approbation of a sub-valuation should be considered as in pari casu with other decreets of valuation pronounced by the High Commission, and ought to rank in the same way with them, and accordingly to draw back to the commencement of the localities not finally settled:—and also excepting in so far as it finds that it is not necessary 'for the claimants to produce evidence, by receipts or otherwise, of the successive particular payments made to the ministers for the time, unless it shall be averred by the respondents, that with reference to any particular sum or sums, the payment was either not made at all, or

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was made by some of the respondents themselves:’ recal this finding; find that the respondents are entitled to receive reasonable evidence of the payments alleged to have been made by the claimants; and, with these findings, remit to the Lord Ordinary to receive such farther evidence, and to dispose of the cause quoad ultra, and find no expenses due to either party.”

J. BRIDGES, W. S.—GARRIE and MORTON, W. S.—Agents.

No. 2.

MORRIS POLLOK, Advocate.*—*Pyper*.
WILLIAM ROBERTSON, Respondent.—*D. F. Hope—Wilson*.

Poor—Jurisdiction—Process.—The heritors and kirk-session of a landward parish, resolved that the assessment for the poor should be levied “from the owners and occupiers of property in the parish according to the real rent of lands, houses, shops, public works, and all other heritable property; one-half from the proprietor, and the other half from the tenant, in proportion to their real rents;” held that the Sheriff had no power to review this order, and that his decree, enforcing it, was not subject to advocacy.

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B.

ON 26th October, 1826, at a meeting of the kirk-session and heritors of the parish of Govan, the minutes bore, that “a good deal of discussion ensued as to the principle to be observed in assessing for the maintenance of the poor, in which the Rev. Mr Leishman, Mr Fullerton, Mr Morris Pollok, and Mr Smith took a part; when Mr M‘Call moved that the assessment for the year to come should be eight hundred pounds, and that it be laid on in the mode practised by the Barony parish of Glasgow. This motion was seconded by Mr Fullerton, and unanimously agreed to.” On 6th September, 1827, the minutes of another meeting bore, that a motion was carried to fix the assessment for that year at £800; and another motion was carried to this effect, “that as the best mode of ascertaining the means and substance of the tenants and possessors of property within the parish, is by reference to the rents payable by them, that that mode be followed; and that, therefore, the parish shall be assessed for the sum above ascertained, from the owners and occupiers of property in the parish, according to the real rent of lands, houses, shops, public works, and all other heritable property; one-half from the proprietor, and the other half from the tenant, in proportion to their real rents.” A counter-motion was made by Mr Morris Pollok, and a minority of the heritors, to the effect, that “the assessment for the ensuing year, be made the one-half upon heritage, and the other half upon means and substance, as pointed out by the laws of this country; because, in so far as regards

* The party pleaded his own case.

tenants of lands, the rents which they pay for their farms cannot be considered a true criterion of their wealth, forasmuch as, by the mode now proposed, a poor tenant paying a rent of £300 a-year would be required to pay a larger sum than a rich merchant renting a house at £50 or £60 a-year." The counter-motion being lost, Pollok objected and protested. Pollok was proprietor of a silk factory, rated at a rent of £450.

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On 24th July, 1828, the amount of assessment was fixed at £1000, and the same rule for uplifting it was resolved upon. Pollok entered on the minutes his dissent from the rule of assessment. During these three years, Pollok had refused payment of his quota; and in 1829, William Robertson, collector of poor's rates for the parish, raised an action before the Sheriff of Lanarkshire against him, concluding for payment of £21, 18s. 9d., as the arrears due by him. He pleaded in defence, that he was perfectly ready to pay his proportion of any assessment which should be lawfully imposed; that it is imperative, in assessing a landward parish like Govan, to lay only one-half of the assessment upon heritage, and one half upon the inhabitants of the parish in proportion to their means and substance;¹ that the resolution of the heritors and kirk-session substantially imported an assessment upon the heritage alone, which produced an excessive allocation upon the advocator, and that such an arbitrary rule of assessment could no more be enforced by the Sheriff, than if the whole had been laid upon moveables excluding heritage, or upon one corner of the parish, excluding the remainder. It is true, that if the heritors and kirk-session keep within their powers, the Sheriff cannot control any error in judgment committed by them, but has merely a ministerial duty to perform in enforcing their assessment; and there are certain discretionary powers conferred on them, which no Inferior Court has a power to review. But when they act arbitrarily, and ultra vires, there is no legal assessment which any judge can be called on to enforce.²

The collector pleaded, that as he produced regular minutes of the heritors and kirk-session, specifying the amount of assessment, and the mode of levying it, the Sheriff had no power to review their proceedings, either as to the quantum or mode of assessment. It is perfectly regular to assess by the real rent of the heritable property,³ and to take that as the criterion of the means and substance of inhabitants, as well as of the property of heritors; and the question, whether the best criterion has been adopted, is not subject to review by the Sheriff, whose sole duty is mi-

¹ 1663, c. 16, Proclam. 11th Aug. 1692; 1698, c. 21; Cochrane, 11th Feb. 1823 (ante, II. 201); Heritors, &c. of Cargill, Feb. 29, 1816 (F.C.)

² Carrick, Dec. 16, 1800 (F.C.); Russell, &c., Jan. 18, 1764 (7353); Countess of London, May 28, 1793 (7398); Dawson, Feb. 18, 1809 (F.C.); Heritors of Corston-pine, March 10, 1812 (F.C.); Young, June 23, 1814 (F.C.); Newal, &c., May 29, 1833 (ante, VI. 684).

³ Scott, Jan. 12, 1779 (10577); Lawrie, Dec. 2, 1797 (10587).

No. 2. ministerially to enforce payment from defaulters. If any redress is to be sought, on the ground that the mode of levying the assessment is illegal, that can only be done in the Supreme Court.¹

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After the record was made up, and a proof led by the parties, the Sheriff "found it instructed by the minutes of the meetings of the heritors of the parish of Govan, certified copies of which are produced, that the defender was present at the meetings of the heritors when the assessments were laid on for the maintenance of the poor of the parish for the years in question; that it appears from said minutes, that although the defender objected to the mode of assessment, his objections were overruled by the meetings; repelled the defences; found the defender liable in payment to the pursuer, (in his character of collector of assessment,) conform to the conclusions of the libel; and found the defender liable in expenses."

Pollok brought an advocacy, in which Robertson declined to discuss the legality of the mode of assessment, and contended that the same reason which rendered it imperative on the Sheriff, ministerially, to give effect to the resolution of the heritors and kirk-session, rendered it incompetent for the Court of Session to discuss the legality of that resolution in an advocacy of the judgment by the Sheriff.

The Lord Ordinary "repelled the objection of the respondent to the competency of discussing, in this advocacy, the question of the legality of the mode of assessment sought to be enforced; and appointed parties to be farther heard, that this point, forming the merits of the cause, may be determined." *

¹ Abbey Parish of Paisley; Dunlop's Poor Law, 270; Paton, July 1, 1794—Bell's Cases, 51; Calder, June 8, 1833 (ante, XI. 694).

* "NOTE.—The respondents have declined to argue the legality of the assessment, on the ground that the Sheriff had not the power of reviewing the resolution of the heritors and kirk-session, and that, consequently, his judgment giving effect to that resolution, cannot competently be questioned in this advocacy. The Lord Ordinary thinks that the objection is bad.

"The heritors and kirk-session are not a Court, in the proper sense of the term. They must be considered as a Board or Commission, intrusted by law with certain powers in regard to the maintenance of the poor, which powers require occasionally for their execution, as in the present case, an application to the Judge Ordinary. In some matters, such, among others, as the necessity or amount of assessment, and the appropriation of it to the support of individuals, or particular descriptions of individuals, which matters are considered to fall properly within their cognizance, it has been decided, that an inferior judicature cannot review their determination; and, in such cases, the Sheriff, when applied to, may be said to act rather ministerially than judicially, in sanctioning it with his decree. But when an objection is taken, as in the present case—on the ground of the illegality of a general mode of assessment—and a question is thus raised, whether that which they have done is within their powers or not, it appears to the Lord Ordinary, that the Sheriff and this Court, in reviewing his judgment, must have jurisdiction to entertain and determine that point; because it truly resolves into the question, whether the case be

Robertson reclaimed, and the Court ordered minutes of debate.

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LORD BALGRAY.—I have no doubt as to the manner in which the Court should dispose of this case. I think the Court must look to the general policy of the law relative to the fixing and levying of assessments for the support of the poor. I do not perceive any distinction between the mode of assessment and the mode of collection, such as to give the Sheriff any power of judicially considering the question raised by the advocate. The Sheriff's duty was purely ministerial, to enforce the resolution of the heritors and kirk-session, and I think the principle involved in the case of Calder, applies to this case.

Nov. 12, 1833
Pollok v. Robertson.

LORD GILLIES.—I concur in thinking that that case is decisive of the present. The Lord Ordinary says in his note, that "when an objection is taken, on the ground of the illegality of the general mode of assessment, and a question is thus raised, whether what they have done is within their powers or not, it appears to the Lord Ordinary, that the Sheriff and this Court, in reviewing his judgment, must have jurisdiction to entertain and determine that point." His Lordship there distinguishes between the Sheriff's power to review an assessment which is objected to as illegal, and one in which an objection is taken to "the necessity or amount of assessment, and the appropriation of it to individuals," &c., which the heritors and kirk-session, in their discretion, have determined; the latter cases appearing to the Lord Ordinary to be exempt from the Sheriff's power of review, and the former not to be so. But I apprehend that the alleged illegality of an assessment is just the objection which is made in every case. In the case of Calder, the objection taken was to the legality of the mode of assessment, yet the Court held

one which authorizes the Judge Ordinary to interpose or not. Thus, to take the case with which the respondent undertakes, in his argument on the merits, to identify the present:—If a commission were appointed with powers to levy an assessment, for a particular purpose, 'upon means and substance, wherever situate,' it would probably be held incompetent to discuss, in the course of procedure before the Sheriff, for the enforcement of the assessment, an objection to the estimate made bona fide, by the commission, of the property of the individual assessed. But if the objection was, that, instead of assessing according to means and substance, the commission had adopted the real rent within the parish, or any other unauthorized scale of assessment, the Sheriff, it is apprehended, would be not merely entitled, but bound to enquire, whether or not, according to the legal construction of the statute, the objections were well founded. This distinction is exemplified in many of the cases referred to by the advocate. In particular, that of Lawrie v. Dreghorn, 2d December, 1797, is an express authority, in circumstances exactly similar. There, the Magistrates of Glasgow, in their judicial character, decerned against Mr Dreghorn, in an action brought against him by the collector of poor's rates, for the enforcement of an assessment laid on by them, or persons acting under their authority, having precisely the same power within burgh, as those of the heritors and kirk-session in landward parishes. Mr Dreghorn's defence was, the illegality of the mode of assessment. The case was brought before the Court by advocacy; and although the judgment of the Magistrates was sustained, it was sustained upon the merits; and it is clearly established by the report, that the competency of enquiring into and deciding the question of the legality of the assessment, never was called in question."

No. 2.
Nov. 12, 1833.
Brown v.
Lindley.

that the Sheriff had no power to determine that question. If there were any doubt entertained by us regarding that case, it might be right to take the opinion of the whole Court in this; but not if we think that judgment well founded.

LORD CRAIGIE.—Unless the Court should entertain doubts of the judgment in the case of Calder, it would be wrong to take the opinion of the other Judges in this case. I think Calder's case was well decided, and consider it conclusive as to this.

LORD PRESIDENT concurred with the other Judges.

THE COURT "altered the interlocutor of the Lord Ordinary reclaimed against; found the advocacy incompetent; dismissed the same, and decerned; and found the advocator liable in expenses."

R. COWAN, W.S.—DOUGLAS and GRAHAM, W.S.—Agents.

No. 3.

WILLIAM BROWN, Pursuer.—*Marshall*.
AUGUSTUS F. LINDLEY, Defender.—*Neaves*.

Process—Expenses—Mandatory.—Although a defender consign a sum, equal to the amount pursued for, yet if he goes abroad, he must sist a mandatory.

Nov. 12, 1833.
1st Division.
Ld. Fullerton.
S.

BROWN raised an action for payment of an account of £27, against Lindley, who left Scotland about the time that the summons was raised, or soon afterwards. Brown used arrestments on the dependence, which were discharged in consequence of Lindley's agents consigning a sum of £30, to abide the issue of the action. The record was closed, and the cause remitted to the jury roll. Brown then craved that a mandatory should be sisted for Lindley, as he had no estate or fund within Scotland, except the sum consigned, which afforded no security for the expenses of process.¹ To this it was answered, that as Lindley had consigned a sum, equal to the amount claimed, to abide the issue of the cause, and his agents held a regular mandate, he was entitled to defend the action without sisting a mandatory.

The Lord Ordinary ordered a minute and answers, which he reported to the Court. Their Lordships "found the defender bound to produce a mandate," and remitted to the Lord Ordinary to proceed quoad ultra.

J. LITTLE, S.S.C.—J. MURDOCH, S.S.C.—Agents.

¹ M'Call, Jan. 17, 1822 (ante, I. 246); Pease, &c., June 4, 1822 (ante, I. 452); Ferguson, Nov. 22, 1825 (ante, IV. 219); Grant, Nov. 30, 1825 (ante, IV. 237); Countess of Strathmore, May 31, 1828 (ante, VI. 903); Reoch, May 14, 1831 (ante, IX. 588).

Mrs E. M. NASMYTH OF VILLIERS and HUSBAND, Claimants.—*R. Bell.* No. 4.
 A. CONNELL, W.S., Common Agent in Multiplepoinding, Respondent. Nov. 12, 1881
 —*Jameson—Anderson.* Villiers v.
 Connell.

Provisions to Children.—A father, shortly after his eldest daughter had married without any contract of marriage, wrote to her husband's father, that he was willing to settle £2000 on the young pair, payable at his death, and in the meantime to advance the interest, or £100 per annum, as an addition to their income. He executed no deed to this effect, but ordered his agent to pay £100 a-year to his daughter and her husband, as being the allowance he had "settled" on them, but without making any reference to the £2000, and the £100 was paid yearly till his death. Subsequently, on the marriage of his younger daughters, he bound himself, in their respective contracts of marriage, in a provision of £2000, and dying without sufficient funds to satisfy the whole in full—Held that the eldest daughter could not compete with the others.

THE late Sir James Nasmyth of New Posso, by general deed of settlement, conveyed all his property to his eldest son, "but always with and under the burden of my lawful debts and deeds, and particularly of the sum of £6000 sterling, which the said James Nasmyth, or whoever shall succeed to my said estate, heritable and moveable, hereby conveyed, shall be bound and obliged to pay to my younger children, other than the heir so succeeding, and that at the first term of Whitsunday or Martinmas after my death, and a fifth part more of penalty in case of failure, and the legal interest of the said principal sum from and after the said term of payment, during the not payment of the same; declaring that the said sum of £6000 sterling shall be payable to my said younger children, who shall be in life at the said term of payment, equally, and share and share alike; declaring also, that the said provision is over and above what is contained in a bond of provision by me, of this date, (10th April, 1807,) in favour of my said younger children, in virtue of the power reserved to me by the entail and investitures of my entailed lands and estate of Posso." Nov. 12, 1881
 2d Division
 Ld. Medwyn
 T.

By the bond here referred to, Sir James, on the narrative that he was entitled to make provisions to his younger children out of his entailed estates to the extent of three years' rents, bound himself and his heirs of entail, "to make payment to my younger children, other than the heir who shall be entitled to succeed to the said entailed lands and estate, of the sum of £6000, and that at the first term of Whitsunday or Martinmas after my death, with a fifth part more of penalty in case of failure, and the legal interest of the said principal sum, from and after the said term of payment, during the not-payment of the same; declaring that the said sum of £6000 sterling shall be payable to my said younger children, who shall be in life at the said term of payment, equally, and share and share alike."

No. 4.

v. 12, 1833.
 Villiers v.
 Connell.

Sir James had at this time two sons, and also six daughters, the eldest of whom, in September, 1811, married Captain Villiers, but without any marriage-contract having been entered into between them. Of date, 8th December, 1812, Sir James, in answer to a letter from Captain Villiers' father, which could not be discovered in his repositories, wrote to that gentleman in these terms:—"New Posso, 8th Decemb^r, 1812.—Sir, I certainly owe you many apologies for not sooner writing in reply to yours of the 5th August; but from distress of mind then, I really found myself incapable of thinking on any thing like business, and absence from this since has prevented me till now fulfilling my intentions. It is highly proper I should make a settlement on my daughter Eleanor, suitable to my ability, and with reference to the situation of the rest of my family. The general settlement I made provided something less than £2000 to each of my younger children, payable at my death, but it was subject to such alterations as I might think fit to make. I am, however, willing to settle on the young pair, and the issue of the marriage, a sum of £2000, payable as above, and in the meantime to advance the interest of this, or £100 a-year, as an addition to their present income, and while they shall have more occasion for it than I have. This is as much as the present state of my affairs can well admit of; but as they improve, which I have reason to expect they must gradually do, nothing will give me more pleasure, than to make any addition I can afford for their comfort. It is reasonable that you or your solicitor should see my marriage-contract, for which purpose I shall bring it to London for your inspection, but the provisions there are under what I have mentioned.

"I beg leave to offer my best respects to Mrs Villiers, and I have the honour to be, dear sir, your most ob^d humble serv^t," (Signed) "JAS. NASMYTH." "To Villiers Wm. Villiers, Esq."

On the 14th September, 1814, Sir James addressed to his agents this letter: "Gent^l—Please remit annually to Captain or Mrs Villiers, £100 sterling, being the allowance I have settled on my daughter, Mrs Villiers, and place the same to my account. I am," &c. This sum was accordingly remitted annually down to the term immediately preceding Sir James's death, which happened in December, 1828. Sir James was survived by his younger son, the present Sir John Nasmyth, (the eldest having predeceased without issue,) and the six daughters above mentioned, together with two children of a subsequent marriage; and his unentailed property and other funds being insufficient to satisfy the claims against his estate, a multiplepointing was raised by trustees appointed under a trust-deed executed shortly before his death, and also by Sir John, his son and heir of entail, as to the provisions payable from the entailed estate. These processes being conjoined, the respondent, Mr Connell, W.S., was appointed common agent, and claims were lodged by the several younger children for the provisions to which they con-

ceived themselves entitled. In the contracts of marriage of four of the daughters, a special settlement of £2000 had been made on them, and these four respectively claimed and were ranked for the provisions so settled, preferably to the unmarried daughters, as provided only under the deeds of 1807. Along with these Mrs Villiers also claimed to be ranked preferably to the unmarried daughters for the sum of £2000, as apportioned to and settled upon her by the letter to her husband's father, of December, 1812, which she contended was of the nature of a post-nuptial settlement, had been confirmed by Sir James's letter to his agents of September, 1814, and acted upon by payment of the interest to the period of his death. The common agent in a scheme of division, refused to give effect to this claim, and proposed to rank Mrs Villiers only along with the unmarried daughters, as simply entitled to a provision under the deeds of 1807, on the ground that the letter to Captain Villiers' father, merely expressed an intention to make a special settlement, which was never done, and imported no obligation on Sir James to do so.

The Lord Ordinary, as to this claim, pronounced the following interlocutor:—"Finds, as to the claim of Mrs Villiers, that the letter of 8th December, 1812, in which the late Sir James Nasmyth states his willingness to settle £2000 on Mr and Mrs Villiers, payable at his death, and, 'in the meantime, to advance the interest of this, or £100 a-year, in addition to their present income, and while they shall have more occasion for it than I have,' not having been accepted of, so far as appears, or at least not having been followed by any formal and irrevocable deed, cannot be viewed in competition as equivalent to a post-nuptial settlement upon his daughter, and that the order by Sir James on his agents, of date 14th December, 1814, to pay '£100, being the allowance I have settled on my daughter, Mrs Villiers,' does not bear reference to the sum of £2000, as finally settled, nor strengthen Mrs Villiers' claim to said provision; and therefore finds that Mrs Villiers can only claim under the bonds in 1807, and share with the younger children, who have no special provisions."

Mrs Villiers reclaimed, but the Court adhered.

J. B. SHAND, W.S.—A. CONNELL, W.S.—Agents.

JAMES JOHN FRASER, W.S., Pursuer.—*Maidment*.
COL. GORDON and A. DONALD, W.S., Compearers.—*Cunninghame—
Russell*.

No. 4.

Nov. 13, 1833
FRASER v. Gordon

No. 5.

Process—Reclaiming Note.—A reclaiming note which has not the summons and defences appended, is incompetent, although the record has not been closed.

- No. 5.** THE pursuer, Fraser, having presented a reclaiming note against an interlocutor, sisting the comparers, Col. Gordon and Donald, W.S., as parties to an action at his instance against the Earl of Fife, pronounced before the record was closed, it was objected that the note was incompetent, in respect it had not appended thereto the summons and defences. To this it was answered, that the provision in the A.S. only applied to cases where a record had been closed; but the Court holding the provision to be applicable to all cases not specially excepted, the note was refused to be written upon.
- Nov. 13, 1833.
2d Division.
Ld. Medwyn.
T.
Fraser v. Gordon.
Hamilton v. Chancellor.

J. J. FRASER, W.S.—J. BENNET, W.S.—INGLIS and DONALD, W.S.—Agents.

- No. 6.** T. M. MACNEILL HAMILTON, Pursuer.—G. G. Bell.
A. CHANCELLOR and MILLAR'S TRUSTEES, Defenders.—Jardine—
Rutherford.

Entail—Sale—Excambion—Stat. 10, Geo. III. c. 51.—1. Bona fide purchasers of lands formerly part of an entailed estate, and excambed under the 10 Geo. III., not affectable by any objections to the transaction not appearing ex facie of the proceedings. 2. Ex facie objections which held insufficient to invalidate the excambion. 3. Excambion valid, though of the surface merely, the minerals being reserved hinc inde. 4. (Note.) Questions raised, (1st,) whether the objection that in the lands given by the heir of entail the minerals were included, while, as to those acquired, the minerals had previously belonged to the entailed estate, was fatal to the transaction, the difference in value on this account not having been taken into consideration; and (2d) whether, in a question between a subsequent heir and the party excambing, the payment of a sum of money to induce the heir in possession to excamb, is probatio probata, that fair value was not obtained to the entailed estate.

- No. 13, 1833.** THE estate of Raploch was held by the late Roger Montgomery Hamilton Macneill, under a strict entail. In 1805, he entered into an agreement with Mrs Mitchelson, a neighbouring proprietor, for an excambion of part of Raploch for a portion of her property, and a petition was presented to the Sheriff of Lanarkshire, for the purpose of having this carried into effect, under the provisions of the 10 Geo. III. c. 51. The petition set forth generally the parcels of lands proposed to be exchanged, without any mention of minerals, and prayed the Sheriff to take the usual steps for ascertaining and adjusting the value, and carrying the excambion into execution. The Sheriff remitted to two valuers "to visit and inspect the grounds mentioned in the petition, and to ascertain and fix the extent and value of these respective lands proposed to be excambed by the petitioners, and to straight and fix the marches thereof mutually to be given off by each party, and to report upon oath, in terms of the act of Parliament."
- Nov. 13, 1833.
2d Division.
Ld. Moncreiff.
T.

The valuers thereupon inspected the lands, and returned a report de-

scribing the parcels proposed to be acquired from Mrs Mitchelson, as contiguous to, and marching with, the entailed estate, and farther bearing as follows :—" And having fully and deliberately considered both the quantity and quality of the foressaid respective lands, we are of opinion, and do hereby report the said grounds to be of equal value, and the proposed excambion just, and for the mutual accommodation and benefit of both the said parties ; declaring, that in valuing the said lands we did not take under consideration the superiority or thirlage thereof, but we are of opinion that each party should pay the public and parish burdens of the ground so to be received by them reciprocally."

No. 6.

Nov. 13, 1883.
Hamilton v.
Chancellor.

This report was then verified on oath before the Sheriff, who pronounced an interlocutor, authorizing the excambion to be executed. Thereafter, a supplementary petition was given in to the Sheriff by Macneill and Mrs Mitchelson, bearing—" That the petitioners have now to mention to your Lordship, that, in the said original application, the petitioners omitted to state that each party was to retain the right to their own metals and minerals, and to the superiorities of the said lands to be exchanged, and that the same were not to be exchanged with the lands above mentioned ; which makes it necessary for them to trouble your Lordship with this application, and to have the thirlage also declared to belong to each party as formerly." And praying him " to find, that the mines, metals, and minerals, and also the superiority of the lands of Patchy and Harelees, are retained by the petitioner Mrs Mitchelson ; and in like manner, that the mines, metals, and minerals, and the superiority of Claylaps and Raploch-wood, belong to Mr Macneill, the same with the thirlage not falling under the exchange."

The Sheriff, without any further report as to the effect of the reservation on the relative values, found and declared in terms of this petition, and a contract of excambion was thereafter executed by Macneill and Mrs Mitchelson, conveying to each other the parcels mutually exchanged, under reservation of the mines and minerals to each of them respectively. The contract was duly recorded. Mrs Mitchelson was infest in the lands obtained from Macneill, and in the course of the same year sold them to Hamilton of Fairholme, from whom they were, in 1815, purchased by the late Archibald Miller, W.S., who, by his trust-deed of settlement, conveyed them to the defenders, his trustees. Macneill died in 1827, and was succeeded in the entailed estate of Raploch by his son, the late Daniel Montgomery Macneill Hamilton, who, shortly after his accession, raised an action of reduction of the excambion, (carried on after his death by the present pursuer, his son, Thomas Montgomery Macneill Hamilton,) to which he called as parties the trustees of Millar,—the son of Hamilton of Fairholme, who had purchased the excambied portions of Raploch from Mrs Mitchelson, and the defender Chancellor, the representative of that lady. In support of this action, he averred that the excambion was disadvantageous to the entailed estate ; that the heir of entail had received

No. 6.
—
iv. 13, 1893.
Hamilton v.
Chancellor.

from Hamilton of Fairholme, for whose behoof he alleged the transaction was carried on, a sum of money to induce him to go into it; that the lands acquired from Mrs Mitchelson were not contiguous to the entailed estate, and that ex facie of the proceedings it was incompetent, and not in terms of the 10th Geo. III., inasmuch as the valutors had not reported the proposed excambion to be just and equal, and the excambion was not of the "lands," in the meaning of the statute, which embraced the whole lands, including the minerals, but only of the surface.

In defence, Hamilton of Fairholme's son stated, that he did not represent his father; and Chancellor and Miller's trustees, besides denying the averments of the pursuer in point of fact, pleaded—

1. The allegations as to the disadvantageous and unequal character of the transaction, and discontiguity of the lands, and as to the fraud of the heir of entail who excambed, are irrelevant to the effect of sustaining a reduction of the titles of a bona fide singular successor, who was entitled to rely on the records, and whose right can only be affected by informalities or irregularities, appearing ex facie of the proceedings.

2. As to the exchange not having been reported to be "just and equal," the report truly bears that it was; and,

3. In regard to the reservation of the mines and minerals, there is nothing in the statute which prevents an excambion of the respective lands under such mutual reservation, the values being equal; and, on the contrary, the professed object of this provision in the statute, being to remove an obstacle to the "enclosing of land," it is obvious that it chiefly had reference to the surface of the land, and the improvement of cultivation.

The Lord Ordinary reported the cause on cases, adding the subjoined note.*

* "It may be proper to explain why this case is reported, although there are at least two matters of fact on which the parties are at variance. The original contract of excambion was made with Mrs Mitchelson. She sold the land which she got to Mr Hamilton of Fairholme; and he sold it to Mr Millar. Whatever may be thought of Mr Hamilton of Fairholme, under the averments in the condescendence, there seems to be no reason to doubt that Mr Millar was a bona fide purchaser, transacting on the faith of the records; and the original transaction cannot be reached in this action of reduction, without reducing the title as it stands in his representatives. It is therefore a question of importance, what averments in fact, and media concludendi in law are relevant,—Mr Millar's representatives pleading that they cannot be affected by any thing but irregularity, amounting to nullity, in the proceedings. The most material averments of fact on which the parties differ are, 1st, A positive statement by the pursuer, that the lands of Patchy, given by Mrs Mitchelson in exchange, do not adjoin any part of the entailed estate, which he offers to prove; while the defenders state, that all the titles bear that they do adjoin: And, 2d, The statement in the 9th article of the condescendence, that one of the considerations by which Mr Hamilton Macneill was induced to enter into the excambion was a payment of £150 or £200, by Mr Hamilton of Fairholme, (not by Mrs

At advising these cases, the Court were agreed that no objections could affect singular successors, except such as appeared ex facie of the proceedings; but differing in opinion as to how far there were fatal irregularities appearing on the face of the proceedings in the present case, their Lordships (Dec. 10, 1830) ordered additional cases, at advising which, they delivered their opinions as follows :—

No. 6.

Nov. 13, 1831
Hamilton v.
Chancellor.

LORD GLENLEE.—The true intention of the act was, that each party should fairly have an equivalent for what the other got. The whole value must be given in land, and a difference in value cannot be equalized by money, as under the old act, and therefore I do not see any objection to each party reserving right to the minerals, and I would not allow much weight to future inconveniences of working through each other's surfaces. We must either suppose the act really meant that where the parties had not the minerals, there should be no transaction, or that each might keep the minerals. I cannot suppose it meant there should be no transaction.

LORD MEADOWBANK.—That was my opinion, and I see no reason to change. I thought the case was given up when it was admitted there might be excambion, although the minerals belonged to third parties.

LORD CRINGLETIE.—As the exchange cannot take place without the act, the provisions of the act must be fully complied with. Now, if it notoriously appears that the objects of the statute are disregarded, I cannot think it under the act; and if it appears on the proceedings that it is not so, singular successors are bound to see that, and they would be liable. Now here, I think, on the face of the proceedings, it is clear that they are not under the act. I would not go into minutiae, but here the report of the valutors bears no enquiry into the superiority, thirlage, or public burdens, and actually excludes them. Then there is a minute put in that the minerals are to be retained, and there is no new report ordered, to see if that makes any difference on their views as to the value, and the excambion goes on upon the original report. It was clearly not under the statute, which it sets at defiance. On the face of the thing the transaction is bad.

LORD JUSTICE-CLERK.—Singular successors must be affected by objections on the face of the title, and none other; but that the minerals are excluded does

Mitchelson,) at whose instigation, and for whose behoof, it is said the transaction was carried into effect, while it is not distinctly averred that even Mrs Mitchelson was privy to this arrangement. The defenders deny the fact of such a payment, but also deny the relevancy of it in a question with them. A third point of some importance relates to the competency under the act of Parliament, of exchanging the surface of the land, reserving hinc inde the minerals. In this state of the case, the pursuer, maintaining that he has a clear case without the disputed facts, and the defenders maintaining that there is no relevant case at all, or that, at all events, it is only on the point of contiguity that any enquiry is necessary, it has appeared to the Lord Ordinary, that the best course for extricating the case is to report it, in order that, if the Court should think that investigation of facts is necessary, they may consider whether, in a case involving so much matter of law, the enquiry should not be limited to special facts; and whether it may not be proper, in case a Jury trial shall be ordered, that the issues should be settled by the Court itself, before the remit is made."

No. 6. appear ex facie of the proceedings, and I cannot at present get over the difficulty.

r. 13, 1833.
Milton v.
Mearns.

The Court being thus equally divided, after allowing the cause to stand over, directed the papers to be laid before the other Judges for their opinion, on the question, "Whether, in respect of the mutual reservation of the mines and minerals and superiority of the lands excambed, as appearing in the proceedings before the Sheriff, and deeds of excambion, and subsequent titles, the excambion and subsequent titles are reducible, in a question with a third party onerously acquiring and infeft in the lands excambed?"

The following opinions were returned:—

LORD PRESIDENT.—"In answer to the question put to us, we are of opinion, that reduction is not competent on account of the reservation of the mines and minerals and superiority, for the following reasons:—

"1mo, The object of the statute is clearly and solely to facilitate agricultural improvements, by draining, enclosing, and otherwise.

"2do, Therefore, when it mentions the excambing of lands, we think this ought to be interpreted to mean only the surface or agricultural part of the land.

"3tio, In general, no doubt, a disposition to land carries mines and minerals; but they may be separated, and often are so.

"4to, There is no mention in the act about mines and minerals.

"5to, This is natural, because, in many cases where mines and minerals had never been worked, it might be impossible for inspectors to value them.

"6to, It might be highly injurious to the entailed estate to part with the minerals under the lands excambed, as it might absolutely prevent, or at least greatly interfere with, the working of the coal or other minerals on the entailed estate—e. g. Suppose a level run through the excambed lands, then, if the minerals were given off, the right to the level would cease, unless regulated by a special agreement, which again might materially affect the value of the coal given off.

"7mo, The parties received land for land. Therefore the reservation leaves each party as they were before, neither better nor worse.

"8vo, As to the superiority, no doubt the Sheriff might have said, as the Court did in the case, 7th July, 1803, Colquhoun, that he would not sanction the excambion unless the superiority went with the land, as it might be, in many cases, inexpedient to separate them.

"9mo, But it is not essential to keep them together, and, therefore, after an excambion has been regularly carried through, it is a very different thing to reduce it, from giving a previous sanction.

LORD BALGRAY.—"I entirely concur, as per separate note.

(Note referred to.)

"I entirely concur in the foregoing opinion; and I have only to observe, 1st, That the separation of the minerals under ground, from the superficies used for ordinary purposes, is perfectly consistent with the principles and practice of the law of Scotland. 2d, That with respect to the more precious minerals, such as lead, silver ore, and the like, which often lie at a great depth, it would be *almost impossible to ascertain the value beforehand, though known to exist.*

3d, That it might be easily shown, that, in many cases, if minerals were, ex necessitate juris, to be exchanged, great loss might arise to heirs of entail, in place of any benefit accruing to them. Lastly, I have it in my power practically to say, that in making exchanges for the purposes of enclosing, which, in hilly districts, is often required to be extensive, in the case of entailed estates, and where valuable minerals were known to exist, the greatest care was taken to reserve the minerals to the several entailed estates respectively, and the utmost attention paid to fix correctly the marches of the minerals by marks, to prevent all future dispute; and this express reservation was adopted, not only as being nowise adverse to the law, but as being the most expedient and the most just for all concerned.

LORD GILLIES.—“ I concur.

LORD MACKENZIE.—“ I concur, with this observation, that I do not mean to say that the statute does not authorize the excambion of land with the minerals, in case such excambion were fit to be made.

LORD FULLERTON.—“ I am of opinion, that the reservations in the deeds of excambion do not afford a ground for reducing the excambion and subsequent titles; but I agree with Lord Mackenzie in the observation, that lands may be effectually excambed under the statute without such reservations.

LORD COREHOUSE.—“ I concur in the opinion of the Lord President, with the explanation given by Lord Mackenzie.

LORD MONCREIFF.—“ I entirely concur, with the same explanation, so far as it may be necessary.

LORD CRAIGIE.—“ If the Sheriff had, by the decree of excambion, done what by the statute he was not authorized to do, or if he had omitted to do what was required by the statute, the exchange would have been inoperative and null; and if so, the conveyances by the parties to the exchange being set aside, the after conveyances would become ineffectual, as flowing a non habentibus potestatem; or if, in addition to the land exchanged, one of the parties had obtained a considerable sum of money from the other, this also would have been fatal to the transaction. But it does not appear that in this case the decree of the Sheriff was liable to exception, the whole proceedings, so far as he was a party, having been conducted with propriety, and authorized by a fair construction of the statute; and with regard to the alleged premium or bonus given on the occasion, no relevant proof has yet been offered.

LORD MEDWYN.—“ I concur in this opinion; and it appears to me, that while it does not render an excambion illegal, and reducible at a distance of years, that there has been a reservation of the superiority and mines and minerals, so it would not be illegal to excamb the lands with mines and minerals, if it were otherwise expedient so to do.”

In conformity to these opinions, the Court accordingly sustained the defences, and assolizied with expenses.*

W. MURRAY, W.S.—J. IRVING, W.S.—R. RUTHERFORD, W.S.—Agents.

* The raiser of the action above mentioned (Daniel Montgomery Macneill Hamilton) at the same time instituted a similar action of reduction against General William Miller, for setting aside another excambion made by his father with Gene-

No. 7.

Nov. 13, 1833.
Gibb v.
Magistrates of
Hamilton.

ELIAS GIBB, Pursuer.—*Solicitor-General Cockburn—Maitland.*
MAGISTRATES OF HAMILTON, Defenders.—*Rutherford—Patterson.*
JOHN SIMPSON, Defender.—*Ivory.*

Act of Grace—Burgh—Reparation—Public Officer.—A debtor having been incarcerated in the evening between six and eight, and no aliment being averred to have been given him that night—Held, that, in estimating the days for which aliment

ral Millar himself, in which, besides some of the grounds of reduction maintained in that against Chancellor, &c., including the payment of a sum of money by General Millar, who, being himself the party, could not avail himself of the pleas competent to a singular successor, this other ground was insisted on, viz. that the excambion was invalid, in respect that while the minerals of the parcel of the entailed estate were conveyed by the heir to General Millar, he merely acquired in return the surface of the parcel for which it was excambed, the minerals being already part of the entailed estate, and no equivalent was obtained in additional extent to make up the difference of value thence arising between the two parcels. The Lord Ordinary, in reporting this cause, observed, in a note, "that none of the objections made to the validity of the excambion in this case are of any material weight, except, 1st, the statement, that in the exchange the lands given by the entailed estate were given with the minerals, whereas the lands received by the proprietor of that estate consisted of the surface only, the property of the minerals being already in himself, and that no notice is taken of this in the report of the valuers; and, 2d, that a sum of money was paid, in order to induce the heir of entail to make the excambion. He thinks it would be dangerous to listen to objections founded on doubts as to the convenience of the exchange, or unimportant varieties in the adjustment of the transaction before the sheriff. But the two points above mentioned appear to him to be very serious. In the present case, the defender's predecessor was himself the party who entered into the contract. There is no interest of a purchaser involved. But it certainly requires grave consideration, whether, if he has taken the minerals in addition to the surface, and given only the surface of lands reckoned to be no more than equal to the other as a whole, without notice of this essential difference, there is not, as against him or his representative, a fatal error in the transaction. The defender has offered to reconvey the minerals given to his predecessor; and it will be for the Court to consider, whether the act, which should have been correctly done under the statute by the late Mr Hamilton Macneill, can now be rectified in this manner. The other objection is still more important, supposing the fact to be proved, though at present denied. It is incorrect to call the grounds of objection *grassum*. The question is, whether it may not follow a *fortiori* of the principle of *grassum*, in the case of leases, (at least in a question with the original party or his heir,) that the payment of a sum of money to induce the excambion is probatio probata that the fair value has not been obtained to the entailed estate in the exchange, whatever any reporters may have thought on such data as were before them. The Lord Ordinary finds it very difficult to see a good answer to the objection on this view." On the death of the original pursuer, his son declined to assist himself as a party to this action; and it accordingly dropped, without any judgment having been pronounced.

awarded under the act of grace had been lodged, the day of incarceration was not to be taken into account; and the magistrates of the burgh of incarceration having, on the certificate of the jailor that the aliment was exhausted, liberated the debtor, while (excluding the day of incarceration) there was aliment in the jailor's hands till the expiry of the day on which he was liberated—Held liable for the debt qua magistrates, but not personally, and with relief reserved against the jailor. 2. Held that no direct action lay against the jailor at the instance of the creditor.

No. 7.

Gibb v.
Magistrates of
Hamilton.

ON the 3d October, 1831, one John Burns was incarcerated in the jail of Hamilton, between the hours of six and eight in the evening, under letters of caption, at the instance of the pursuer, Gibb, for payment of a debt contained in a bill for £88; and ten shillings, in terms of the 6th Geo. IV. c. 22, were lodged in the hands of the jailor. On the 7th, the magistrates awarded him an aliment of a shilling a-day, under the act of grace; and Gibb, from time to time, consigned various sums, amounting, with the ten shillings originally lodged, to £7, 10s. On the forenoon of the 1st March, 1832, the jailor granted a certificate "that there is no aliment lodged for John Burns;" and he also wrote out an interlocutor in these terms:—"In respect the incarcerator has failed to provide aliment for the prisoner, John Burns, in terms of deliverance, of date 7th October, 1831, grants warrant for his liberation, in terms of the statute." This interlocutor was signed by Hamilton, one of the magistrates; and Burns was, in pursuance thereof, liberated between the hours of twelve and two. Gibb thereupon raised this action against the magistrates and council, as representing the community, and also against Hamilton, who had signed the warrant, and Simpson, the jailor, personally, for payment of the debt, on the ground that Burns had been illegally liberated before the time for which aliment had been lodged was expired. Including the day of incarceration as one of the days for which Burns was entitled to and had received aliment, the whole £7, 10s., making 150 shillings, would have been expended on the expiry of the 29th February, which, including the day of incarceration, would have made 150 days of imprisonment; while, if the day of incarceration were not to be included, the 150 days would not have expired till the close of the 1st March: It was not averred that, de facto, a shilling had been paid to Burns for that day, or that any aliment had been provided for him by the jailor, and the question was, whether it was to be included or not?

Pleaded by Gibb—

The incarceration having taken place in the evening, after the hours of meals, and no aliment having been furnished to Burns on that day, there must have been, on the 1st March, still a shilling of the money lodged remaining in the jailor's hands, applicable to aliment for the whole of that day, or, at all events, the aliment must be held as awarded de momento in momentum, so as to have sufficed to the hour in the evening of the 1st March corresponding to that at which Burns had been incarcerated on the 3d October, and completing 150 periods of 24 hours.

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2d Division.
Ld. Medwyn.
T.

No. 7. *Pleaded by the Magistrates—*

Nov. 13, 1833.
Gibb v.
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Hamilton.

The aliment authorized by the statute is so much “per day,” and the amount allowed is due for each day, including the day of incarceration, whatever hour of the day that took place; and, consequently, as including the day of incarceration, 150 days had elapsed on the expiry of the 29th February, Burns was duly liberated.

It was further maintained for Hamilton, as an individual, that no personal liability could attach to him; and for Simpson, that, whatever claim of relief the magistrates might have, he had incurred no obligation directly to the incarcerator.

The Lord Ordinary pronounced this interlocutor:—“Having resume consideration of the debate, and advised the process, finds it admitted by the defenders, that the incarceration of the debtor, Burns, took place on the 3d day of October, 1831, between the hours of six and eight o’clock in the evening: Finds that aliment having been awarded at the rate of one shilling per day, the sum of £7, 10s., or 150 shillings in all, was paid into the hands of the jailor: Finds, that upon a certificate by the jailor that no aliment was lodged for the prisoner, it is admitted by the defenders, that he was liberated from prison on 1st March, 1832, between the hours of twelve and two o’clock afternoon: Finds, from the terms of the act 6th Geo. IV. c. 22, and from the nature of the thing, as well as from the decision, Blair against the Magistrates of Edinburgh, 11th November, 1704, Fount., that the days during which aliment is to be paid are tempus continuum, and so must be counted de momento in momentum; and as the aliment lodged was sufficient for 150 days, that is, 150 times 24 hours, from the time of the incarceration, the liberation in this case, as in the case cited, has been anticipated a few hours; therefore decerns against the defenders, the magistrates and members of the town council of the burgh of Hamilton, in terms of the libel: Finds expense due; allows an account thereof to be given in, and remits to the auditor to tax the same, when given in, and to report; assoilzies the defenders Mr Hamilton and John Simpson: Finds them entitled to expenses, so far as separately incurred by them.”

Both parties reclaimed; the magistrates and council on the merits, and Gibb in so far as he was subjected in expenses to Hamilton and Simpson.

LORD GLENLEE.—We cannot alter this interlocutor. I do not say that we are always to enter into a proof whether so many completed periods of twenty-four hours have elapsed; and the question here rather is, if aliment is to be allowed for the 3d of October, the day on which the party was imprisoned. If he had been incarcerated in the morning, it might have been held that the aliment was intended to be allowed for that day; but when the incarceration is in the evening as in this case, I cannot consider the day of incarceration to be one of the days for which aliment was allowed; and the jailor here has just kept a shilling, which was not applied to aliment the prisoner, for he does not pretend that he gave aliment on the 3d October.

The other Judges concurred.

Solicitor-General for Gibb, and *Rutherford* for the magistrates, now craved, that under Gibb's note, the Court would so far alter the interlocutor, as to subject Simpson, the jailor, in the expenses of process.

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Miller.

Ivory, for the Jailor.—The action is here by Gibb; and, though the jailor may be liable in relief to the magistrates, there is no ground of direct liability towards Gibb; and as to the magistrates, they, in their defences, adopt and justify his proceedings as regular and correspondent to the practice of the burgh.

Solicitor-General.—The jailor was directly bound to me not to have given a false certificate.

LORD JUSTICE-CLERK.—We cannot on this record decide against Simpson; but we certainly will not adhere to that part of the Lord Ordinary's interlocutor, finding him entitled to expenses.

The other Judges concurring,

THE COURT accordingly refused the reclaiming note for the Magistrates, reserving to them "any claim of relief they may have against the defender, John Simpson, and to him his answers thereto, as accords." On the note for Gibb, their Lordships pronounced as follows: "Alter the interlocutor complained of, in so far as it finds the defender, John Simpson, entitled to any expenses; and, in so far as it assoilzies the defender, Hamilton, qua Magistrate. Quoad ultra, adhere, and find the defender, Hamilton, entitled to such separate expenses as he can show to have been incurred by him in resisting the conclusion against him personally."

M'KENZIE and M'FARLANE, W.S.—F. HAMILTON, W.S.—Agents.

PATRICK MILLER, Pursuer.—*Greenshields*.

CHILDREN OF THOMAS HAMILTON MILLER, Defenders.—*D. F. Hope*
—*Jameson*.

No. 8.

Fee and Liferent—Husband and Wife—Provisions to Children.—By a contract of marriage, the lady contributed a tocher of £2500, which was provided to her and her husband in liferent, and to the children nascituri in fee, while, on the other hand, the husband's father bound himself at his death, "to content and pay, or otherwise to provide and secure, on heritable or moveable security, to the said husband and wife, in conjunct fee and liferent, for the liferent use alienarly of the wife in case she shall happen to survive her husband, and to the children to be procreated of the marriage, in fee; whom failing, to the husband, his heirs and assignees whomsoever, in fee, the sum of £5000;" with power to him to divide it among his children as he thought fit; but declaring that, as soon as the sum was payable, he should invest it on good security, "in terms, and for the purposes before written," and that, at the sight of parties named in the deed: and the father farther bound himself, if the husband predeceased him, to pay the interest of the £5000 yearly to the wife, and, if she also predeceased, to the children: held, 1. That the obligation undertaken by the father was onerous; and, 2. That the fee of the £5000 was in the children.

No. 8. THE late Mr Patrick Miller of Dalswinton had four younger children, on each of whom he made provisions to the extent of £10,000, by two deeds of settlement, executed in 1790, and 1803. Mr Thomas Hamilton Miller was one of the younger children. The eldest son, Patrick Miller, jun., married in 1804, and his father became a party to the marriage-contract, whereby he bound himself to dispoise to his son the estate of Dalswinton, and the whole heritable and moveable estate that might belong to him at his death, "under the burden always, however, of his debts, and provisions made by him for his younger children and grandchildren."

Nov. 14, 1833.
1st Division.

Ld. Corehouse.
B.

Miller v.
Miller.

In 1809, Mr Hamilton Miller married Miss Mary Anne Ramm, and his father became a party to the marriage-contract, which contained these clauses:—"In contemplation of the marriage, and in consideration of the sum of £2500, as the tocher or portion of the said Mary Anne Ramm, settled and secured to the said Thomas Hamilton Miller, and Mary Anne Ramm in liferent, and the children of the marriage between them in fee, the said Patrick Miller and Thomas Hamilton Miller hereby bind and oblige themselves, their heirs, executors and successors whomsoever, at the term appointed, or to be appointed by any deed or deeds of settlement, executed or to be executed by the said Patrick Miller, for payment of the provisions which he thereby makes, or shall make, to his children; and failing such settlements, as soon after the said Patrick Miller's death, as the same can be made forthcoming from his estate, to content and pay, or otherwise to provide and secure, on heritable or moveable security, to the said Thomas Hamilton Miller and Mary Anne Ramm, in conjunct fee and liferent, for the liferent use allenary of the said Mary Anne Ramm, in case she shall happen to survive her said promised husband, and to the children to be procreated of the marriage in fee; whom failing, to the said Thomas Hamilton Miller, his heirs and assignees whomsoever, in fee, all and whole the sum of £5000 sterling, and interest thereof, from and after the death of the said Patrick Miller, till the said principal sum shall be so paid or secured: And notwithstanding the term of payment before-mentioned, the said Patrick Miller, in case the said Thomas Hamilton Miller shall predecease him, binds and obliges himself, his heirs, executors and successors, to pay to the said Mary Anne Ramm, during all the days of her life, in case she shall survive her said promised husband, the sum of £250 sterling yearly, as the interest of the said sum of £5000." The father bound himself to pay "the said sum of £250 sterling yearly," to the children, if Thomas Hamilton Miller and his spouse should both predecease him: The deed then proceeded—"And, in the event of the said Patrick Miller's predeceasing his said son, the said Thomas Hamilton Miller binds and obliges himself and his foresaids, at the first term at which, by the deed or deeds of settlement of the said Patrick Miller, the sum to be left to the said Thomas Hamilton Miller shall be payable, or as soon, in case no such settlement is, or shall be made, as the said sum of £5000,

for which the said Patrick Miller is hereby bound, shall be paid by the heirs or executors of the said Patrick Miller, or shall be recovered from his estate, or otherwise out of his, the said Thomas Hamilton Miller's means and estate, to invest and secure the said sum of £5000 in good and sufficient security, in terms and for the purposes expressed in the joint obligation before written, and that at the sight, and to the satisfaction of the said Abel John Ramm, &c., at the instance of all or either of whom, it is hereby agreed that all action for implement of the provisions in favour of the said Mary Anne Ramm, and the children of the said marriage, shall pass." Mr Hamilton Miller farther provided his wife in one-half of his household furniture after his death, "which provisions in favour of the said Mary Anne Ramm, she hereby accepts of in full of all terce, share of moveables and goods in communion, and every other thing that she, jure relicte, or otherwise, may be entitled to demand on the death of her said husband, should she survive him, or which it may be competent for her nearest of kin to demand from the said Thomas Hamilton Miller, in case of her predeceasing him, any further voluntary provision which her said promised husband may make, always excepted: And it is hereby provided and declared, that it shall be in the power of the said Thomas Hamilton Miller to divide and proportion, as he shall think proper, among the children of the said marriage, the fee of the said sum of £5000; and in case of his death, without having done so, and of the death of the said Mary Anne Ramm, the same shall be divided equally amongst the said children, share and share alike."

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The tocher of £2500 was settled by an English deed, the tenor of which was said to be such as to give the fee of that sum to the children natiuri, and a mere liferent to the spouses.

Some years thereafter, the father made large additional provisions on his younger children or grandchildren; in particular, a provision of £5000 in favour of his grandchildren by the second marriage of his second son Major William Miller; and a bond for £7000 to a trustee for the creditors of Mr Hamilton Miller. He died in 1816.

The oldest son, Mr Patrick Miller, now of Dalswinton, raised a reduction to set aside the bonds of provision and other deeds in favour of younger children or grandchildren executed by his father subsequently to 5th October, 1804, the date of his contract of marriage, as being in fraudem of his father's obligations under that contract. He also concluded for declarator, that certain advances made by his father, including the bond for £7000, should be imputed in extinction of the provisions granted in their favour, anterior to 5th October, 1804.

The Court pronounced a judgment, which was taken to appeal by the defenders, and the House of Lords pronounced this judgment:—"Find, that by the provisions contained in the contract of the 5th October, 1804, entered into by the late Patrick Miller, deceased, on the marriage of his eldest son, the respondent, Patrick Miller, he bound and obliged himself, his

No. 8. heirs, and successors, to provide, secure, and dispoſe and make over, heritably and irredeemably, the eſtate of Dalſwinton, and his whole other eſtate, real and perſonal, that might belong to him at the time of his death, under burden always of the debts of the ſaid Patrick Miller, the father, and proviſions made by him for his younger children and grandchildren ; and find that the exception contained in the ſaid marriage-contract, of proviſions made by him for his younger children and grandchildren, ought not to be conſtrued to extend to enable him, by gratuitous proviſions in favour of his younger children and grandchildren, to defeat the intent of the ſaid marriage-contract, with reſpect to the proviſions thereby intended to be made in favour of the reſpondent Patrick Miller, and his wife and children ; but find that, inasmuch as the proviſions made by the ſaid Patrick Miller for his younger children and grandchildren, by deeds executed previous to the ſaid marriage-contract of the 5th of October, 1804, were made to take effect only on his death, the ſame were not in their nature proviſions for his ſaid children and grandchildren during his life ; and that therefore any gifts or payments of money given or made by him to or for ſuch younger children or grandchildren in his lifetime, which were not in the nature of permanent proviſions for them, ought not to be conſidered as in extinction or ſatisfaction of the proviſions ſo made for them previous to the ſaid marriage-contract of the 5th of October, 1804, and intended to take effect on his death : But find, that the ſeveral proviſions made by the ſaid Patrick Miller deceased for his children and grandchildren, by deeds executed after the ſaid marriage-contract of the 5th of October, 1804, ought to be conſidered as in fraud of the ſaid marriage-contract, ſo far as they exceed the proviſions made for ſuch younger children and grandchildren reſpectively, by deeds executed before the date of the ſaid marriage-contract, and ſo far as ſuch children or grandchildren are reſpectively intereſted therein, except ſo far as any proviſions ſo made for ſuch grandchildren may be deemed to have been ſubſtituted in lieu of proviſions made for their reſpective parents before the date of the ſaid marriage-contract : But that the ſame, ſo far as the ſame ought not to be conſidered as in fraud of the ſaid marriage-contract, ought to be conſidered as in ſatisfaction, or in part ſatisfaction of the proviſions made for ſuch younger children and grandchildren, by deeds executed before the date of the ſaid marriage-contract, according to the nature and amount of the proviſions ſo made after the date of the ſaid marriage-contract : And the Lords farther find, that the obligations which the ſaid Patrick Miller deceased entered into after the date of the ſaid marriage-contract, for the benefit of any of his children, for valuable conſiderations, although effectual as debts againſt the eſtate of the ſaid Patrick Miller deceased, ought to be conſidered as proviſions for ſuch children, and taken in computo of the ſums claimed by them reſpectively, under the proviſions made for them reſpectively by deeds executed by the ſaid Patrick Miller deceased, before or after the date of the ſaid

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marriage-contract of the 5th of October, 1804. And it is ordered that, subject to these findings, the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of in the said appeal, and to do therein as shall be consistent with these findings, and as shall be just."¹

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The judgment was applied, and the cause remitted to Lord Alloway, who found, "that by the decision of the House of Lords, it must be held, Primo, That all the provisions made by Mr Miller after the 5th October, 1804, must be considered as in fraudem of the marriage-contract, in so far as they exceed the provisions previously made, except in so far as such provisions are made in favour of grandchildren, which may be deemed to have been made in lieu of provisions for their respective parents before the date of the marriage-contract. Secundo, That the subsequent provisions after the 5th October, 1804, are to be held as in satisfaction, or in part satisfaction of the provisions made for Mr Miller's children or grandchildren, by deeds executed before the date of the contract, and that any sums paid to third parties, or obligations granted them for behoof of the said children and grandchildren, and which are held as effectual debts against the estate, must be imputed pro tanto of the provisions to which the defenders would have been entitled as made previous to the date of the contract of marriage. Tertio, That inasmuch as the provisions made by the said Patrick Miller for his younger children and grandchildren, by deeds executed previous to the contract of marriage, were made to take effect only on his death, the same were not in their nature provisions for the children and grandchildren during his life; and that therefore any gifts or payments of money given or made by him to or for such younger children or grandchildren, which were not in the nature of permanent provisions for them, ought not to be considered as in extinction or satisfaction of the provisions so made for them previous to the said marriage-contract of the 5th October, 1804, and intended to take effect on his death: Therefore, remits to Mr Charles Ferrier, accountant," &c.

A report being returned by the accountant, Lord Meadowbank pronounced a judgment, which, inter alia, contained these findings—"Repels the claim of W. H. Miller and others, the children of the said Major Miller by his second marriage, for the sum of £5000 settled on them by the said Patrick Miller, senior, except in so far as there may be any balance remaining of their father's provision, after deducting the sums before specified; finds that the amount of the provisions due to the defender Thomas Hamilton Miller is £8500, subject to deduction of the sum of £7000, and interest corresponding thereto, contained in the bond granted by the late Patrick Miller to Claud Russell, accountant in Edinburgh, as trustee for the creditors of the said Thomas Hamilton

¹ See 1 Shaw's Appeal Cases, p. 308.

No. 8. Miller; that the said Thomas Hamilton Miller and his children are not
 entitled to claim and rank as creditors to the said Patrick Miller, senior,
 for the sum of £5000 contained in said Thomas Hamilton Miller's con-
 tract of marriage with Miss Ramm, to a greater extent than may remain
 due of the said Thomas Hamilton Miller's provision of £8500, after
 deducting said bond for £7000 to Mr Russell."

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The defenders reclaimed against this judgment, and appearance was now entered for the children of Mr Hamilton Miller. The Court "remitted the whole cause to the Lord Ordinary," who ordered Cases, and reported them to the Court.

Pleaded for the pursuer, in the question with the children of Mr Hamilton Miller—

1. The fee of the £5000 provided by the marriage-contract of Mr Hamilton Miller, was in him, and not in his children, because the disposition was expressly in conjunct fee and liferent to the spouses, and to children to be procreated; and the sum which came from the husband's father was provided to the husband, and his heirs and assignees, immediately after the children nascituri.¹

The fee being therefore in Mr Hamilton Miller, he was the creditor, and his father the debtor to him, for the £5000. The obligation of the father was consequently discharged by the advances made to Mr Hamilton Miller to that amount.

2. But even if the fee was in the children, it was not in the power of the late Mr Miller to grant it, being an additional provision to grandchildren, and therefore in fraudem of his obligation, under the pursuer's marriage-contract of 1804, as now fixed by the House of Lords.

Pleaded by the children of Mr Hamilton Miller—

1. The fee was in them, not in their father. It was constituted by a marriage-contract, one main object of which was to make provision for the children. The mother contributed £2500, which was settled by an English deed, so as to give the fee to the children nascituri, and nothing but a liferent to the spouses, and it was so stated in the contract. On the other hand, their grandfather contributed £5000 to the spouses in conjunct fee and liferent, for the liferent allenary of the wife, and to the children in fee. The plain intention therefore was, that the rights to the £5000 should be the same as those to the £2500. Besides, a power was given to their father to divide the sum, as he thought fit, among his children: he was also substituted after the children, and action was to proceed at the instance of certain parties against

¹ 3 Stair, 5. 51; 3 Ersk. 8. 36 and 39; 1 Bell, 639; Beg. Jan. 14, 1663 (4251); Pearson, Dec. 12, 1665 (4249); E. of Bute, Feb. 24, 1710 (4250); Frog's Children, Nov. 25, 1735 (4262); Lillie, Feb. 24, 1741 (4267); Children of Mactavish, Nov. 15, 1787 (12922); Brown, Feb. 1, 1820 (F. C.)

him, "for implement of the provisions in favour of the said M. A. Ramm and the children of the marriage," if he failed to invest and secure the provision; all of which clauses were useless or absurd, unless upon the footing, that only a fiduciary fee was in the father for behoof of the children. Accordingly, where a fee was apparently given to a father, but qualified with such declarations or conditions as proved the grant to be intended only as a liferent to him, the Court had repeatedly held that there was but a bare liferent in him, along with a fiduciary fee for his children.¹

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Assuming, therefore, the fee to be in the children, they were creditors of their grandfather for the £5000. It was a debt of a most onerous nature; their mother having entered into a marriage, given a tocher, and renounced all her legal claims, in consideration of that provision to the children;² and the pursuer having taken the estate under burden of the debts, it was impossible for him to reduce the obligation.

2. Even if the fee were in their father, the obligation was a debt against their grandfather's estate; and he retained the power of contracting onerous obligations, notwithstanding the pursuer's marriage-contract in 1804.

Pleaded by the pursuer, in the question with the children of Major Miller's second marriage—

The provision of £5000 to them was gratuitous in the sense of the judgment of the House of Lords, where the word gratuitous was used in contradistinction to onerous; but, farther, the provision was not even rational, under all the circumstances.

Pleaded by Major Miller's children—

The provision was rational, the children being otherwise unprovided, and, therefore, it was not gratuitous in the sense of the judgment of the House of Lords, the word gratuitous being there used in contradistinction to what was rational as well as what was strictly onerous.

LORD BALGRAY.—The question raised by the children of Mr Hamilton Miller does not depend on the circumstance whether the previous provisions to the younger children were so ample, that any addition to them was excessive, and in fraudem of the pursuer's marriage-contract. For, even after that contract, the late

¹ Sandford on Herit. Succ. 220; Gerran, June 14, 1781 (4402); Newlands, July 9, 1794 (4289); Seton, March 5, 1793 (4219); Waterstone, Nov. 25, 1801 (4297); Mein, June 8, 1827 (ante, V. 779); Napier, Feb. 14, 1826 (ante, IV. 454)—Aff. 2 W. & S. 550; Rollo, Nov. 28, 1832 (ante, XI. 132); Gordon, Feb. 9, 1833 (ante, XI. 368); Turabull, April 15, 1825, 1 W. & S. 80; Mackintosh, Jan. 21, 1812, (F. C.); Dykes, June 3, 1813, (F. C.); Cuming, Feb. 10, 1756 (4268); Bailey, Feb. 23, 1809 (F. C.); Wilson, Dec. 14, 1819, (F. C.); Thomson, 1 Dow, 417.

² 3 Ersk. 8. 39; 3 Stair, 5. 52; 1 Bankt. 3. 15 and 17; 1 Bell, 339; Blackburn, May 23, 1816 (F. C.); Gourlay, Dec. 15, 1820 (2 Shaw's App. 183); Garden, Nov. 26, 1822 (ante, II. 39).

No. 8. Mr Miller had still full power to contract debts ; he was dominus of his estate to that extent. The obligation which he undertook in the marriage-contract of his son, Mr Hamilton Miller, was onerous to all intents and purposes. This being the case, the next question is whether the fee was in Mr Hamilton Miller or his children. This is always a *questio voluntatis*, and as, in every such case, it must happen that the intention of the testator is to be gathered from various circumstances, sometimes minute in themselves, the decisions have an appearance of being arbitrary. It cannot well be otherwise ; but still, the principle to be applied is certain, though the manner of its application will depend on the circumstances of each case. The Court must always look to the intention of the parties, and endeavour to decide thereby. On considering the whole of this case, my opinion inclines to hold the fee to be in the children. The lady brought a tocher which was settled in fee upon the children, and apparently was meant to receive the same destination with this sum : it is provided, that if Mr Hamilton Miller had predeceased his father, the interest of the sum should be paid to the children by the father during his lifetime : when his father should die, Mr Hamilton Miller was not left at liberty to dispose of the sum as he pleased ; he was taken bound to invest it, on good security, "in terms, and for the purposes expressed in the joint obligation before written, and that at the sight" of parties there named, at whose instance action was to be competent to compel implement. That last circumstance is a very strong one, indeed it appears to me to be decisive ; and I hold that the fee was in the children.

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LORD PRESIDENT.—I am of the same opinion. An express power was given to Mr Hamilton Miller to divide the sum among his children, in such proportions as he pleased. Such a power as that is inherent in every *fiar*. Why, then, was it expressly given to him ? Upon what footing could it so much as occur to the parties that it was necessary to give this power ? Only, I apprehend, because, according to their intention and understanding, he was not the absolute *fiar* of the sum. As a circumstance indicative of the intention of the parties, this very strongly confirms those grounds which have been already mentioned by Lord Balgray.

LORD CRAIGIE.—Looking at the whole circumstances, I think the absolute fee was not given to Mr Hamilton Miller, and that a *liferent* merely was given to him. In addition to the grounds already stated, I am moved by the fact of his being substituted to the issue of the marriage, under the clause "whom failing, to the said Thomas Hamilton Miller, his heirs," &c. Had he been absolute *fiar*, such a substitution would have been incongruous and inept.

LORD GILLIES.—I concur in the opinions which have been expressed by the Court.

Their Lordships also intimated their opinion, that the provision of £5000 to the children of Major W. Miller, by the second marriage, was to be held as gratuitous, in the sense in which that word had been used in the interlocutor of the House of Lords, and therefore ineffectual in a question with the pursuer.

THE COURT pronounced this interlocutor : "Imo, Find, that the provisions made by the late Patrick Miller, Esq., in the marriage-contract of his son Thomas Hamilton Miller, in favour of his wife and children of the marriage, were, according to the true sense and construction of the judgment of the House of Lords, onerous provisions in favour of third parties, and not granted in defraud or contravention of the obligation of the said Patrick

Miller, contained in the contract of marriage of his son, the pursuer; and find, that the fee of the sum of £5000, provided in the foresaid marriage-contract of Mr Thomas Hamilton Miller, was vested in the said children, and behoved to be invested and secured for the said children, at the sight of the trustees appointed for them in the said marriage-contract of the father; and in respect of the appearance now made on the part of the said children, and the trustees named in the said contract of marriage, assolzie the said children from the conclusions of the libel, so far as applicable to the provision in their favour, and decern. 2do, Find, that the provisions made by the late Patrick Miller, Esq., in favour of the children of Major Miller, are to be held as gratuitous, and so ineffectual against Mr Patrick Miller, the pursuer. 3tio, Remit all the other points of the cause not determined by this interlocutor to the Lord Ordinary, with power to him to call the cause without an hour, and to hear parties further, and to determine therein as to him shall seem just; and the Lords recal the interlocutor reclaimed against, in so far as it shall be found inconsistent with this interlocutor."

No. 8.

Nov. 14, 1831
Taylor v.
Crawford.

R. RUTHERFORD, W.S.—J. and J. N. FORMAN, W.S.—Agents.

MRS TAYLOR or BRYSON, and HUSBAND, Pursuers.—*Skene—Deas.*
WILLIAM CRAWFORD, Defender.—*Rutherford—Baxter.*

No. 9.

Trust—Proof.—In a declarator of trust, it is not necessary to produce a probative deed by the trustee admitting the trust; a holograph writing, or a writing to which his signature is adhibited, is sufficient.

Process.—A party cannot compare as pursuer without consent of the defender.

ON 25th January, 1817, William Crawford obtained a disposition of an heritable subject from the late John Taylor, ex facie absolute, and bearing that the price, £350, was paid and discharged. Sasine followed on the same day, and was recorded on the 27th. In March following, Taylor was incarcerated for debt. He raised a process of cessio, and, in his condescendence, specified the receipt of £350 from Crawford, as the price of the heritable subject, and also stated a list of creditors, whose debts were alleged to have been paid with it. After his death, Mrs Taylor or Bryson, one of his sisters and co-heiresses, raised a declarator of trust against Crawford, and produced a missive in these terms: "Lochee, Feb. 1, 1817.—Mr John Taylor—I hereby agree to the following articles: In the first place, I acknowledge that I have, according to your desire, got into my name your money which you have in the Dundee New Bank, the said money being accounted in a book from said bank; but although my name is fixed on said book as being proprietor, yet I acknowledge I have no right to the money, any farther than to uplift or put into said book the whole or any part which you and your heirs shall desire me to do, as the money wholly belongs to you; and you or your heirs is at your or their pleasure to have the said book always

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D.

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Crawford.

a-keeping, if it is not when it is given to me for to do business in the bank with it; and at any time when you or your heirs shall please, your or their name is to be inserted for whatever sums is contained in said book, and my name taken away, as I have no right to the money. The above bank-book bears date 6th January, 1817. (Signed) WILLIAM CRAWFORD. 2dly, I also agree, that although I purchased all your moveables by roup in the month of January, 1817, that I have no right or claim to any of the articles which I purchased at said public roup, because I paid no money of my own for any article, but I paid the whole with your money, and therefore you and your heirs has the right to the whole which I purchased, without me having any demand for any article—the amount of said roup being £70, 3s. sterling. (Signed) WILLIAM CRAWFORD. 3dly, I farther agree, that I purchased your whole property of both houses and lands of Old Milehouse, Lochee, in the month of January, 1817, at £350 sterling; but as I paid no money of my own for said property, I hereby agree that you and your heirs is to have the right to dispose, to use said property in any manner you or they shall please; and you or your heirs is to have the rights which you have given me of your property a-keeping, and to destroy them when you or your heirs sees it proper, as they are declared to be null and void; only if needcessity require, I am to get those rights only to show whatever you or your heirs shall direct me to do, and then return said rights to you or your heirs, at your or their request. This paper to be stamped at any time you or your heirs shall require, at your or your heirs' expense. I agree to the above. (Signed) WILLIAM CRAWFORD."

The pursuer also offered to prove homologation of this document by facts and circumstances.

Crawford denied the authenticity of the missive, of his signatures, and also the alleged homologation; but he pleaded that it was irrelevant to enquire into this, because, by 1696, c. 25, the pursuer was restricted to a proof either "by a declaration or back-bond of trust, lawfully subscribed by the person alleged to be the trustee," or by the oath of that party; and that the missive being unstamped, and not holograph or tested, could bear no faith in judgment; and, besides, Taylor had sworn that the property was not his.

The Lord Ordinary found, "that this action is a declarator of trust brought by an heir-portioner of the alleged truster, John Taylor, against the defender, William Crawford, who was infeft in the heritable property in dispute, in virtue of an absolute disposition from the said John Taylor, dated in January, 1817; that this case falls under the provision of the act 1696, c. 25; that the writ libelled on in support of this action, bearing to be dated the 1st day of February, 1817, is unstamped and improbativ; that in March, 1817, the late John Taylor obtained a cessio bonorum against his creditors, on the statement, inter alia, in his condescendence, and afterwards confirmed by his oath, that the property in dispute

had been sold to Crawford, in terms of the foresaid disposition ; that any alleged homologation of the improbative deed, by facts and circumstances, is excluded by Taylor's statement in the cessio, confirmed by oath, and absolutely contradictory to the contents of the improbative deed ; therefore, found the present action is not supported by the evidence required by the statute ; assoilzied the defender from the conclusions of said action, and decerned ; and found the defender entitled to expenses." * No. 9.
Nov. 14, 1835
Taylor v.
Crawford.

The pursuer reclaimed ; and the Court, observing that the parties substantially interested in the question might be the creditors in Taylor's process of cessio, ordered intimation to be made to them. The defender, however, objected to their right to appear.

LORD BALGRAY.—I do not think that a probative deed is necessary in order to prove the existence of a trust. I have repeatedly heard from Lord Braxfield and Lord Eakgrove, the doctrine, that a simple letter from the trustee was enough. At one time the Court considered that a proof by facts and circumstances might suffice to establish a trust ; but, ever since the case of Duggan, the writ or oath of party has been required. But any writing under the hand of the party is sufficient. Suppose, for example, that Taylor had written a letter to Crawford, setting forth the trust-nature of Crawford's right, and that Crawford had written back in answer, " I agree to the same," that would have satisfied the statute. If the words at the close of the missive, " I agree to the above," be holograph of Crawford, that would appear to me to be sufficient.

In regard to the intimation given to the creditors, that was done *ex proprio motu* of the Court, as it appeared that they should be made aware of the case ; so that, if the whole transaction was a fraud against them, they might obtain redress against it. The Court often order such intimation to be given to parties whom they perceive to be materially interested in a question at issue before them.

LORD PRESIDENT.—I concur with Lord Balgray in thinking that no probative deed is requisite. Any writing under the hand of the party is sufficient : for example, if he lodged defences, admitting the trust-nature of his right, and signed

* * **NOTE.**—The transaction between Crawford and Taylor is attended with several very suspicious circumstances ; and the Lord Ordinary gives no opinion on the possible result of an investigation at the instance of parties entitled to a more extensive mode of proof. But the present is a case strictly regulated by the act 1696 ; and the writ founded on in support of it is the letter of the 1st of February, 1817. The authenticity of the signature is denied by the defender ; and upon this point it would have been necessary, if the case depended on it, to send the matter to a jury.

" The absence of stamp might also have been remedied. But the deed is confessedly improbative ; and though perhaps it might, even in a question of this kind, be competent to support the deed by homologation, it has appeared to the Lord Ordinary to be impossible here to admit inferences from facts and circumstances as confirmatory of the improbative deed, when the disposition, as an absolute disposition, is confirmed, and the improbative missive directly contradicted by the judicial statement of the grantor, confirmed by his oath in the cessio. This must have been conclusive against any offer of proof of homologation of the missive by him, and it must be equally conclusive against his representatives."

No. 9. these himself. If the authenticity of the missive and signatures were admitted, I should hold it a sufficient declaration of the trust-nature of the right conveyed to the defender. But the authenticity is denied in point of fact, and it will require a proof.

Nov. 14, 1833.
Wood v.
Spence.

LORD GILLIES.—I concur. It is true that the words of the statute 1696, c. 25, require a declaration “lawfully subscribed;” but that does not necessarily imply the subscription to a probative deed. Any genuine subscription, adhibited by a party without fraud, is, in one sense, a lawful subscription by that party. In cases of the short prescription, where the writ or oath of party is founded on, it is never understood that the writ is required to be a regular and probative deed. Any writ under the hand of the party is enough; and I think any such writ should suffice in this case as a declaration of trust. I would therefore propose that the Court should pronounce a finding, that the letter produced, if the signatures be genuine, is a sufficient declaration of trust; and remit to the Lord Ordinary, quoad ultra.

I thought it right to call the creditors; but I apprehend that, without the consent of the defenders, they cannot be allowed to sist themselves as pursuers in this action.

THE COURT pronounced this interlocutor:—“Recal the interlocutor reclaimed against, in hoc statu: Find that if the signatures ‘William Crawford’ to the letter founded on are genuine, and the words ‘I agree to the above’ are holograph of him—or, if the signatures are genuine, the said letter was a sufficient declaration of trust: but, in respect it is denied on the part of the defender that the subscriptions are genuine, or the above words holograph, they remit to the Lord Ordinary to proceed in the investigation of this defence, and do therein as shall be just, reserving all questions of expenses.”

BROWN and MILLER, W.S.—C. F. DAVIDSON, W.S.—Agents.

No. 10. WOOD, SMALL, AND COMPANY, Pursuers.—*D. F. Hope—Cuninghame.*
JOHN SPENCE, Defender.—*Rutherford—Monteith.*

Trust—Proof.—Circumstances sufficient to infer that an assignation in favour of one party was truly for behoof of another, to the effect of sustaining action against the latter by the grantor, to account for his intromissions with the effects assigned, under an obligation to account contained in the assignation.

Nov. 14, 1833. PRIOR to 1821, the defender, Spence, accountant in Edinburgh, had done some professional business for the pursuers, Wood, Small, and Company, musical instrument makers there, and for a prior firm, of Muir, Wood, and Company, which they represented, for which he made a charge of £700; and, in August of that year, deducting certain counter-claims, which left a balance of £543, alleged to be due him, he drew a bill on the company for that sum, in favour of one Archibald Fyffe, who immediately presented it for acceptance. Wood, Small, and Company, considering, as they stated, that Spence’s claim was extravagantly overcharged, refused to accept, and the bill was protested, in Fyffe’s name, for non-acceptance.

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L.J. Mackenzie.
T.

A few days after this, an arrangement was entered into with Spence, No. 10. whereby he agreed to make an abatement of his charge, and to accept of £490, in full of all claims; and Wood, Small, and Company agreed, on the other hand, to grant him three bills, one for £100, and two for £195 each, making in all the sum of £490, and also to grant to Fyffe an assignation to certain debts due them in security of these bills, Spence himself being at this time under sequestration. An assignation to certain specified debts, alleged to amount to £2000, was accordingly thereafter executed in favour of Fyffe, proceeding on the narrative, that Wood, Small, and Company "have paid to the said John Spence £75 to account of the first bill, and are to pay the balance of £25 in a few days, and have granted two bills for £195 each, payable at six and nine months, as aforesaid," and taking Fyffe bound "to hold just count and reckoning with us for any balance which may arise beyond payment of the said bills." After some time, Fyffe having become bankrupt, and been sequestered, Wood, Small, and Company, alleging that Spence alone had intromitted with the debts contained in this assignation, which had been granted to Fyffe for his behoof, and that he had done so to an amount greatly beyond that of the bills in security of which it had been granted, raised an action of count and reckoning against him, to which they also called Fyffe's trustee. In defence it was pleaded by Spence, that the assignation being in favour of Fyffe, who was creditor of Wood, Small, and Company, by the draft by Spence on them in his favour, he (Fyffe) was the only party against whom a direct action of accounting lay, and that the averment of the assignation having been in trust for Spence, could only be proved by Fyffe's writ or oath. Spence, however, did not aver, that, when he granted Fyffe the draft on Wood, Small, and Company, he was a debtor of Fyffe, or that he received any value therefor; and it was pleaded for Wood, Small, and Company, that the terms of the assignation, and the admitted facts, proved indisputably that it was granted for his behoof, in security of the debt due him, and that Fyffe was not an onerous holder of the draft for £543, but merely a hand for the more effectual recovering of Spence's claim, pending his sequestration. The Lord Ordinary found that Spence "is liable to account to the pursuers for the debts libelled due to Wood, Small, and Company, in so far as the same have been intromitted with by him," and appointed him to give in an account thereof.

Spence reclaimed; but the Court adhered, under a reservation of all claims competent to him in the accounting.

No. 11. R. DOWNIE and COLL MACDONALD, W.S., Advocators.—*Skene—Christison.*

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2D DIVISION.
Ld. Mackenzie.

DUGALD STEWART, Respondent.—*Keay—A. Wood.*

T.
Downie v.
Stewart.

Expenses.—QUESTION of expenses, in regard to which the Court refused to interfere with an interlocutor of the Lord Ordinary, subjecting the advocators therein to a certain extent.

Walker's Executrix v. Low's Trustees.

W. Renny, W.S.—C. C. Stewart, W.S.—Agents.

No. 12.

WALKER'S EXECUTRIX, Pursuer.—*Buchanan.*
LOW'S TRUSTEES, Defenders.—*A. McNeill.*

Agent and Client—Right in Security.—Circumstances in which an agent, who had obtained from his client (a rustic) a conveyance to his lease, purporting to be an absolute sale for a price paid, with a back-letter declaring it redeemable on payment of the price, was held not entitled to avail himself of it to a further effect than as a security for repayment of the money advanced.

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2D DIVISION.
Ld. Medwyn.
F.

THE late John Walker held a liferent lease of the farm of Chapeltoun, part of the estate of Dunottar, in the county of Kincardine, including assignees and subtenants, at a rent of £32, and sixteen bolls of meal. In 1806, he subset a part of the farm to one Taylor, at a subrent of £36, and eight bolls of meal; and in 1814 he subset another part to James Walker, at a rent of £39, and eight bolls of meal; making thus a surplus rent of £43, over that payable to the landlord, besides retaining about forty-five acres in his own hand. No special consent was obtained from the landlord to these subleases, but no objection was made on his part. In October, 1814, Walker, having fallen into embarrassed circumstances, applied to the late John Low, writer in Stonehaven, his law-agent, for an advance to pay off certain debts; and on the 26th, he executed a deed of sublease and assignation, prepared by Low, and signed by Walker at Low's house, without the intervention of any other man of business, whereby, "in consideration," as the deed bore, "of the sum of £299 instantly advanced and paid for, and in consideration of the sublease and assignation hereafter written, and as the full and agreed-on price and value thereof, whereof he the said John Walker hereby acknowledges receipt," the latter subset to Low those parts of his farm possessed by Taylor and James Walker, assigning him to their subleases, with a clause of absolute warrandice—Low being taken bound to pay the rent to the landlord. At the same time, Walker further executed in Low's favour an assignation to two policies of insurance on his life, for £150 each, the premiums payable being £13, 5s. 3d., for

which, by acceptance of the assignment, Low bound himself; and Walker received from Low a back-letter in these terms: "Hilton, 26th October, 1814. Sir—Notwithstanding of your sub tack and assignment to me this day, in terms of our agreement, if you shall hereafter think it proper, at any time during your life, to repossess yourself thereof, I shall, at any time you please, reconvey the same to you, upon your paying to me £299 sterling, being the price I have paid you for same, for all the years and terms thereof that may be to run thereafter. I am, your most obedient servant, (Signed) JOHN LOW. To John Walker, tenant at Chappelton." Notwithstanding the acknowledgment, in the sub tack and assignment, of £299 being instantly paid, no money was in point of fact actually handed over to Walker; but in the course of the year following, Low discharged various debts owing by Walker, amounting, with a business-account of his own, and certain advances, to considerably more than the sum above mentioned. In 1815, Low prepared two accounts of his transactions with Walker. In the first, he took credit for divers payments made by him, in discharge of debts due by Walker subsequent to the date of the assignment, amounting, with a small business-account, to £394, 4s. 6d., while, on the other hand, he debited himself with the £299 stated in the account as "the agreed-on price of John Walker's assignment," and also with the proceeds of two bills granted by Walker, making in all £397, 6s. 8d., and thus bringing out a balance in favour of Walker of £3, 2s. 2d. The second account again consisted of various other charges and advances, amounting in all to £802, 4s. 5d., from which the small balance in the first account was deducted, as the "balance in J. Walker's favour, on price of the Chappelton lease, per other attested account," and bringing out a balance still due by Walker of £299, 2s. 3d. Both these accounts were docqueted by Walker, of date 26th June, 1815,—the docquet on the first account being in these terms: "Stonehaven, 23d June, 1815. The above account examined, found correct, and vouchers delivered up to John Walker, being the full and fair application of the money agreed to be paid and advanced by the said John Low to me, the said John Walker, and applied at my desire, by my order, and in discharging the above debts, as the agreed-on value of that part of my lease in Chappelton, subset and assigned over by me to the foresaid John Low, and which is attested by us. (Signed) JOHN LOW—JOHN WALKER." No intimation had been made to the landlord of the assignment at its date, but it was now intimated by Low, who further entered into possession of that portion of the farm to which it applied, and thereafter levied the subrents. He also thereafter paid the premiums of insurance on Walker's life, but in his books charged them against Walker, whom he likewise therein debited with the expense of the assignment.

For the purpose of discharging the balance on the second account above mentioned, Walker granted bills to Low; but not having fully retired them, he granted to Low, in 1807, when the balance against him was £190, a second assignment and sub tack, applicable to the remainder of the

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No. 12. farm (of which he had retained possession), wherein, as in the former o
 Nov. 14, 1833. it was set forth that Low had paid to Walker a sum of money, "as
 Walker's Exe- agreed-on value" of this sub tack and assignation; and it was further s
 cutrix v. Low's ted in the narrative, that "the said John Low, some years ago, for a
 Trustees. and adequate consideration, acquired right to, and has been, and is no
 in possession of the other parts of the lands of Chappelton, by subt
 and assignation from the said John Walker, during the reversion of
 right thereto."

This assignation was qualified by a back-letter by Low, in these term
 "Stonehaven, 5th February, 1817. Sir—Although you have gran
 to me a sub tack and assignation on the remaining part of the lands
 Chappelton, set to David Hutcheon for the sum of £190, therein m
 tioned, yet I declare that how soon the surplus rents of £30, paya
 yearly by Mr Hutcheon, shall come to be sufficient to extinguish
 foresaid principal sum, and progressive interest thereof, I shall im
 mediately deliver back to you said assignation and sub tack, or that at w
 ever time you repay me what may be due at the time of said princi
 sum and interest, or in case I shall ever be able to recover the sum fr
 any of the bills I hold of you and your brothers, so as that the said s
 and interest be completely paid up, with any expense, if any, that r
 be due thereon, I shall restore you to the said assignation and subt
 now granted to me this day, on your expenses. I am, &c. (Signed) Jo
 Low." Some years thereafter, when the debt of £190 had been ex
 guished by Low's intromissions with the rents of that portion of the fi
 contained in this second assignation, Walker was reinvested therewi
 but in regard to the first assignation, Low contended that it was an ab
 lute, though redeemable, conveyance for a price paid, and not in secu
 of the £299 as money advanced in loan, and, consequently, not ex
 guishable by intromissions with the surplus rents, but only on repaym
 of that sum. To have this point determined, Walker raised the pres
 action against Low (carried on after their deaths by their respective rep
 sentatives), concluding for a count and reckoning of his intromissi
 with the rents, and to have it found that the assignation had been gran
 in security of the sum of £299; that that sum had been extinguished
 Low's intromissions, and that he was bound to retrocess Walker into
 lease, and policies of insurance.

Pleaded in defence—

The terms of the assignation, and of the back-letter with which it
 qualified, import an absolute sale for a price paid, subject to a powe
 redemption, on repayment of the price. It is impossible, therefore
 refuse effect to them on mere allegations of inequality in the terms
 the bargain, which, however, considering the risk of the landlord refus
 to sanction the assignation, which was prohibited by the tack, was t
 a fair and reasonable transaction. Besides, the true intention and und
 standing of the parties is clearly shown by the terms of the entries
 the accounts settled and docketed by Walker a year after, and by

fact, that when the second assignation came to be granted on the footing on which it is now sought to place the first, totally different terms were used in the corresponding back-letter, properly calculated to express the object in view.

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To this it was answered—

The transaction was entered into by Walker with his own law-agent, without the assistance of a man of business. The assignation bears, that it was granted in consideration of a sum of money paid down. It is now admitted, however, that this was a false narrative, and that the money advanced by Low was only afterwards advanced in the course of the year following, in paying debts due by Walker. Taking this along with the back-letter, and the circumstance, that if it had been an absolute sale, Low would have thereby acquired right to a surplus rent of £43, in consideration of an advance of a principal sum of £299, repayment of which principal sum was fully secured to him by the assignation of the policies of insurance, it is impossible to hold that it was other than a loan, with an assignation in security of the advance; and, at all events, Low, being an agent dealing with his own client (a rustic), cannot be allowed to avail himself of the transaction to a greater extent. His representatives are therefore bound to account for his intromissions on that footing; and if the advance be extinguished thereby, to reassign the policies—the lease having now expired by Walker's death.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: * “ Finds, that the import of the agreement between the deceased

* “ It is admitted that Low was Walker's agent, and that Walker applied to him for a loan of money in his difficulties. Low stated in the defences that he agreed to advance £299, not by way of loan, but as the price or consideration of an assignation to a life-rent lease of lands, with a surplus rent of £43, after paying the rent to the landlord, and also an assignation to two policies of insurance, to the amount of £300, on Walker's life, on which the premium payable was £13, 5s. 3d. On the same date he granted a back-letter, agreeing to retrocess Walker upon his repaying the sum of £299 at any time. The assignations are made out by Mr Low himself, and subscribed by Walker at Mr Low's residence at Hilton, and the back-letter also is written by Mr Low. According to this statement it was very far from an equal bargain. During Walker's life the surplus rents afforded nearly ten per cent of the sum paid, and the policies made payment of the principal secure at his death; and if at any time Walker chose to pay the £299, Low was to retain all the surplus rents received in the meantime.

* “ As the back-letter is written by the agent himself, and is in very brief, and not perfectly unambiguous terms, the Lord Ordinary feels himself entitled to construe it in the most favourable terms for the other party, who does not appear to have had any assistance in the transaction on his part, more especially as, otherwise, the Lord Ordinary would be obliged to put an interpretation on it that would constitute to him a bargain between an agent and his client, in favour of the former, as could scarcely be reckoned fair or honest. For to a plain man the terms of the letter would, without difficulty, convey the idea that when the £299 was repaid, he would be entitled to a reconveyance, whether this was by surplus rents or otherwise. As a

No. 12. John Low and the deceased John Walker, in 1814, was, that the sub tack and assignation then granted, as well as the assignation to the policies of insurance, were to be in security of the sum of £299 advanced by the former for behoof of the latter, and that when the sum of £299 was repaid, with interest, Low should reconvey the subjects contained in the sub tack and assignation to Walker: appoints the defender to produce a statement of the whole rents uplifted and received in virtue of the said assignation,

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proof that the letter does not clearly express the intention of the parties, it may be mentioned that there is no obligation whatever in it to reconvey the policies of insurance, if the sum should be repaid.

"It is very true that on 5th February, 1817, for a debt or farther advance of £190, an assignation of another part of the farm is also granted, and a back-letter in much more precise terms, is granted, by which it is stipulated that how soon the surplus rents of £30 shall be sufficient to extinguish the principal sum and interest he shall reconvey. It would have afforded a strong argument if the letter founded on in the present process had been of a date subsequent to the above. The tenant must have observed the difference, and it would be natural to suppose that the different mode of expression had been adopted *ex præposito*. But the argument does not hold where it was of a subsequent date, and Walker might well suppose it was only a more explicit mode of expressing the same transaction.

"No reason could be assigned why this latter loan was on different terms from the former. The surplus rent was no doubt higher, in proportion to the sum advanced, but then, on the other hand, the advance was not secured by an insurance as on the first occasion. It was stated that the first assignation might be held a questionable bargain, as the lease excluded assignees and subtenants. There seems little doubt that Low must have ascertained that the clause as to assignees would not be enforced by the landlord, as in fact it had not been as to subtenants, the farm having been subset.

"It has been argued that Low did not understand this to be an absolute sale for a price, but a mere security for a loan, as he charged Walker for the expenses of the assignation, and also once, if not oftener, charged against him the expense of sequestrating for the landlord's rent; but notwithstanding these charges, it rather appears to be otherwise. The assignation calls it the full and agreed-on price and value of the assignation, and in the settlement of accounts on 23d June, 1815, it is described 'as the agreed-on value' of the assignation; and in another account he calls it 'the price' of the assignation. But, further, when Low takes an assignation to the remaining part of the farm, as it is admitted on different terms, he puts in clause as to the condition of the former assignation, 'whereas the said John Low some years ago, for a full and adequate consideration, acquired right to, and has been,' &c. With a third party, totally unconnected with Walker, a mere money lender, it might be difficult to get the better of these expressions; but as between these parties, an agent and his client, unassisted by any man of business in the transaction, the same result does not necessarily follow; and whatever Low may have conceived, or wished to be conceived, if Walker might reasonably have been deceived in his idea of the contract, it is such that, on payment of the principal with interest, from the surplus rents and otherwise, he ought to have obtained possession of the subrents assigned, and an accounting must now take place. As the defenders are the representatives of the original party, and bound, at least entitled to maintain the defences put in by him; and, further, as the case is far from being without difficulty, no expenses have been found due."

after deducting the necessary expenses of reconveying the same, and to state an account, showing how much of the original sum of £299, with the interest, remained due after imputing the free rents, when the possession came to an end by the death of Walker: appoints said state to be put in in fourteen days from this date: finds no expenses due hitherto incurred."

No. 12.

Nov. 14, 1833.
Walker's Executrix v. Low's Trustees.

Low's trustees reclaimed on the merits, and Walker's executrix as to expenses.

LORD JUSTICE-CLERK.—I prefer the Lord Ordinary's note to his interlocutor. We are bound here to look to the principles of equity; and it is a material fact, that Low was agent, and accommodating his client (a rustic) with money. I must hold, therefore, that a fair transaction was intended; and all the documents must be construed in favour of the client; and in doing this, I think nothing but one meaning can be put on both letters, as they were both written by Low. Then we see the transaction was not what is set forth in the assignation—a payment over the table. The transaction, on the defender's statement of it, was most unjust and usurious, and an advantage taken by an agent over his rustic client, which cannot be sanctioned; and, therefore, I think, under the whole circumstances, we should hold that he was not entitled to found upon the assignation otherwise than as a security.

LORD GLENLEE.—I doubt how far we can put a construction on documents, perfectly clear in themselves, so very different from what they admit of, as the Lord Ordinary has done. But I think that we may hold that the transaction, according to its letter, is so improper, that we cannot support it. The transaction was truly unconscionable, and the deed was false too in representing payment to have been instantly made. We cannot therefore adhere to the exact terms of the deeds taken by Low, and we should hold that Low cannot maintain these documents to any other purpose than as a security. But I do not think we can, with the Lord Ordinary, hold that the documents will admit the construction which he puts upon them.

The other Judges concurring—

THE COURT, "upon the whole circumstances of the case," adhered to the interlocutor of the Lord Ordinary on the merits, but recalled it in so far as it found no expenses due, and found the pursuers entitled thereto.

JAMES BURNES, S.S.C.—**C. F. DAVIDSON, W.S.**—Agents.

No. 13.

Affleck v.
Girdwood.
Wood v.
M'Caul.

ARCHIBALD AFFLECK, Advocate.—*W. Bell.*
JOHN GIRDWOOD, Respondent.—*Robertson.*

Process—Reclaiming Note.—A reclaiming note, with part only of the record the Inferior Court appended, is incompetent.

Nov. 15, 1833. In a process of advocation, a reclaiming note, to which were appended the letters of advocation, and one article of the condescendence and answers made up in the Inferior Court, (and held as the record in the Court,) but without the rest of the record, and without the pleas in law—refused as incompetent.

1st Division.
Ld. Corehouse.
B.

T. M. MOFFAT, S.S.C.—W. POLLOCK, S.S.C.—Agents.

No. 14.

HENRY WOOD, Pursuer.—*J. Anderson.*
CHARLES M'Caul and Others, Defenders.—*D. F. Hope—Wilson.*

Title to Pursue.—An action was raised by the preses and treasurer of an unincorporated Society, against a member, concluding for sums due to the society; and on an objection to the title, the other members were sisted as pursuers, on payment of ten shillings of expenses, which sum the defenders' agent uplifted—held, in a reduction of the decree, that the defender could not object to the original instance as incompetent.

Res Judicata.—The refusal of successive bills of suspension and liberation presented on the ground that a decree was null on objections to the instance, held in res judicata against an action of reduction of the decree on the same ground.

Nov. 15, 1833.

1st Division.
Ld. Moncreiff.
R.

IN 1829, an action was raised before the Magistrates of Edinburgh by "Charles M'Caul, residing at the High School Yards, Edinburgh preses, and Mark M'Glaughlan, broker, St Mary's Wynd, Edinburgh treasurer, of the Edinburgh Speculative Building Society," concluding for payment of a sum of £10 of money lent by the society to Henry Wood, broker in Edinburgh, one of their members, and £7, as a balance of rent for a room which he held in lease from the society. In defence, Wood objected to the society's title to pursue in the name of its office-bearers, as it was not an incorporated society. The pursuers craved leave "to amend their libel," and were allowed to do so. Under the proposed amendment, the other individual members of the society were sisted as pursuers. The amendment was allowed to be seen; after which, this interlocutor was pronounced:—"The Bailies hold the libel as amended, upon the pursuers (M'Caul, &c.) paying ten shillings of previous expenses on the clerk's receipt to be put into process; after which, allow the defender (Wood) to see the amended libel, and within six days to lodge additional defences." Wood reclaimed against the judgment, and his petition, on answers, was refused. Afterwards the magistrates "admitted protestation against the defender (Wood) for not lodging additional defences, and, in respect thereof, decerned in terms

the libel, with expenses." On the following day, Wood's agent uplifted the sum of ten shillings of expenses, which had been previously consigned by M'Caul and others with the clerk of Court.

No. 14.

Nov. 15, 1833.

Wood v.

M'Caul.

An arrangement ensued between the parties, under which Wood granted M'Caul and others a bill at 12 months for £32, said to include arrears of contribution to the society. But as M'Caul and others stated that this bill did not embrace the £7 of rent due to them, they extracted their decree, and gave a charge for that amount, and the expenses of extract. Wood presented a bill of suspension, which was refused; and, after incarceration, he presented two bills of suspension and liberation, which were also refused. He at the same time raised an action, concluding for reduction of the decree, and for damages.

Pleaded by the pursuer,—

The libel, as originally raised in the Sheriff Court, was intrinsically null, the society being unincorporated, and its preses and treasurer having no persona standi. Neither were any articles of agreement among the members produced, in virtue of which he could be held bound to sanction the right of these office-bearers to sue the members. But if the instance at first was null, it was impossible to cure this after the summons had been called in Court. It was therefore incompetent to allow the other members of the society to sist themselves as pursuers, because this was not merely the case of new pursuers intruding themselves into a process against a defender's consent, but the case where there was previously no pursuer having persona standi at all.

Pleaded by the defenders—

The instance was not originally null. Both M'Caul and M'Glaughlan were individual members of the society, as well as office-bearers; and they were entitled to insist for their own interest. It was competent to allow the other members to come forward, as this only validated the instance, without changing it to a new instance; just as if a party whose commissioner's title was objected to in respect of a defective commission, should come forward and sist himself. But the case did not depend on any general principle, as the amendment, under which the other members were sisted, had been allowed conditionally, on payment of ten shillings of expenses; and the pursuer, by his agent, had uplifted that sum. Such proceeding afforded a personal objection against any after-challenge of the amendment.

The defenders pleaded separately, that the refusal of the bills of suspension formed res judicata against the pursuer.

The Lord Ordinary found, "that the various judgments refusing bills of suspension do not constitute res judicata to bar the present action, and repelled the plea of res judicata accordingly; but, on the merits, sustained the defences, assolizied the defenders, and decerned: Found expenses due." *

* * *NOTE.*—The interlocutors in the suspension, especially those refusing libera-

No. 14. Wood reclaimed.

Nov. 15, 1833.
Wood v.
M'Caul.

At the advising, it was admitted by the defenders, that the Lord Or-

tion, though not forming *res judicata* to bar reduction, are very important, in the Lord Ordinary's opinion, as authorities. For if the Court had thought the proceedings altogether null, they would certainly not have allowed the pursuer to lie in jail till a reduction should be discussed. On the merits, the Lord Ordinary thinks that the question as to the regularity of the proceedings might be originally somewhat doubtful. He is inclined to think, however, that they involve no nullity. It will be observed that this is a question among the members of the society themselves. The action was not against a third party unconnected with it, which is the case in which the difficulties raised in the House of Lords as to the title of the office-bearers, or the firm of a private society, occurred. According to the case twice decided by the Second Division of the Court, *Wilson, &c. v. Kippen, &c.*, June 23 1821, and February 8, 1822, the action would not be incompetent as between the partners of the society, in its original form; upon this principle, as it should seem that the partners had bound themselves by contract to pay to these office-bearers. But perhaps some of the later decisions may be thought to have altered this, or at least rendered it doubtful. Supposing it to be so, the two parties in whose name the action was brought, were entitled to sue for their own interest, even if the other members had refused to concur with them. And the objection then comes to be not so much to the title of the pursuers to insist, as an objection that all the parties interested were not made parties to the suit. But, without dismissing the action they might have been called; and if those other parties chose to assist themselves, it does not appear that there was any incompetency in allowing them to do so. On this ground, therefore, the Lord Ordinary thinks, that, in a matter of this peculiar kind, prosecuted in an inferior court, it cannot be considered as a change of the instance, that, when a member of the society refuses to answer to the office-bearers because all the members of the society were not in Court, these members were allowed to assist themselves, and insist along with the individuals who had raised the action.

"At the same time, the Lord Ordinary does not think it immaterial that the pursuer first acquiesced in the interlocutor by which an amendment was allowed to be given in to this effect—then by his agent accepting payment of the ten shillings assigned when the amendment was finally sustained—and, at last, entered into a negotiation, by which he granted a bill for £32, (though clearly not including the whole debt,) and this after having denied on the record that he owed any thing to the society. The Lord Ordinary does not say, that if there was a clear nullity in the proceedings, these things would bar the complainer from complaining by reduction; but he thinks that they afford very strong grounds for not opening up such proceedings upon doubtful questions of mere form, where there is scarcely an attempt to state any case at all on the merits.

"By the note in process, holograph of the pursuer, it is made quite certain that the sum of £7 of rent was not included in the bill for £32; and the Lord Ordinary has no doubt that the parties, having a decree for £17, were entitled to obtain an extract decree for the £7 not settled, and also to obtain decree for the expenses of extract.

"It is stated that this is the ninth process in which the pursuer has involved the defenders about this sum of £7, manifestly still a just debt; and it is insisted in after the defenders had liberated him from jail, and so far abandoned their diligence and when even the bill for £32 stands dishonoured, without any chance of payment. The summons contains a conclusion for damages, which seems to be the object of the action."

dinary had made an oversight in supposing that the note in process, stating £7 of rent not to be included in the bill for £32, was holograph of the pursuer. But they stated they were ready to prove the fact, that this rent was not included in the bill.

No. 14.
Nov. 16, 1833.
Maiklem v.
Walker.

LORD PRESIDENT.—The sum of ten shillings was given, and taken, as a condition of the amendment being allowed. It is too late, after that, for the pursuer to attempt to object to it.

LORD BALGRAY.—I am quite satisfied that the objection taken to the title cannot be sustained. But the question whether the sum of £7 for rent was included under the bill for £32, should be enquired into.

The other Judges assented.

THE COURT accordingly repelled the pursuer's plea, founded on the want of title in the inferior court, and remitted to the Lord Ordinary to allow a proof as to the £7.

D. CHRISTIE, S.S.C.—R. and A. KENNEDY, W.S.—Agents.

JOHN MAIKLEM, Suspender.—*Sol.-Gen. Cockburn.*

ROBERT WALKER, Charger.—*A. Dunlop.*

No. 15.

Bill of Exchange—Forgery—Personal Objection.—An allegation by one of two brothers, ex facie co-acceptors of a bill, that his signature had been forged by his brother, held barred, as he had received a charge for payment, and acquiesced in it for a long time, during which his brother, the true debtor, left the country.

ON May 28th, 1827, Robert Walker gave a charge on a bill to John Maiklem, who was, ex facie, co-acceptor with his brother, Robert Maiklem. Another charge was given in September, 1828, followed by denunciation, and letters of caption against both brothers. They resided together, and part of the effects of Robert Maiklem were pointed and sold under the diligence. During these proceedings, John Maiklem never intimated that he was not liable for the bill, but, Walker having used arrestments against him in 1833, he offered a bill of suspension of the charge, without caution, on a general allegation that his name at the bill was a forgery. The Lord Ordinary having passed the bill, but on caution only, Maiklem reclaimed, and produced genuine signatures for the purpose of comparison with that at the bill, alleging the forgery to have been made by his brother, the co-acceptor.

Nov. 16, 1833.
1st Division.
Bill-Chamber.
Ld. Gillies.

LORD GILLIES.—When the bill was before me, it was unsupported, except by the common and vague allegation of forgery, and there were no signatures produced for the purpose of comparison. On this point, it is now a new case, and, on looking at these signatures, my belief is, that the name at the bill is a forgery. But after a charge was given to the suspender, on the footing of his subscription being genuine, and his consequent liability undoubted, is he to be allowed to

No. 15. acquiesce until the proper debtor makes his escape out of the country, and then to come forward and allege he has incurred no responsibility to the holder of the bill?
Nov. 16, 1833. The brothers resided together, and the suspender saw diligence done against the
Laird v. Miln. estate of his brother, and a charge given to himself, followed by letters of caption against both, without making the objection of forgery. He acted thus, I have no doubt, from the laudable motive of desiring to screen his brother from the consequences of the crime of forgery, but he did so by adopting the signature for the time, and, having thereby thrown the charger off his guard, the suspender must submit to the liability which he has incurred.

LORD BALGRAY.—Unless the objection of forgery was stated tempestivè, the suspender incurred personal liability to make good the contents of the bill.

LORDS PRESIDENT and CRAIGIE concurred.

THE COURT accordingly refused the reclaiming note.

J. CULLEN, W.S.—J. PATTEN, W.S.—Agents.

No. 16. **MRS G. LAIRD OF ALISON, and D. LAIRD, Complainers.**—*Robertson—Maidment.*

J. MILN and J. OGILVIE, Respondents.—*More.*

Interdict—Process—Appeal.—A bill of suspension and interdict was ordered to be answered, and interim interdict granted till it should be advised, and the Court, on advising the bill, with answers, continued the interdict to a certain extent, and recalled it quoad ultra, and the suspender appealed from this interlocutor—held, on the bill being advised, that the interim interdict fell, without the necessity of a special recal, and that the appeal had not the effect of continuing it in force.

Husband and Wife—Title to Sue.—Question whether a wife, who is a trustee, can sue without concurrence of her husband.

Nov. 16, 1833. THE late Admiral Laird, of Strathmartine, by trust-deed of settlement, conveyed all his estate to the complainer, Mrs Alison, (then the widow of the Admiral's son, deceased, but who had since married a second husband,) the respondent Miln, the Rev. Dr Nicoll, and certain other persons, or the accepting survivors, as trustees, the majority of such accepting survivors, residing in Scotland, to be a quorum, for the purpose of paying off debts, &c., and conveying the estate of Strathmartine to his grandson, the complainer David Laird, when he should have attained the age of twenty-five. The accepting trustees resident in Scotland, were Mrs Alison, Miln, and Dr Nicoll; and when this period was within about a year of arriving, Mrs Alison, alongst with David Laird, presented a bill of suspension and interdict, setting forth that Dr Nicoll had become incapable of acting, and that Miln was mismanaging the estate, and, in particular, improperly cutting down the wood thereon, and containing a prayer in these terms:—"Herefore we beseech your Lordships, for letters of suspension and interdict, prohibiting and discharging the said James Miln, from proceeding to cut down the remaining trees upon the estate of Strathmartine, and others, or carrying off, or dis-

2D DIVISION.
Bill-Chamber.
Ld. Medwyn.

posing of the same, and against his other acts of management, relative to the said trust-estate." The Lord Ordinary (Cringletie) pronounced this interlocutor—"Appoints this bill to be intimated, and to be answered within fourteen days," (reserving certain objections to the competency,) "meantime grants the interdict prayed for till the bill be advised with or without answers." Thereafter the bill and answers were reported to the Court, who pronounced this interlocutor—"The Lords having considered this bill, &c., pass the bill, and continue the interdict against cutting all wood whatever, but quoad ultra recal the same." Against this interlocutor, Mrs Alison and Laird entered an appeal, which was duly served. Thereafter they presented a new bill of suspension and interdict against Miln, and against Ogilvie, factor on the trust-estate, praying to have them interdicted from acting at all, the one as trustee, and the other as factor, on the ground that, although the general interdict granted in the Bill-Chamber had been recalled by the interlocutor of the Inner House, that interlocutor had been appealed from, and that the appeal had the effect of maintaining in operation the interdict granted in the Bill-Chamber; and they referred to the case of Innes, June 13, 1829,¹ as having established that an interim-interdict, once granted, stands in force notwithstanding an interlocutor recalling it, while that interlocutor remains under appeal in the House of Lords.

In answer, it was pleaded for Miln and Ogilvie—

1. Mrs Alison's right as a trustee fell by her second marriage, and, at all events, she has no title to institute any proceedings in a court of law without the concurrence of her husband, which has not been given to this bill.

2. The interdict granted in the Bill-Chamber was only *ad interim* till the bill should be advised; and so, unless expressly continued, it fell whenever the bill was advised, without the necessity of being specially recalled. The recal of it in the interlocutor of Court was superfluous, and the appeal from that interlocutor cannot possibly revive it; and,

3. The case of Innes truly proceeded on the equitable interference of the Court in a case where the whole existing state of matters was attempted to be irremediably overturned, pending an appeal to the House of Lords on the merits of the question between the parties, and it did not establish any such rule as that contended for by the complainer.

The Lord Ordinary reported the bill and answers to the Court, adding the subjoined note.*

¹ Ante, VII. 762.

* "This case has been taken to report, because a very important question of form is involved in it, and a decision has been founded on, as supporting to the full, the views of the suspenders. It is argued, that if, on presenting a bill, an interdict is granted in the Bill-Chamber, and that interdict is afterwards recalled, on advising the bill with answers, an appeal against that interlocutor has the effect of reviving

No. 16. LORD JUSTICE-CLERK.—I concurred in the judgment in the case of Innes, but that case affords no authority for what is asked here. We granted the interdict on
 Nov. 16, 1833.
 Baird v. Miln.

or continuing the interdict. The Lord Ordinary would hold, on the contrary, unless the decision referred to, *Innes v. Innes*, June 13, 1829, is to be considered as laying down an opposite doctrine, that as an interdict, when imposed in the Bill-Chamber, takes effect immediately, notwithstanding a reclaiming note is presented against that interlocutor, so when an interdict is recalled, it operates immediately: See the concluding observations on the bench, in the case of the Earl of Hyndford, December 17, 1811. It is only where the Lord Ordinary prohibits the legal evidence of the refusal, when the bill is refused (the certificate) to be issued, or receives a second bill, and grants a sist upon it, that it still remains in force. Although the interdict has been recalled, and the temporary step has thus been removed, the party no doubt may crave a review of this judgment, by a reclaiming note, but the mere presenting of such a note does not again renew the interdict, otherwise the object would often be gained, in spite of the Court, who, *causa cognita*, had removed the interdict, if the mere presenting a reclaiming note tied up the hands of the party, till it was disposed of. Now, will the presenting of an appeal do more than a reclaiming note would? Will it continue the interdict originally granted, on presenting the bill, which has been recalled by the interlocutor appealed? It is said, that by a standing order of the House of Lords, when an appeal is served, 'the sentence or decree so appealed against, ought not to be carried into execution by any process whatsoever.' Now, if Mr Miln continues to act as trustee, as he has hitherto done, and against doing which the temporary bar has been removed, is this, in the sense of the order, using any process, for carrying a sentence or decree into execution? But it is said, that this was the opinion of the Court in the case of *Innes*: According to the report of that case, the majority of the Judges seem to have entertained different grounds for the opinion held by them; and it might well be thought, in that case, that such an inversion of the rights of the parties as would be a practical decision of the case, ought not to take place in the face of an appeal, without meaning to lay it down as a general rule, that an appeal operates in all cases as an interdict, where it has been once granted in the Bill-Chamber, but afterwards recalled, or that, in such a case, a new interdict is to be granted, on presenting a new bill, till the appeal is discussed. Perhaps it does not make much difference, that the interim-interdict granted by Lord Cringletie, in the present case, was only to subsist till the bill was advised; but this form of interdict, the usual and proper form in such a stage, is in favour of the respondent's plea. On passing the bill, if the interdict was to be continued to any effect whatever, it was necessary to say so expressly, because the operation of the temporary interdict was only till the bill should be advised, and it seems unnecessary to have said any thing about recalling it *quoad ultra*. It was further stated, that no certificate of refusal, or rather of recall, was taken out before Mr Miln proceeded again to act. It will be considered how far this was necessary, where the bill was not refused, but where it was passed, though interdict was not granted on the broad terms craved by the suspenders.

"Another point is, whether Mrs Alison can appear in this proceeding, as a suspender, without the concurrence of her husband. It is not objected that she cannot act as a trustee, in respect that she has become a married woman since her nomination, and the death of the truster, (a point not decided either by the case of *Stodart*, 1812, or *Stormonth*, 1825,) but that she cannot so act, without the concurrence of her husband, as she may incur personal responsibilities in so acting, for which her husband can alone be answerable. This is a matter well deserving of consideration, and the Lord Ordinary rather inclines to think that he must concur for his interest."

the plain ground, that if we did not, we would be running a race with the House of Lords. On the merits, it is preposterous to ask us to interfere in the squabbles of these people.

No. 16.

Nov. 16, 1833.

Hotson v.

Threshie.

LORD CRINGLETIE.—My interdict was only till the cause came to be advised, and then it fell, and nothing stands but the interdict granted by the Court, and it was not necessary to have recalled it, for it fell as a matter of course.

LORD GLENLEE.—I agree. And, further, this person cannot insist without the concurrence of her husband.

THE COURT accordingly refused the bill.

J. J. FRASER, W.S.—A. STORIE, W.S.—Agents.

JOHN HOTSON, Pursuer.—G. G. Bell—*De Maria*.

No. 17.

ROBERT THRESHIE, (for the Scotsdyke Road Trustees,) Defender.—*Whigham*.

Proof—Reference to Oath—Trust.—Under a reference to oath to road trustees—held incompetent to examine one of them as to matters not known to him as trustee, but with which he had previously been conversant in another capacity.

SEQUEL of the case mentioned ante, XI. 482, which see. The pursuer having referred the cause to the oaths of the Road Trustees, a commission was granted to the Judge Ordinary of the bounds to take their depositions. One of their number, Davidson, who was a trustee by virtue of holding the situation of master of woods and works to the Duke of Buccleuch, and who had, previously to his becoming a trustee, acted as surveyor on the road, being examined, questions were put to him by the pursuer relative to transactions and proceedings which had taken place while he was surveyor, and before he became a trustee, and which had come to his knowledge in his capacity of surveyor. Objections were taken to these questions, and the commissioner, doubting how far they were competent under the reference, took down the deposition as to them on a separate paper, which he sealed up, to be subject to the determination of the Court. On the commission being reported, it was contended for the defenders, that under a reference to the oath of trustees, it was incompetent to examine them as to any matters not having come under their cognizance as trustees, and the knowledge of which had been acquired by them in a different capacity, and, in the present case, before the party became a trustee, because as to such matters their deposition was that of witnesses, not of parties. The Lord Ordinary found, "that Mr Davidson's evidence in regard to all transactions, in which he did not act as trustee, cannot be admitted," and therefore sustained the objections to the opening up of the deposition.

Nov. 16, 1833.

2D DIVISION.

Ld. Medwyn.

The pursuer reclaimed.

- No. 17.** LORD JUSTICE-CLERK.—I understand the import of the interlocutor to be, that it is competent to ask Mr Davidson all questions as to any matter within his knowledge as trustee, but not to make him a witness by asking him as to what he does not know as a party; and I think that perfectly right.
 Nov. 19, 1833. A. B. v. C. D. Halley v. Leitch. The other Judges concurring,

THE COURT adhered.

JAS. ROBERTSON, S.S.C.—W. STEWART, W.S.—Agents.

- No. 18.** A. B., Petitioner.—
 C. D., Respondent.—*H. J. Robertson.*

Process—Poor.—Incompetent for the Court to review the judgment of the counsel for the poor, as to the question of probablis causa.

- Nov. 19, 1833. UNDER a remit to the counsel and agents for the poor, the counsel thought there was no probablis causa, the agents thought there was. The party petitioned the Court to examine the documents on which these opinions were founded, and direct accordingly.
 1st Division.

LORD PRESIDENT.—This is just a reclaiming note against the deliverance by the counsel for the poor. It is irregular, and must be refused.

Petition refused accordingly.

- No. 19.** DAVID HALLEY, Suspender.—*A. McNeill.*
 WILLIAM LEITCH, Charger.—*Pattcn.*

Stamp—Process.—A defender granted a letter, by which, “in order to prevent farther litigation or expense in the process,” he agreed to pay £30 in full of the account libelled on: but having failed to pay, decree for that sum passed—held, in a bill of suspension of the decree, that an objection that the document was unstamped, was irrelevant.

- Nov. 19, 1833. WILLIAM LEITCH, writer, raised an action before the Sheriff of Perthshire, against David Halley, residing in Crieff, for payment of a business account. Halley granted him a letter in the following terms:—“Crieff, 24th February, 1830. Sir,—In order to prevent farther litigation or expense in the process at your instance against me, I agree to pay you £30 sterling in full of the account libelled on. I am,” &c. Leitch agreed to this by counter-missive, and promised a deduction of £5, “in the event of your settling the obligation which you have this day granted me for £30 sterling, betwixt and Whitsunday first.” Halley failed to make payment, and Leitch obtained decree for £30 and interest. A charge being given to Halley, he offered a bill of suspension, without caution, and
 1st Division. Ld. Balgray. Bill-Chamber.

pleaded that the letter was of the nature of a promissory-note, or, at all events, of a bond : in either case it required a stamp, and, being unstamped, the charge founded on the Sheriff's decree for payment of its contents should be suspended. No. 19.
Nov. 19, 1833
Earl of Fife's
Trustees v.
Duke of Gordon's Trustees.

The Lord Ordinary ordered answers, upon caution, and afterwards, "refused the bill, in respect no sufficient caution had been found."

Halley reclaimed.

Their Lordships refused the bill, Lord Gillies observing that the document seemed to refer to a conditional obligation, and did not appear to require a stamp.

J. ADAM, W.S.—D. CHRISTIE, S.S.C.—Agents.

EARL OF FIFE'S TRUSTEES, Objectors.—*Sol.-Gen. Cockburn—A. Wood.* No. 20.
DUKE OF GORDON'S TRUSTEES, Respondents.—*D. F. Hope—Robertson.*

Teinds—Locality—Process.—Competent in a process of locality to discuss a question of relief between heritors, arising from an alleged use of payment out of certain lands, although these lands had passed from one heritor to another, under a contract of excambion.

THE parish of Urquhart formerly belonged to three heritors, the Duke of Gordon, the Earl of Fife, and Mr Innes of Leuchars, all of whom had heritable rights to their teinds. The Duke was patron and titular : and up to 1779, the whole stipend was in use to be paid out of his lands. In that year his Grace excambied his patronage and lands with the lands of the Earl of Fife. Parties were at issue, whether, in point of fact, the Duke's lands were valued in the excambion, as under deduction of the whole stipend. The use of paying the stipend out of the same lands as before, continued after the lands thus passed into the hands of Lord Fife. In 1792, a decree of augmentation was obtained, which was not followed by any final scheme of locality. The use of paying the augmented stipend, as well as the old stipend, out of the same lands, continued, notwithstanding some inchoate proceedings by Lord Fife, with a view to allocate the stipend differently. A new decree of augmentation was obtained, to take effect from 1807, but no final locality followed, and the whole stipend continued to be paid by the late Lord Fife and his trustees. In 1829, a new process of augmentation was raised, and decree obtained : an interim scheme was afterwards approved, in which the whole of the old stipend was localled upon the same lands as before, and the augmentations since 1792 were localled rateably upon all the teinds in the parish. Nov. 19, 1833
1st Division.
Ld. Fullerton
Teinds.

Lord Fife's trustees lodged objections, maintaining that, notwithstanding any use of payment of the old stipend, it had always been made under circumstances implying the right of ultimately allocating the whole stipend proportionally among all the heritors ; that this was the natural

No. 20. result of all the heritors having an heritable right to their teinds; the Duke's trustees were to plead that the contract of excambion i
 Nov. 19, 1833. laid any implied obligation on the Earl of Fife relative to the old s
 Earl of Fife's it was not competent to determine such question in a process of lo
 Trustees v. Duke of Gor-
 don's Trustees. The Duke's trustees answered, that they founded simply on t
 of a use of payment of stipend out of the lands excambed; that th
 tion, in point of competency, stood upon the same footing as if th
 been no excambion, and they, though still proprietors, had attem
 lay the old stipend on all the teinds of the parish, and been met
 objection of use of payment; that, in these circumstances, the ex
 of a contract of excambion could not affect the competency of ir
 in the locality on the necessity of localling according to the use c
 ment, any more than a sale of the lands to a third party in 1779
 have done.

The Lord Ordinary "sustained the objections by the Earl of trustees, and approved, as final localities, of the schemes appro Lord Moncreiff, on the 12th day of February, 1831, as interim payment,—and decerned, reserving to the trustees of the Duke of C their right to insist, if they shall be so advised, in any action, for tuting against the trustees, or other representatives of the Earl o the obligation of relief, in regard to the stipend alleged to arise un contract of excambion 1779, and to the trustees and representatives Earl of Fife, their defences against the same, as accords." *

THE COURT altered the interlocutor, and "remitted to the Ordinary to hear parties, and to do farther as he shall see reserving all questions of expenses."

J. MORISON, W.S.—H. INGLIS and DONALD, W.S.—Agents.

* "NOTE.—Had there been any express obligation on the part of the Earl to relieve the Duke of Gordon of the stipend, payable at the date of the ex in 1779, the Lord Ordinary would have been bound, agreeably to the dec Ker v. Duke of Roxburgh, 18th January, 1831, to give effect to it in the locality. But there is no such obligation;—according to the titles produc party has a right to the teinds of his lands; and the plea of the respondent in consideration of the circumstances attending the excambion in 1779, particular, of the use of payment of stipend, the obligation upon the part Fife, to relieve the Duke of Gordon of the stipend payable at the time, must to have formed an implied condition of the contract of excambion.—Now, it to the Lord Ordinary, that whatever may be the merits of that plea, it is ir tent, and would, at all events, be most inconvenient to enter into such an en a process of locality."

ALEXANDER SINCLAIR, Suspender.—*Shene—Russell.*
 PETER SINCLAIR, Respondent.—*D. F. Hope—G. G. Bell.*

No. 21.

Nov. 19, 1833.
 Sinclair v.
 Sinclair.
 Cumming v.
 Munro.

Process—Interim-Decree.—Before an interim-decree for a balance in a mutual accounting can be allowed to go out, it requires to be made certain to the Court, that, whatever may be the issue of the cause in other respects, such balance must remain due.

In this case, where the parties had counter-claims, the Sheriff of Lanarkshire decerned against Alexander Sinclair, defender, for a balance of £52, 4s. 11d., and allowed interim-decree to go out. Sinclair brought a suspension, and as the Court considered it uncertain that the balance must be ultimately due, they held it premature to pronounce interim-decree. Their Lordships, therefore, remitted to the Sheriff, "with instructions to recal his interlocutor, so far as it allows the decerniture to go out, and be extracted as an interim-decree, and to proceed in the usual form in the disposal of the remaining points of the cause; reserving the question of the expenses of this suspension, and remitting the same to the Sheriff."

LORD GILLIES.—Before an interim-decree for a balance in a process of mutual accounting can be allowed to go out, it requires to be made *lucе clarius* to the Court, that, whatever may be the issue of the cause in other respects, the sum so decerned for must be due. This case is not in that situation.
 The other Judges assented.

C. FISHER, S.S.C.—SCOTT, RYMER, and SCOTT, W.S.—Agents.

JOHN CUMMING, Suspender.—*Ld.-Adv. Jeffrey—A. McNeill.*
 KENNETH MUNRO, Charger.—*D. F. Hope—A. Wood.*

No. 22.

Process—Citation—Homologation.—1. A summons in an Inferior Court, signed by the substitute of a Sheriff-clerk depute, who had no power to name a substitute, held null, and incapable of being homologated. 2. Opinion intimated, that when a summons is not called within year and day, the instance falls, and cannot be revived even by the defender entering defences, and making up a record. 3. An execution of citation bearing that a party was cited to a day prior to the execution, inept; and it is *pare judicis* to give effect to an objection to it, though stated at a late stage in the cause.

THE commission granted to Mr Suter, Sheriff-clerk of Ross-shire, Nov. 19, 1833, contains a power "to appoint deputies in the said office." He granted commission to William Ross as his deputy, with power to subscribe all summonses, &c., and Ross granted commission to J. A. Crawford "to act as my substitute, with power to subscribe, in my absence, all sum-

1st Division.
 Ld. Corehouse.
 B.

No. 22. monses," &c. Suter gave his sanction to the substitution in these terms:
 Nov. 19, 1833. "I agree to the above commission." It did not appear at what date this
 Cumming v. was adhibited.
 Munro.

On 25th September, 1828, Munro raised a summons before the Sheriff of Ross-shire, against Cumming, which was signed by Crawford, as clerk of Court. The Will referred to a citation, "to appear on the day of _____," without adding the words "next to come," commonly inserted prior to the A. S. 1831. An execution of citation was returned, bearing, that on the 25th September, 1829, the messenger had cited Cumming to appear on the 16th September, 1829, which was not a court-day. It was said by Munro that the 16th of October was the day meant by the messenger, and actually specified in the service copy left with Cumming. The summons was called in Court on the 16th October, 1829, when it was taken out to see by Cumming, who afterwards lodged peremptory defences, and no dilatory defences. A record was made up, and a proof was led, after which Cumming was allowed to lodge a note of objections, to obviate part of which, Munro put a new execution into process.

Pleaded by Cumming—

1. The commission granted to the Sheriff-clerk depute, gave no power to him to name a substitute; and no power was contained, even in the commission, to the principal clerk, to name substitutes to his deputies. Crawford was not, therefore, the clerk of Court to any effect, and his signature had no more force than that of any stranger. This was a fundamental nullity in the summons.

2. The citation was to appear on 16th September; this citation was not given until the 25th September; the execution returned by the officer bore this, and no after proceeding could cure so gross a defect.¹ It was now too late to produce a new execution.²

3. Even if the 16th of October had been meant by the messenger, that was a diet of compearance beyond year and day of the date of the summons, so that, before it could arrive, the summons had fallen.³

Pleaded by Munro—

1. The commission, sanctioned by Suter, gave due authority to Crawford to act as clerk of the Court in subscribing summonses; and it could be proved that Crawford's acting in that character had been recognised by all parties in the Sheriff-court, and particularly by Cumming, who was a practitioner before it. At any rate, the objection of Cumming was omitted at the proper season, and he was barred from pleading it.

2. A defender might, of consent, dispense with citation, and his consent might be given in writing, or be evinced by his acts and deeds; therefore

¹ Hamilton and Clunis, 7th Dec. 1830 (ante, IX. 143).

² Stewart, Jan. 13, 1831 (ante, IX. 261).

³ 4 Ersk. 1. 8; Parker on Arbit. 69; 1 Ivory's Proc. 169; 3 Jurid. Styles, 7.

the defect in citing to a date anterior to the execution of citation, was not incurable, but might be waived by the party cited, either expressly or impliedly: and it had been waived in this case by the procedure subsequent to citation.

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Nov. 19, 1833.
Cumming v.
Munro.

3. But the true date of the citation given, was to appear on 18th October, not on 18th September. This would appear by the service copy, if Cumming would produce it: * and Munro now tendered a new and correct execution, stating the fact to be so. The summons was called on 18th October, and the subsequent procedure barred challenge, especially as the words "next to come" were not inserted in the Will, so that the usual ground for a summons falling after year and day did not apply.

It was farther stated by Munro, that one of his most important witnesses had died, since leading the proof, and that this evidence would be lost if Cumming's objections were sustained.

The Sheriff, in respect that the pleas now proponed were of the nature of dilatory defences, and that the proper time for stating them was past, repelled them, and allowed interim-decree for the expense of discussing them.

A charge being given for the expenses, a bill of suspension was presented, which the Lord Ordinary (Cringletie) appointed to be answered.†

At passing the bill, the Lord Ordinary (Moncreiff) issued the subjoined note.‡

* Cumming stated that he had lost it.

† "The Lord Ordinary considers the interlocutor of the Sheriff as containing a sensible and distinct view of the case, and of the law, in so far as relates to the conduct of the party defending; and had it not been that there was an objection to the summons itself,—tantamount to there being no summons at all,—the Lord Ordinary would have had no hesitation in refusing this bill. For he thinks, that, though a defender may require a citation, and object timeously to an informal one, yet he may dispense with the citation and the induciæ, and sist himself in Court; and, consequently, if he do so, upon an informal citation, he must be held to have waived all objections. But then there must be a summons to which the judge must look, and without which, he cannot entertain any action, as there is no such proceeding as a defender being brought into Court, *ob torto collo*. Now, in this case, the summons was not called in Court, as is said, till after the lapse of a year from its date, whereby it had fallen as if it had never existed; and 2dly, it is said to have been signed by a person who had no authority to constitute it a regular writ issuing from the Court. The Lord Ordinary's doubt, therefore, is, that the Sheriff had not before him any summons on which he could proceed, and no waiver by the defender could alter this radical objection to established form. The respondent will attend to this in his answers."

‡ "There is no doubt that many objections to the form of citation may be waived, and only afford dilatory defences, which must be stated in limine. But here the objections appear to be of a more serious and fundamental nature. The summons fixes no day of comparance but the day of , evidently by its form confined to the months of the same year. By the decision, *McDonald v. McIntosh*, November 26, 1825, it is held that the citation must specify a

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Cunning v.
Munro.

A record was made up, after which the Lord Ordinary "suspended the letters simpliciter, and decerned: Found the suspender entitled to the expenses incurred in this Court, and to that part of the expenses in the inferior Court, which was incurred subsequent to the time when the objections to the summons were stated." *

.. Munro reclaimed.

LORD PRESIDENT.—The summons is signed by a person not duly authorized to do so. This is a defect which makes the whole procedure funditus null and void. Such a radical nullity, appearing on the face of the procedure, the Court may take up at any stage of a cause at which their attention is called to it.

LORD GILLIES.—The parties have pleaded a great deal on the record as to what will, or will not, cure a defective summons; but what is to be said when there is no summons at all? That is precisely the case before us.

fixed diet, and that the want of this is a radical nullity. But the citation in this case, bearing date on the 23d September, fixes a diet on 16th September preceding, which is manifestly absurd, and no better than no diet. To obviate this, the respondent assumes that the diet was meant to be the 16th October, and urges that the error in the month, or the blank in the diet, is obviated by the appearance of the party, and the record made up without objection. This seems to be doubtful, because the summons could not be called, without a day of compareance fixed before any appearance was made. But the more weighty objection is that made by Lord Cringletie, that there is neither a day of compareance fixed, nor any thing which can by possibility stand in the place of this, till after year and day from the date of the summons, whereby it is maintained to have entirely fallen; and the Lord Ordinary not being convinced by the argument in the answers, either that the objection is not good, or that it does not create an irremediable nullity in the proceedings, finds it necessary to pass the bill. It does not necessarily follow, however, that though the proceedings should be set aside generally, that the evidence taken in the complainer's presence will be entirely lost, where a witness has died in the meantime."

* **NOTE.**—The summons is subscribed by a substitute-clerk, appointed by the depute-clerk, who had no power to grant a substitution; and the approval of the substitution by the principal clerk, cannot be considered as equivalent to a deputation from him; an act in itself null from its incompetency, cannot be homologated.

"Various objections to the execution of summonses have been repelled by the Court, on the ground that the defender had waived them by pleading peremptory defences. But the Lord Ordinary thinks it inconsistent with correct procedure, that an execution so grossly defective as the present, should be sustained, in which the defender is cited to appear on a day previous to the date of the execution. It is *pari judicio* to notice an error of this description.

"The third objection seems equally fatal. Before the Act of Sederunt, 1831, the will of a summons, in ordinary style, cited the defender to appear on the day of next to come, which necessarily inferred that the date of appearance should be within a year of the date of the summons. This summons was previous to the Act of Sederunt, but it omits the words 'next to come.' The Lord Ordinary, however, conceives that they must be held as implied; and consequently, that as the day of compareance is not within a year of the date of the summons, it could not be competently called in Court."

ORDS CRAIGIE and BALGRAY concurred.

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THE COURT, "in respect the summons is not signed by a person lawfully authorized so to do, and also, in respect of the defect in the citation, adhered, and of new found expenses due to the suspender."

Nov. 19, 1835
Cowan v.
Brownlee.

L. MACKINTOSH, S.S.C.—J. MACDONNELL, W.S.—Agents.

HYAMS COWAN, Suspenders.—*Cunninghame—W. Bell.*
JAMES BROWNLEE, Charger.—*D. F. Hope—More.*

No. 23.

ex-lease.—Circumstances in which held, that, where a landlord's factor had received receipts for rent, and had also addressed a letter, to A, as tenant of a house, and the landlord had failed to prove by the parole evidence of the factor and his wife, that A was the true tenant.

At the beginning of August, 1829, two persons, Mrs Ewart and James Cowan, entered into possession of a house in Davie Street, belonging to Mr Brownlee. This was done with the sanction of Brownlee's factor, William Milne, who had let the house, at a rent of £15 per annum, to one of them. The proportion of rent falling due at Martinmas, 1829, was paid by Mrs Ewart to Milne, who granted a receipt on 20th November, acknowledging to have "received from Mrs Ewart the sum of £15, 15s. sterling, being the rent of a house possessed by her from the 1st of August 1829, to Martinmas following." The name of Mrs Ewart was written on the door of the house from the first. At Candlemas, 1830, in consequence of an intimation that the house was to be left vacant at the end of the year following, Milne addressed a letter to Mrs Ewart, on 10th January, stating, "I repeat what I did last night to your friend, Mr Brownlee, that you are bound for the rent of said premises for the next year, 1830 till 1831, in terms of the agreement in August last; and Mr Brownlee especially holds you as tenant for the ensuing year." At Whitsunday, 1830, Milne granted a receipt, acknowledging to have "received from Mrs Ewart the sum of £7, 10s. sterling, being the rent of a house possessed by her from Martinmas, 1829 to Whitsunday, 1830." Both Mrs Ewart and James Cowan left the house at Whitsunday. Brownlee raised an action before the Sheriff of Edinburgh against Cowan, as liable to him for the rent of the house from Whitsunday to Martinmas, 1830. He stated that James Cowan was the true tenant of the house from the first; that Cowan made a verbal agreement with Milne, at his entry in August, 1829, for a period of twenty-one months, and therefore extending to Whitsunday, 1831; that, afterwards, Cowan had induced him (Brownlee) to take James Cowan into the house, in January, 1830, on the agreement of paying £15 per annum of additional rent, from Whitsunday, 1830, to Whitsunday, 1831; but that this made a new contract of lease for that year, which was binding on both parties.

Nov. 19, 1835
1st Division.
Ld. Corehouse
B.

No. 23. ing, though verbal, especially in consequence of the rei interventus, by introducing the water-pipe. In support of these averments, he offered to prove the fact of the water having been introduced; and he tendered Milne and his wife to prove the whole communings as to the bargain for taking the house.

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Cowan v.
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Cowan denied that he had ever become tenant, though he said he was willing to have become cautioner for Mrs Ewart, but was never required to do so. He pleaded that it was incompetent to adduce proof of a verbal agreement of lease for twenty-one months, as any party might resile from a verbal lease for more than a year; and he objected to Milne or his wife being adduced to prove that there were two verbal agreements as to taking the house.

The Sheriff allowed a proof, in which the only witnesses adduced were the plumber, who laid the water-pipe, and Milne and his wife.

The Sheriff decerned in terms of the libel, and a charge having been given, Cowan presented a bill of suspension, which was passed. The Lord Ordinary found "that it is not proved by competent evidence, that Milne, the charger's agent, let the house in question to the suspender, or that the suspender became bound as cautioner for the rent: on the contrary, it appears from the written documents produced, that the house was let to Mrs Ewart, who is not a party to the process; that it is proved by the evidence of Milne and his wife, that the house was let in August, 1829, for a period of one year and nine months; and that there was no subsequent or new agreement for a second lease, for a year after Whitsunday, 1830; and, lastly, that the original agreement, not being in writing, would not have been obligatory upon the suspender, although he had been a party to it; therefore, suspended the letters simpliciter, and decerned; and found the charger liable in the expenses incurred in this and in the inferior court."*

Brownlee reclaimed; but the Court unanimously adhered.

T. MOFFAT, S.S.C.—A. SMITH, W.S.—Agents.

* "NOTE.—The written evidence, consisting of the receipts granted to Mrs Ewart for the rent, and the letter addressed to her by Milne on the 10th of February, 1830, go far to prove, that the house was let to Mrs Ewart, and this is confirmed by Milne's evidence, who admits that the suspender, although he may have acted for Mrs Ewart, distinctly represented himself to be, not the tenant, but a lodger in the house.—Milne's apology for addressing the letter of the 10th February, 1830, to Mrs Ewart, and not to the suspender, is by no means satisfactory.—He says he did so, because her name was upon the door of the house, and there was a danger, if he addressed it otherwise, that the letter carrier would not deliver it. But, surely, if he considered the suspender to be the tenant, he would have addressed the letter to him at Mrs Ewart's. Farther, the parole evidence is not explicit or satisfactory. Milne and his wife are not unexceptionable witnesses in point of credibility; because Milne, who was employed as an agent to let the house, acted very carelessly, in

JAMES INGLIS, Pursuer.—*D. F. Hope—Fargyth,*
WILLIAM LANE and Co., Defenders.—*Shene—Marshall.*

No. 24.

Nov. 19, 1833.
Inglis v. Lane.

Right in Security—Sale.—The registered owner of a vessel entered into a sale, not in terms of the registry acts, whereby he agreed to put the vessel in possession on his retiring a bill granted for the balance of the price; she took possession of the vessel, and employed her as his own property, and yet failed to retire his bill—Held bound to relieve the registered owner as for repairs and furnishings made to her while in his possession.

September, 1826, a vessel called the Dolphin, was exposed to sale, under authority of the Judge-Admiral, and was purchased by the decree of sale going out in name of James Inglis, principal of James Inglis and Co., bankers in Edinburgh, who thereupon registered as the owner of the vessel. Immediately thereafter, Lane and Co. entered into a minute of sale (not, however, in the terms required by the registry acts) with William Lane and Co., merchants, whereby, at the price of £301, whereof they acknowledged paying £101, and to have received from Lane and Co. a bill for the sum of £200, they agreed to denude of the vessel in favour of Lane and Co. on terms thus set forth in the minute:—"That is to say, on retiring the said bill, amounting to £200, which falls due on the 1st January, 1827, we engage to put you in possession of said vessel at our expense, and, in the meantime, as you propose sending out the vessel to Fayal, you engage to have her insured at the value of £400, by paying the insurance."

Lane and Co. thereupon entered into possession of the vessel, appointed a broker, effected an insurance of her in their own names, and despatched her on a voyage to Fayal, and from thence back to the Clyde. When the bill of £200 became due, Lane and Co. failed to retire it, but Inglis and Co. refused to take a renewal. The renewed bill fell due on the 18th March, 1827, and Lane and Co. still failed to retire it. After a few days' delay, during which Lane and Co. stated that they were endeavouring to raise money

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2d Division.
Admiralty.
Ed. Medwyn.
F.

in reducing the agreement to writing, nor having any person present when it was made, but himself and his wife, and for that neglect he may be responsible to the employer, and consequently have an interest in the cause. The charger's defence may be correct; but where business has been conducted in so slovenly a manner, it is not surprising that he should be a sufferer from want of evidence. The agreement, that if the charger brought water into the house, one additional rent should be paid, does not seem to be material. It was not proved that the charger expressly admits, but merely a subsidiary agreement. The fact that he would have become cautioner for the rent, if it had been required, is no proof that it was required."

No. 24. on a transfer of the vessel, which had returned to this country, Inglis, on the 6th of April, assumed possession of her, and took measures for bringing her to sale. Before exposing her, however, Inglis, on the 30th April, executed a regular vendition in favour of Lane and Co., and offered it to them on condition of their paying their bill for £200. This was declined, and the vessel was thereafter sold for £200, under authority of the Judge-Admiral. During her voyage to Fayal and back, the Dolphin had been considerably damaged, and Lane and Co. drew from the insurance office averages to the amount of £430. Repairs in consequence of this damage, and various furnishings, had been made by order of Lane and Co. during the time she remained in their possession, and demands for the payment of these having been made against Inglis, as the registered owner, he raised an action against Lane and Co., concluding, 1. for payment of the £200 bill as the balance of the price of the vessel; and, 2. for relief of the claims made against him, and damages for the use had by Lane and Co. of the vessel. Objections were taken to the relevancy of the summons, which the Court sustained, so far as regarded the conclusion for payment of the £200 bill, while they remitted to the Lord Ordinary to hear, as to the other conclusions; see ante, X. 368. Thereafter the Lord Ordinary pronounced as follows:—"Finds that there is no proper conclusion in the summons for a count and reckoning, but sustains the conclusion to the effect of admitting a decerniture to free and relieve the pursuer of all claims which have been, or may be, made against them or the said James Inglis, as registered owner of the schooner Dolphin, by any persons employed by the said defenders or their master, whom they placed in charge of the said vessel, to make furnishings or repairs to the said vessel, or who have made advances of money to their said master on account of the said ship: appoints the pursuers to put in a state of the sums of which they claim to be relieved, with the vouchers of said state, within ten days hereof."

This interlocutor was acquiesced in by Lane and Co., and a state of claims, of which relief was sought by Inglis, was given in by him accordingly. To this state objections were lodged for Lane and Co., in which, besides special objections to the particular claims unnecessary to be noticed, they contended generally—that the transaction was truly a conditional sale, not to take effect at all unless they retired their bill for £200; and that, in the meantime, they were to have the vessel as under a contract of affreightment, the terms of which would fall to be regulated by the ordinary practice in regard to such contracts—that, on this footing, all that Inglis could demand was freight for the use of the vessel, which they, as charterers, were willing to allow to the extent of £250, but which deducted from their outlay on the vessel, still left a balance due them by Inglis; but that he, as owner, was liable for all the repairs, furnishings, &c., which were expended for his behoof, he having had the benefit of them in the sale of the vessel.

it was answered, that there was no contract of affreightment between the parties, but that although Inglis, for his own security, the £200 should be paid, remained registered owner, and as such to third parties making furnishings to the vessel, Lane had assumed possession under the agreement of sale, which they refused to fulfil; and having taken the use of the vessel, and the repairs and furnishings, they were liable to indemnify Inglis for losses made against him, or loss suffered by him in consequence of proceedings.

No. 24.

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The Ordinary pronounced this interlocutor:—"Finds the state of the defenders, that they were charterers of the Dolphin, and the claims now in discussion must be settled between the parties as charterers, is not the correct view of the respective characters of the parties in relation to the said vessel, but that the defenders having become purchasers of the Dolphin at the price of £301, were bound in a vendition on the payment of the balance of the price, being in the meantime the defenders, who were to take possession of the vessel and proposed to send her on a voyage to Fayal, were to insure the vessel: finds no stipulation whatever that she was freighted for by the defenders for the sum of £250, and no proof offered in support of the claim: finds that the transaction as to the sale of the vessel was completed, as the defenders failed to retire their bill for the balance, and on the return of the Dolphin from Fayal the pursuers resumed possession of the said vessel: finds, under these circumstances, that the defenders must be liable for the expenses necessary for fitting out the vessel for the above voyage, or incurred in the course of it, retaining the sums were recovered from the underwriters as average loss on outward or homeward voyages; and therefore that they must free and relieve the pursuers of all claims which have been, or may be made against them or James Inglis, as the registered owner, by any persons by the defenders, or their master, to make furnishings or repairs to the vessel, or who have made advances of money to the master on the said ship prior to the 1st of April, 1827, when the pursuers took possession: finds, accordingly, that the defenders must relieve the pursuers of the debts paid to Goodwin, Curling, and Co. for repairs on outward voyage, as in No. 1 of State; that they must also relieve them of the sums in No. 2 and 3, they being entitled to be relieved under the contracts of insurance for the average loss, and also liable for the harbour dues: finds, as it appears by Captain Aitken's report of 3d April, 1827, that the claim under No. 4 was then due against the defenders: finds the defenders must also relieve the pursuers of the sum paid as a premium for his claim and expenses; therefore decerns for payment of the sums, with interest from the respective dates of payment and further, finds the defenders bound to relieve the pursuers of such sums as were incurred on the order of the defenders, or their master at

No. 24. Leith, in October, 1826, as they shall be called upon to pay, as well the sums claimed at Glasgow, with the exception of the account to David Gillies, of which relief is claimed only to the extent of £30, 18s. 6d. and finds the defenders liable in expenses since the remit from the Inner House."

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Robertson v.
Henderson.

Lane and Co. reclaimed.

LORD CRINGLETIE.—The only purpose of Inglis and Company being registered owners was for their security, and the vessel was immediately taken possession of as their own by Lane and Company, who insured and employed her. They made repairs, and made no bargain of charterparty or affreightment of any kind. They treat her as their own, and the only ground against the pursuers is, that being registered owners, they are liable to third parties. But it is obvious, the equity is that they are to be relieved by Lane and Company. The principle of the interdict is, that they are to be relieved, and it is founded on justice.

LORD JUSTICE-CLERK.—Inglis and Company are entitled to be relieved, though there may be a question whether particular items are due. All that the interdictor says, is, that they are to be relieved, and I cannot doubt that it is right. It would be monstrous injustice to put it on the footing of common affreightment.

LORD GLENLEK.—I am entirely of the same opinion. Finding Lane and Company liable to relieve Inglis, does not interfere with any count and reckoning on that principle.

LORD MEADOWBANK.—I am of the same opinion.

THE COURT accordingly adhered, reserving to the parties to bring a competent action of count and reckoning.

JOHN RYMER, W.S.—JOHN HARVEY, S.S.C.—Agents.

No. 25.

JANE ROBERTSON, Pursuer.—*Patton.*

JOHN HENDERSON, Defender.—*Shaw.*

Process—Bankruptcy—Expenses.—1. A summons setting forth a marriage, concluding for declarator of marriage, which failing, damages for seduction, but stating no facts other than those connected with the marriage, held relevant as to damages, after the conclusion of marriage had been abandoned. 2. A sequestrator bankrupt (whose trustee, after sisting himself in an action of damages for seduction pending against the bankrupt at the date of the sequestration, had afterwards withdrawn appearance) allowed to maintain his defence without finding caution for expenses.

Nov. 19, 1833.

2d DIVISION.
Consistorial.
Ld. Medwyn.

THE pursuer, Robertson, raised an action of declarator of marriage and damages before the commissaries against the defender, Henderson, listing as follows:—"That in the course of the year 1828, the said Jane Henderson having become acquainted with the said Jane Robertson Henderson, complainer, he, after professing the greatest love and affection for her, made his addresses to and courted her for his wife: That in consequence of the said John Henderson, defender, his repeated addresses and solicitation, the said Jane Robertson or Henderson, c

plainer, agreed to accept of him as her husband; and accordingly, upon one of the days of March, 1829, or of the month of April following, or February preceding, the said Jane Robertson or Henderson, and the said John Henderson, defender, did accept of each other as husband and wife: No. 25.
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That owing to certain circumstances, it was found necessary to keep the marriage private: That of this marriage the other complainer James Henderson was procreate, and was born upon the 28th day of December, 1829: That previous to the birth of the said James Henderson, and from that time till the day of February, 1830, the defender, as far as was consistent with the plan of secrecy laid down, owned and acknowledged, treated and entertained, behaved to, and cohabited with the said Jane Robertson or Henderson, complainer, as his wife, and visited with and introduced her to many different persons as such, in whose presence and hearing, he addressed her by the name of 'Mrs Henderson,' and conducted himself towards her in every respect as her husband, and to whom also he apologised, and gave sundry reasons for not publicly declaring his marriage: Notwithstanding of which the said John Henderson now refuses to entertain and cohabit with the said Jane Robertson or Henderson, complainer, as his wife. Therefore, the said Jane Robertson or Henderson, complainer, ought to have our sentence and decreet, finding and declaring that she, the said Jane Robertson or Henderson, complainer, and the said John Henderson, are married persons, husband and wife, and that the other complainer, James Henderson, is their lawful son; and decerning the said John Henderson, defender, to adhere to and cohabit with, and entertain the said Jane Robertson or Henderson, complainer, as his wife, and in case of his non-adherence, decerning him to pay to the said Jane Robertson or Henderson, complainer, the sum of £150, less or more, annually, for the support and maintenance of herself, and the maintenance and education of the other complainer, James Henderson, her son, and that in the terms of Candlemas, Whitsunday, Lammas, and Martinmas, by equal portions, beginning the first quarter's payment as at the term of Lammas, 1830, for the quarter immediately preceding, and the next quarter's payment at Martinmas next, for the quarter now current, and so on quarterly and per advance in all time coming thereafter, and so long as the defender refuses to cohabit with the said Jane Robertson or Henderson, complainer, as his wife, together with the legal interest of each quarter's aliment, from the respective terms of payment, and till paid: And further, decerning the said John Henderson, defender, to make payment to the said Jane Robertson or Henderson, complainer, of the sum of £50, less or more, for her maintenance, from the time he deserted her till the term of Whitsunday last, together with the legal interest thereof from the foresaid term of Whitsunday last, and in time coming, till paid: And also, of the further sum of £10, less or more, for maintaining the other complainer, James Henderson, during that time, with interest also from the foresaid term of Whitsunday last, and in time coming, till paid: But in case the said Jane Robertson or Henderson, complainer, should fail in

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establishing the said marriage, then, and in that case, the said John Henderson, defender, ought and should be decerned and ordained to make payment to the said Jane Robertson or Henderson, complainer, of the sum of £1000, in name of damages, on the head of seduction, or such other sum, more or less, as the said Jane Robertson or Henderson, complainer, may be entitled to, and likewise decerning and ordaining him to make payment to the said Jane Robertson or Henderson, complainer, of the further sum of £100, less or more, as the expenses of the process and decree hereon to follow."

After a record as to the conclusions for declarator of marriage had been prepared, but not closed, Robertson gave in this minute, departing therefrom :—" Patton, for the pursuer, Jane Robertson, stated, that she had been advised, and was now willing to depart from the conclusion of the action at her instance against John Henderson, which was directed to establish that the defender and she were married persons, and she now abandoned that conclusion, and restricted the libel accordingly."

Thereafter Henderson having become bankrupt, and his estates having been sequestrated, his trustee sisted himself as a party defender. A record was then made up and closed on the conclusion for damages for seduction, and an interlocutor pronounced, allowing a proof. The trustee, however, now gave in a minute, withdrawing his appearance, and intimation being made to Henderson, he craved to be allowed to maintain the defence, but was met by the demand, that being a sequestrated bankrupt, whose trustee had refused to defend the action, he must find caution for expenses.

The Lord Ordinary appointed him to find such caution, and on his failure, decerned against him, in terms of the libel.

Henderson now reclaimed, and besides maintaining that he was not bound to find caution, he stated certain pleas, founded on alleged irregularity of procedure, as to which the Court remitted to the Lord Ordinary to hear parties further. Before his Lordship, Henderson contended, 1. That the summons, as now limited to the conclusion for damages for seduction, contained no relevant statement to support such conclusion, being rested entirely on a narrative importing a marriage, and exclusive of seduction, which was not libelled therein, and that after the record had been closed, an amendment was incompetent ; and, 2. That this action being of a kind to fix a personal stigma upon him, he could not be precluded from maintaining his defence against it, on account of his bankruptcy ; and also, that the principle of the case of Clerk¹ and of Taylor, decided in the House of Lords,² applied here.

To this it was answered—

1. The conclusion for declarator of marriage being abandoned, the summons contains a sufficient statement, holding the libelling of marriage

¹ May 20, 1818 (F.C.).

March 1, 1823, (1 S. D. B. Sup. p. 55).

withdrawn, to support a conclusion for damages, on the head of seduction; and, 2. The object of the pursuer is not to affect the defender's person, but to be able to rank on his estate, and she will limit herself to that; and if so, the incidental injury his character may sustain, affords no legal ground for escaping the obligation incumbent on sequestrated bankrupts, whose trustees have refused to maintain a defence in actions against them, to find caution for expenses before they can be allowed to carry on litigation; and as to the case of Taylor, the decision proceeded on a state of matters which has no place here, namely, the action having been brought against a party who was bankrupt at the time when the pursuer chose to direct his action against him.

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The Lord Ordinary reported the cause verbally to the Court, having previously issued the following note.*

On the relevancy—

LORD JUSTICE-CLERK.—In order to give fair play to the summons, we should take it as a whole. As the minute only abandons the conclusion for marriage, we are driven to see if the rest of the averments are relevant to infer damages for seduction; and I think the summons, without the condescendence, which cannot be looked at as to this matter, is quite relevant.

The other Judges concurred.

As to the question of caution—

LORD JUSTICE-CLERK.—I have great difficulty in requiring this party to find caution. The case of in 1813 went to this, that the party was entitled to defend from any thing that was to affect his person, and the pursuer here may use diligence and not claim on the estate, and she may also keep it up in case he afterwards acquire other property. The case of Taylor goes a considerable length too. The House of Lords reversed our judgment, and in these circumstances, and this man having an important interest to exculpate himself from this charge, I rather think he is not obliged to find caution.

LORD CRINGLETIE.—After the trustee is called, and appears and gives up the case, the presumption is, that it is indefensible, and if so, then it would be very hard to make the pursuer litigate without caution. It makes a difference, however, that no proof had been taken when the trustee gave it up.

LORD MEADOWBANK.—The trustee's opinion does not affect my mind.

* "The Lord Ordinary having heard the counsel for the parties on the remit from the Court, hereby intimates, in terms of the 19th section of the Judicature Act, that he will take the opinion of the Court on the following points in this case: 1st, Whether in the summons, taken along with the condescendence, facts are sufficiently set forth to support the conclusion for damages on the head of seduction. 2d, Whether, if the summons be held defective, it can be cured by an amendment of the libel, although the record has been closed, the objection not having been pleaded as a preliminary defence, nor till after the record was closed, and a proof, by consent of both parties, allowed. 3d, Whether the defender is bound to find caution for the expenses of process, before being farther heard in his defence; and appoints this interlocutor to be printed and boxed for the information of the Court, in order to his reporting the cause."

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THE COURT instructed the Lord Ordinary to find the summons relevant, and to allow the action to proceed, without requiring the defender to find caution.

J. A. ROBERTSON, S.S.C.—JAS. ARNOTT, W.S.—Agents.

No. 26.

LORD ELIBANK and Others, Pursuers.—*Murray—Jameson—A. Wood.*
PATRICK CAMPBELL and WILLIAM PURVES, Defenders.—*D. F. Hope—*
Keay—J. W. Dickson.

Entail—Prescription—Superior and Vassal—Consolidation—Service.—A crown-vassal was infeft in the barony of Ballencrieff, except the dominium utile of a minor portion called Stantalane, to which he held right under a disposition in favour of himself "and his heirs succeeding to him in the lands and barony of Ballencrieff:" he executed an entail by procuratory of resignation, containing the whole barony, and expressly the lands of Stantalane: the heirs of entail were bound "to take and possess the lands above written upon this taillie only, and upon no other right or title whatsoever: and to use any other rights they may happen to have or acquire thereto, as additional and collateral securities and titles for strengthening and supporting this deed of taillie only, and for no other purpose whatsoever:" the first heir took up the procuratory, by general service, as heir of taillie and provision under the deed of entail, and he expedite a charter of resignation, and was infeft: succeeding heirs expedite services under the same deed, and were infeft: during upwards of forty years they exercised all acts of proprietorship, and in the course of that period the creditors of one of the heirs adjudged his liferent interest under the entail, therein including the dominium utile of Stantalane, and a sale was made for redemption of the land-tax, computing the same property as within the entail: afterwards a party was served heir under the same entail, and sold the dominium utile of Stantalane, conceiving himself not bound by the entail as to it, and a reduction was raised by the next heir—Held, 1. That the personal right of the entailer under the disposition, was not taken up by the service of any heir of entail: 2. that prescription had run upon the entail, not only in questions with third parties, but also inter heredes: 3. that consolidation of the dominium utile, with the superiority of Stantalane, must be held to have taken place by forty years' possession, under a charter and sasine which contained the lands of Stantalane, while the base fee lay unclaimed in the superior's hands, and consequently that the dominium utile was now within the entail: and, 4. that the lands stood sufficiently recorded in the register of entails, by virtue of the procuratory of resignation as recorded in that register by the entailer.

Entail—Sale.—Terms of an irritant clause in a deed of entail held sufficient, in fair construction, to reach sales of the estate.

Entail—Stat. 1695, c. 24.—An heir of entail who had been above three years in possession, disposed an estate to a trustee for creditors, who took infeftment: he also entered into a minute of sale of the estate: in a reduction of these deeds after his death, it was disputed whether part of the estate was free from the entail, and had been possessed merely on apparency—question, on such assumption, whether the next heir would have been barred from reducing quoad hoc, by 1695, c. 24.

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1st Division.
d. Moncreiff.
B.

In 1760, Patrick, Lord Elibank, was infeft in fee-simple, as crown-vassal, in the whole lands composing the barony of Ballencrieff. In that year, he granted a disposition, ex facie absolute, of part of these lands called Stantalane, or Stand-the-lane, &c. to Samuel Mitchelson, W. S.,

who took infestment on the precept, and recorded his infestment on 5th April, 1760. On 10th May following, Mitchelson executed a reconveyance, with procuratory and precept, in favour of Lord Patrick "and his heirs succeeding to him in the lands and barony of Ballencrieff; whom failing, to his other heirs or disponees whatsoever." This was done on the narrative of "certain onerous causes and good considerations." No price was specified; the obligation of warrandice was "from all facts and deeds done, or to be done by me in prejudice hereof allenarly;" and there was an assignation to the rents for the crop 1759, and all crops thereafter.

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It did not appear that Lord Patrick ever took infestment under the precept, or resigned under the procuratory in Mitchelson's reconveyance. On 22d May, 1776, he executed a bond of tailzie and procuratory of resignation, containing "all and whole the lands and barony of Ballencrieff, comprehending all and sundry the lands, barony, tenandry and others underwritten: viz., all and whole that half of the Mains of Ballencrieff, which is called Stand-the-lane, and the houses, &c., and other parts, pendicles, and pertinents belonging to the said lands," &c. The destination was to himself, and the heirs-male of his body; whom failing, to his brothers, seriatim, and the heirs-male of the body of each, respectively. The deed was in the form of a naked procuratory, containing no dispositive clause. It contained a declaration, that the whole heirs of tailzie "shall take and possess the lands above written upon this tailzie only, and upon no other right or title whatsoever, and that they shall enjoy any other rights which they may happen to have, or acquire thereto, as additional and collateral securities and titles for strengthening and supporting this deed of tailzie only, and for no other purpose whatsoever," which was fortified by irritant and resolute sanctions. The lands were declared not affectable by terce, but power was given to provide liferent localities of £200 per annum to widows of heirs, and to make limited provisions for younger children. After a prohibition against altering the order of succession, the heirs were forbidden "to sell, dispone, alienate, burden, dilapidate, or put away the lands and others above written, or any part thereof, either irredeemably or under reversion, or to contract debts, grant bonds, or any other securities, or to do any act, civil or criminal, that shall be the ground of any adjudication, eviction, or forfeiture of the aforesaid lands and estate, or any part thereof, or anyways to affect or burden the same." There was, in an after part of the deed, a resolute clause, in these terms, "if the said heirs of tailzie shall contravene any of the conditions, provisions, or limitations herein contained, either by failing or neglecting to obey and perform the said conditions and provisions, and every one of them, or by acting contrary to the said restrictions and limitations, or any of them, excepting as is above excepted; that in any of these cases, the person so contravening, by failing and contravening to obey the said conditions, or acting contrary to the said

W. S.
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W. S.

No. 26. limitations, or any of them, shall, for himself only, forfeit, omit, and lose all right, title, and interest to the foresaid lands and estate, in the same manner as if the contravener were naturally dead." The deed then provided, that the next heir might pursue a declarator of irritancy; after which this clause immediately followed—"It is hereby expressly provided and declared, that all the debts and deeds of the said heirs of entail, or either of them, contracted, made, or granted, as well before as after their succession to the foresaid lands and estate, in contravention of this present tailzie, and provisions, conditions, restrictions, and limitations herein contained, and all adjudications, or other legal executions or diligences that shall happen to be obtained or used against the fee or property of the said lands and estate, or any part thereof, upon the same, shall not only be void and null, with all that may or shall follow thereon, in so far as they might anyways affect the said lands and estate; but also the heirs of tailzie respectively, upon whose debts and deeds such adjudications have proceeded, shall ipso facto forfeit their right and title to the said lands and estate, and the same shall devolve to the next heir of tailzie, in like manner as if the contraveners were naturally dead, and that freed and disburdened of the said debts and deeds, and adjudications and other diligences deduced thereon."

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Lord Patrick recorded this deed in the register of tailzies in 1777; but he did not make up a title under it. He died without lawful issue, and was succeeded by his brother George, Lord Elibank, who, in 1778, expedite a general service as heir of tailzie and provision under the deed of entail. The retour bore "*quod dict. Georgius est legitimus et propinquior hæres talliæ et provisionis dict. quondam Patricii, virtute et secundum dispositionem talliæ de data 22d May, 1776.*" Lord George obtained a crown charter of resignation, conform to the procuratory of entail under which he was infeft in the barony of Ballencrieff, in 1779. His Lordship died in 1785, leaving daughters, but no son. He was succeeded by Alexander (1), the son of his predeceased younger brother, who expedite a special service as heir of tailzie and provision under the deed of entail, 1776. He was infeft in the barony of Ballencrieff in 1786. He died in 1820, and was succeeded by his son Alexander (2), Lord Elibank, who expedite a special service as heir of tailzie and provision under the deed of entail, 1776, and was infeft in the barony of Ballencrieff in 1821. Prior to his Lordship's accession, more than forty years had elapsed since the infeftment of Lord George, during all which time the heirs of entail were in possession of the whole lands, including the dominium utile of Stantalane, and were exercising acts of proprietorship, such as letting tacks, &c. Mitchelson was dead long before this.

During the possession of Alexander (1), he contracted considerable debts, and his creditors led an adjudication of his life interest in the barony of Ballencrieff, including therein the property of Stantalane. A portion of the entailed estate was also sold to redeem the land-tax, and

the relative calculations were made on the basis of the lands of Stantalane, No. 26, both in property and superiority, being part of the entailed estate. It was also stated generally, that, in making provisions of liferent locality for their wives, the heirs of entail had acted as if the property of Stantalane was part of the entail. But no precise details were given as to this. Nov. 21, 1833
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Alexander (2) Lord Elibank, being involved in debt, repeatedly granted private trust-conveyances of his liferent interest in Ballencrieff, for behoof of his creditors. Afterwards, conceiving that the deed of entail was defective in so far as regarded sales, he announced an intention of selling the barony of Ballencrieff. His eldest son, Alexander (3), raised a declarator on 12th January, 1828, to have it found and declared that his Lordship had no power to sell, and that if he sold he would incur an irritancy. In May, 1828, his Lordship disposed the lands and barony of Ballencrieff to Patrick Campbell of Lawers, as trustee, with full powers of sale, in order to pay his Lordship's debts. Campbell was infeft in May, 1828. Several of the creditors of his Lordship subscribed a deed of accession to the trust.

On 17th February, 1829, his Lordship entered into a minute of sale of the lands of Ballencrieff to Mr William Purves, merchant. In this deed, after setting forth the lands contained in the barony, and, inter alia, the lands of Stantalane, it was stated, "which whole lands, &c. were disposed and conveyed by the deceased Patrick Lord Elibank, conform to deed of tailzie, dated 22d May, 1776, and recorded in the register of entails, 24th July, 1777, &c., and in which lands, &c. the said Alexander Lord Elibank was infeft under a precept from Chancery, in virtue of the retour of his special service as heir of tailzie and provision to his father, in the said lands and others." His Lordship bound himself to grant a disposition, with procuratory and precept, and to purge the lands of all encumbrances. Purves bound himself to pay a price of £110,000, and, on the same day, he accepted a draft for that amount, by Lord Elibank, in favour of Patrick Campbell: in consequence of which, Lord Elibank bound himself, in absolute warrandice, of the minute of sale and relative conveyance to be granted by him. Mr Campbell, the trustee, subscribed the minute of sale, with a declaration that he approved of it. His Lordship died without executing any disposition or procuratory, and Alexander (3) Lord Elibank, after expeding a general service as heir of entail, raised a reduction and declarator against Messrs Campbell and Purves, to set aside the trust-disposition to Campbell, and Campbell's infeftment; the deed of accession to the trust; the minute of sale to Purves, and the bill accepted by Purves, in so far as prejudicial to his rights as heir of entail; and to have it declared that he had the only good right to the lands as heir of entail.

The discussion, under these actions, which were conjoined, resolved into two branches; first, whether there was a sufficient irritant clause to strike at sales of the barony of Ballencrieff; and, second, whether the

No. 26. peculiar condition of the dominium utile of Stantalane did not leave each successive heir of entail at liberty to dispose of it in fee-simple.

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BRANCH I. Whether the irritant clause struck at sales?

Pleaded by the pursuer—

The irritant clause struck at "all debts and deeds," "contracted, made, or granted." These words were broad enough to reach sales; and, although another member of the clause struck at such debts and deeds as might be the basis of an adjudication, this was not expressed so as, in fair construction, to narrow the words above quoted. Besides, a sale by minute, such as that between the late Lord Elibank and the defenders, was a deed which might be the subject of an adjudication in implement (which was a species of diligence), and thus sales would be reached by the irritant clause, even if the defenders' construction of it were admissible.¹ Indeed, the same form of words with that of the Ballencrieffe entail was given in the Juridical Styles as the model of a strict entail.

Pleaded by the defenders—

The irritant clause in the deed of entail, so far as it struck at "all the debts and deeds of the heirs," was so conceived as to apply only to such debts as might be the ground of the diligence of adjudication. The word "deeds" must be interpreted in this limited sense when the whole context was viewed together, and construed according to the received principles, that no implication was admissible to extend fetters, and that no part of a clause was to be held superfluous, if it was fairly susceptible of a meaning of its own.² There was therefore no irritancy of a sale of the estate, as a sale was not of the class of deeds which were irritated.

BRANCH II. Whether Stantalane fell within the entail?

Pleaded by the defenders, in support of the negative—

1. At the date of the entail, Patrick, Lord Elibank, the entailer, was feudally vested in the superiority of Stantalane. Mitchelson had never been feudally divested of the dominium utile of these lands, and Lord Elibank had only a personal right to the dominium utile under Mitchelson's re-conveyance. If his Lordship wished to entail the dominium utile as well as the superiority, he might have consolidated them, by a resignation ad remanentiam, or he might have bound his heirs of entail to make up titles to the dominium utile, and entail it. But he did neither of these things. He executed a naked procuratory of resignation, which could not include the dominium utile as it stood, and he must be presu-

¹ Sandford on Entails, 67; 1 Bell, 748; 8 Jurid. St. 334; 2 Ersk. 12. 1 & 47; Douglas and Co., Nov. 14, 1838 (ante, II. 487); Syme, Feb. 27, 1799 (15472); Bruce, Jan. 15, 1799 (15539).

² Bruce, Jan. 15, 1799 (15539); Dick, Jan. 14, 1812 (F. C.); Barclay, May 18, 1831, 1 Sh. App. 24.

was known such to be the legal effect of that deed. It was true No. 26.
lands of Stantalane were expressly included in the procuratory, Nov. 21, 1833.
as necessary, even if he only wished to entail the dominium Lord Ellbank
of these lands, in which he was infeft, and had desired, ex pro- v. Campbell.
leave the dominium utile on a fee-simple title. In these cir-
s it must be held that it was not even his Lordship's intention
the dominium utile; and it was certain that it was not aptly in-
the entail.

Mitchelson's reconveyance disposed the property to Lord Patrick,
heirs succeeding to him in the lands and barony of Ballencrieff."
Heir-apparent of the barony of Ballencrieff, was therefore at the
heir-apparent of the fee-simple title to the property of Stanta-
lane apparenancy was a good title of possession;² and all acts of
by the heirs of entail might be imputed to their apparenancy.
For, the general service of Lord George, as first heir of entail,
had been a good warrant, if produced to a notary, to authorize him
Lord George under the open precept in Mitchelson's reconvey-
ance showed Lord Patrick to have died without issue, and Lord
Patrick to be the heir succeeding him in the barony of Ballencrieff. Thus
the service of Lord George, and each successive service as heir of entail
of Ballencrieff, took up the personal right to the fee-simple property of
Stantalane,³ and this was a still better title than mere apparenancy, to which
the service of possession by heirs of entail, so far as regarded the domi-
nium of Stantalane, might be ascribed.

Lord Patrick, therefore, had vested in him a right under the
dominium directum, and a right under Mitchelson's recon-
veyance to the dominium utile of Stantalane. But though it should be
that the entail included the dominium utile of Stantalane, ex figura
and that Lord Patrick intended this, and had imposed a per-
petuation on the heirs of entail to implement his intention, still
the result would be, that there was a double title to the dominium
of Stantalane in the person of each heir.

On two titles, it was for the interest of the heirs to possess upon
the full title, rather than on the limited title. They incurred no irri-
solutely delaying to make up a feudal title to the dominium utile
of Stantalane. Nor did they run any risk from Mitchelson or his heirs;
only not more than they must have done by possessing the domi-
nium of Stantalane, as the pursuer alleged they did, on the inept entail, so long
as the term was running; before that term had run, Mitchelson was
no party, through the heirs of Mitchelson who never possessed,

¹ Hamilton, Jan. 8, 1740 (14935); 3 St. 5. 12; 3 Ersk. 8. 48; Sandford on
205.

² Nov. 24, 1802 (11220).

³ Nov. 27, 1766 (14444).

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could have reached the subject. Mitchelson's heirs were bound by his disposition to Lord Patrick, the entail; and they could not be effectually charged by any creditors to enter, seeing that the disposition contained procuratory and precept.¹

5. In these circumstances there was no room for prescription running, in a question inter heredes, upon the one title as against the other. Where an heir has a double title in him, he may found upon either as fortified by prescription, in any question with a third party, because possession upon either has been adverse to any third party's claim. But in questions inter heredes, there is no length of possession which will fortify one of two titles, to the sacrifice of the other, if both be equally beneficial to the heirs possessing. Still less can prescription run against the uberior titulus, for no man prescribes against himself. To furnish termini habiles for prescription to run, there must be a party having a title to possess, which is adverse to another, in which title, that other has no right or interest; and on which, possession has actually followed, although such possession might have been prevented by the other party against whom prescription is pleaded. In questions inter heredes, these requisites only concur in one limited class of cases, and prescription can run upon one of two titles in no other class of cases;—that is, where an heir is infeft under an unlimited title, and is also heir under a latent personal deed of entail. Prescription runs upon the former and against the latter, even in questions inter heredes. But no length of possession upon one title has the effect of destroying another equally beneficial and concurrent title which continued in the person of the possessing heirs. Therefore prescription had not run against the last Lord Elibank, upon the one title against the other, and it was as competent to him in 1829, to sell the fee-simple of the dominium utile of Stantalane, as it would have been to Lord George to do so, the day after he expedited his service in 1778. Had Lord George bought the dominium utile of Stantalane, and afterwards succeeded as heir of entail, his subsequently possessing for forty years would not have made him lose his fee-simple title. But though it had come to Lord George by succession, and not by purchase,² if there originally was an undoubted title in fee-simple, it ought not to be lost by similar possession.

6. Though the late Lord (Alexander 2) had never been infeft in fee-simple in the dominium utile of Stantalane, yet he had possessed on apparenacy for more than three years. If the pursuer took up the dominium utile out of the hereditas jacens of Lord Patrick, he became liable

¹ Dundas, Feb. 1, 1769 (15035).

² M. of Clydesdale, 1726 (1262), and Rob. App. Ca. 564; M'Dougal, July 10, 1789 (10947); and 1 Elch. v. Prescription, No. 20; Douglas, Feb. 2, 1758 (10955 and 4350); Smith and Bogle, June 30, 1752 (10803); 1 Elch. v. Prov. to Heirs and Child. No. 14; V. Supp. 790; 3 Ersk. 7. 6; Bruce, Dec. 6, 1770 (10805); Durham, Nov. 24, 1802 (11220); Zuille, March 4, 1813 (F.C.); Bald, March 8, 1786 (15006).

15, c. 24, to implement the sale by the late Lord to Purves. And as No. 26.
 well stood infeft in the whole barony, under a disposition from the late
 and the pursuer was insisting in a reduction of that infeftment, he Nov. 21, 1833.
 only do so by completing his title, or at least he must be dealt with Lord Ellbank
 Court in this question, as if he had completed his title. He could v. Campbell.
 permitted to pursue, on the footing that he was lying out unenter-
 d, if entered, he could have no title to reduce a sale and infeftment,
 ie was bound, on the contrary, by the statute, to implement.
 he property of Stantalane not having been effectually included in
 curatory of entail, and that being the only deed recorded in the
 r of Entails, it could not be held that the property had subse-
 passed under the entail, as that would be sanctioning an entail as
 erty which was never recorded.

led by the Pursuer, that Stantalane was within the entail—

was clearly the intention of Lord Patrick, the entailer, to include
 perty of Stantalane in the entail, and, being vested in a personal
 o it, he had full power to entail it,¹ if he duly exercised the

The conveyance to Mitchelson had been apparently for political
 s, and certainly was nothing more than a colourable and tempor-
 nation, savouring of a mere gratuitous trust. Mitchelson recon-
 within two months; no price was specified; and no rents of the
 y had been drawn by him. The reconveyance was to Lord Pa-
 nd his heirs succeeding to him in the barony of Ballencrieff.
 his Lordship afterwards entailed “all and whole the lands and
 of Ballencrieff,” including expressly the lands of Stantalane, it
 certain that it was his intention to include both property and
 rity of these lands. His procuratory contained words sufficiently
 o embrace both; titles were made up under the procuratory. If
 on followed for forty years, the necessary effect was to render this
 prescriptive title to both property and superiority, the consolida-
 which would then be presumed; and this right, if challenged by
 party, would be a good title to exclude.²

he personal right under Mitchelson’s reconveyance was never
 out of the hereditas jacens of Lord Patrick, the entailer. The
 of each heir, was as heir of taillie and provision under the procu-
 of 1776. It could take up nothing which was not included in
 ed. It could not infer an intention to take up the character of
 nder another deed, and especially a different and more general
 er of heir. Even if it appeared with certainty, on comparing the
 under the deed of 1776 with the terms of any other deed, that the

ngstone, March 3, 1766 (15418); V. Supp. 888.
 x, Dec. 6, 1750 (10805); Grieve, Feb. 27, 1827 (ante, V. 469); Muir, July
 (10820); Millers, Feb. 7, 1766 (10942); D. of Buccleuch, Nov. 30, 1826 (ante,

No. 26. heir served was the party entitled to take up a provision contained in such other deed, still it was fixed by repeated decisions that the service did not, and could not, take up that provision.¹

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3. The heirs took up no right but one, the right under the entail. To this, the feudalised title, their possession must therefore be exclusively ascribed.²

4. Even if the heirs had had a proper double title, they were bound to possess on the entail alone. This was expressed in the deed of entail, and the entailer had made it competent for any heir-substitute to declare an irritancy if they possessed any part of the estate specified in the procuratory, by any other title. It was for their interest, therefore, to possess on the entail. Besides, the creditors of Mitchelson might have adjudged, or his heirs might have served to him, and sold to a third party; which hazards would be avoided so soon as prescription had run on the entail title, but would always remain so long as the heir's right was one of mere apparency. Accordingly the possession had actually been under the entail title only. The heirs had exercised generally all acts competent to proprietors infeft. The creditors of Lord Alexander (1), had adjudged the liferent interest of his estates, including the dominium utile of Stantalane; the land-tax had been redeemed for the same property as if entailed; the late Lord Alexander (2), had repeatedly granted private trust-conveyances of his liferent interest; and, in the minute of sale to Purves, which proceeded on the assumption that the irritant clause of the entail was defective, he had expressly set forth that the whole lands contained in it were held by him and his predecessors, from Lord George downwards, as heirs of entail.

5. In a proper case of double title, prescriptive possession upon the one title would not have the effect of losing the other. But the very basis of such cases was, that the heir was entitled to possess at pleasure upon either of the titles in him, and that his possession upon the one title did not imply the abandonment of the other. Had Lord George purchased the dominium utile of Stantalane, there would have been no obligation on him to bring it under the entail, and it would have been against his interest to do so. But, as the case stood, there was an express obligation on the heirs to possess on the entail title, and not to possess on the other; and it was clearly for their interest to do so. The possession, *de facto*, was in conformity to their interest and their obligation; and the entail title, being thus fortified by prescription, of necessity cut down the fee-simple title, just because the effectual imposition of fetters upon the right

¹ Edgar, July 6, 1786 (3089); Cairns, Nov. 12, 1742 (14438); Forbes, Aug. 12, 1753 (14431); Hay, June 30, 1758 (14369); Cathcart, Nov. 16, 1802, and Nov. 24, 1807 (14447); Ogilvy, Nov. 16, 1817 (F.C.); Spalding, Feb. 20, 1784 (14461); 3 St. 4. 35.

² *Welsh Maxwell*, June 21, 1808 (F.C.); Carmichael, Nov. 15, 1810 (F.C.); *Smith, Ford on Ent.* 97; Maule, March 4, 1829 (*ante*, VII. 527).

of an heir, was necessarily incompatible with his being at the same time an unfettered proprietor. Indeed it was admitted, that if any third party attacked the estate after the forty years had run, it could be defended by the heirs pleading that it was within the entail. This demonstrated that the heirs could no longer recur to the fee-simple title; otherwise they would be in the anomalous predicament of being entitled to make it pendent on their mere pleasure, whether their estate should be accessible to their creditors, in consequence of their choosing to ascribe the past possession to the fee-simple title, or should be withdrawn from their creditors, in consequence of their ascribing it to the entail title.

6. The dominium utile of Stantalane being part of the entailed estate, the late Lord could neither sell it, nor affect it with debt. The pursuer represented him merely as heir of entail, and was not liable to fulfil the sale.*

7. The deed of entail, as originally recorded, was broad enough to embrace the whole lands now in question.

The Lord Ordinary ordered Cases, and reported them to the Court.†

* There was a subordinate question which did not require ultimately to be decided—Whether, the sale being of the whole barony as a unum quid, and being made on the faith that the entail was defective as to the whole barony, could be sustained as to a part only (Stantalane), if it turned out that all the rest was entailed, and that the sale of that part would have inferred forfeiture of the rest.

† * NOTE.—The Lord Ordinary has considered the revised cases with attention, but he has not had the benefit of so full a hearing as he could have wished.

* The pursuers insist for reduction of a trust-deed, with the sasine and deed of accession following upon it, and of a minute of sale, and relative writs. The cause depends on two general points.‡ 1. Whether the dominium utile of the lands of Stantalane has been validly comprehended within the entail? 2. Whether the irritant clause is so expressed as to annul the minute of sale challenged? It appears to the Lord Ordinary that the second of these points, as involving the more general question, ought to be first considered.

* 1. The defender, Purves, says, that the minute of sale is effectual, because the only irritant clause does not apply to the prohibition against sales. It will be observed, that this plea applies only to the minute of sale, and not to the trust-deed. For if there were no sale, it could hardly be denied that the trust-deed for creditors is within the irritant clause; and this may be material with reference to one of the pleas of the pursuers.

* This question as to the efficacy of the irritant clause is very ably argued for the defender. But at present the Lord Ordinary is not satisfied of the sufficiency of that argument, at least according to the present state of the decisions on the subject. He thinks that the clauses in the cases of Dick against Drysdale, and Robertson Barclay against Adam, are very materially different in their construction from the clause in this case. He further thinks that the defender has incorrectly assumed that the clause taken as a whole, giving effect to every word, is necessarily or naturally confined to debts and deeds to be made effectual by adjudication. He thinks that the grammatical construction does not require this; but that the whole words

‡ This Note was issued at an early stage of the pleadings; in the subsequent hearing, the pleas already stated, were urged.

No. 26. Their Lordships ordered a hearing, after which they intimated that they concurred in opinion with the Lord Ordinary, that the irritant clause was sufficient to cut down all sales; and generally, that the chief
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relative to adjudications may be fairly confined to such of the debts or deeds mentioned in the first part of the clause as may admit of, or require adjudication. And, as he does not feel any difficulty in this respect, he is at present inclined to think, from the broad terms of the clause, and the connexion in which it stands, that it is sufficient both in intention and in expression. That the words are the very same with those given in the last edition of the Juridical Styles is remarkable and important, though not decisive. How far the Lord Ordinary's present inclination of opinion might be affected by a more full viva voce discussion of the question he will not presume to say.

"The pursuers have pleaded separately, that the minute of sale challenged is collusive, and that there was no real sale made; and the act 1621 is referred to in the pleas in law, though not libelled on. The defender does not appear to have taken a clear view of this objection. He says, indeed, that the sale was a true and bona fide sale, and certainly it would lie with the pursuers to show that it is not. But it is nothing to the purpose to say that the trust-deed was onerous. For if the Court were to be satisfied in point of fact, that there was no true sale to Purves individually, but that, under pretence of that sale, the parties were endeavouring to make the trust for creditors effectual against the estate, it might then become a serious question whether the whole transaction was not struck at by the irritant clause, even holding it to apply only to debts contracted, or deeds relative to such debts: And if there were any reversion, it might amount to an alteration of the succession. The cause is not in a state for the decision of this question. But, in principle, and according to the decision in the case of Grant Duff against Dunbar, it might be of importance if the Court were to be of opinion that the clause is not sufficient to annul a bona fide sale.

"2. The other point, viz. Whether the dominium utile of the lands of Stantalane is effectually entailed, appears to the Lord Ordinary to be much more difficult; and he would require farther hearing before he could feel himself prepared to decide it. He has no doubt that the defenders are entitled to plead it in defence both of the trust-deed and of the minute of sale, whatever difficulty the defender, Purves, might be in, as to the settlement of the price, if the sale were to be reduced as to the other lands.

"It is clear, that at the date of the entail, and at the death of the entailer, the dominium utile of Stantalane stood separated from the superiority by Mitchelson's infeftment, and that the entailer had only a personal right by Mitchelson's reconveyance. He could have conveyed that personal right; and the Lord Ordinary sees no reason to doubt that he could so far have comprehended the base fee in the entail, as to lay a personal obligation on the heirs of entail to make up titles, and entail it in the same manner as the other subjects. The case of Carmichael goes thus far; but this does not solve the present case. The difficulty here is, that the entailer simply disposes the lands of Stantalane, descriptivé, as part of the estate of Ballencrieff, as they stood in his own person, with a procuratory of resignation for completing the new title by entail as a unum quid. There can be no doubt that this procuratory of resignation was inept and nugatory, if it were held to apply to the base fee of Stantalane; but both the disposition and the procuratory had a clear legal meaning and effect in the mention of the lands of Stantalane, independent of that base fee altogether. The great difficulty, therefore, in this part of the case is, that if there had been no question of entail, and no room for any plea of prescription, it could not have been a matter of doubt in point of law, that the base fee

point requiring further consideration, was the question of prescription, No. 26.
and the effect of the act 1695, c. 24. They therefore ordered Cases,

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standing upon personal right would have remained untouched by the disposition in the deed of tailzie, and certainly unaffected by the procuratory of resignation, and the titles which followed on it. If the destination had been different, the tailzie could never have been held to have altered the destination of the base fee; and the superiority and property would have been taken up by different heirs.

"There is a separate difficulty. Supposing that the personal right were held to have been conveyed by the entail, and assuming that the heirs, by taking the whole estates, were bound to make the entail effectual to protect the property as well as the superiority of Santalane, this was only a personal obligation; and if those heirs had a separate title in their persons, the Lord Ordinary must hold that third parties contracting with them cannot be bound by the conditions of the entail. The case of Carmichael does not reach this point.

"The pursuers endeavour to relieve the case of these difficulties by pleading prescription on the feudal title completed under the entail. This is stated under the idea of an ipso facto consolidation of the property and superiority. Though the difference is of no real importance, the Lord Ordinary thinks that the true doctrine in the authorities referred to is, that, as the title of superiority is *ex facie* a title to the lands *tanquam optimum maximum*, prescriptive possession on that title excludes all enquiry as to other alleged rights of property depending on bare feudal titles. The case of Bruce establishes this, but no more.

"But the pursuers have left out of view the important distinction—Where there are two titles, the one limited and the other unlimited, prescription may run on the unlimited title against the limited; but it cannot run on the limited title against the unlimited. Where, again, both titles are unlimited, prescription may run on the one against the other, if any positive act be done to indicate the title of possession. Now, in the case of Bruce, the possession founded on was on the unlimited title against the tailzie; and, in the case of Grieve, both titles were unlimited. But, on the other side, the principles which apply to this case are settled by the old case of McDougal of Mackerston, and the law as laid down in Kilkerran's report of the case of Smith and Bogle, which has ever since been observed. The argument of the pursuers would invert the principle, and make prescription to run on a limited title, while the heirs all the time had an unlimited title in their persons,—a point which never could be maintained. There is, therefore, great difficulty in the plea of prescription.

"There are some minor points in the case. The destination in Mitchelson's reconveyance being to Lord Elibank, and his heirs succeeding to him in the lands and barony of Ballencreiff, the Lord Ordinary has no doubt that that would have carried the lands at Patrick's death to the heirs of the entail 1776, whether under the fetters or not; and, therefore, he is of opinion, that the subsequent general services, as heirs of tailzie and provision, were sufficient to carry the personal right in the base fee into the person of the last Lord Alexander, without in any way affecting the question of fetters. It is also maintained by the pursuers, that no right could be acquired by the purchaser or trustee, unless the lands were attached before the entail was feudalised as to them, but that they were not attached in the lifetime of Lord Alexander, their author. This plea assumes a great deal of very doubtful matter of law and fact; and if the right was only feudalised the other day, what becomes of the plea of prescription, &c.? But the pursuers have overlooked the important case of Smollet's creditors, which, though it related to the registration of the tailzie, is, in principle, very adverse to their conclusion, supposing the premises to be correct. In some views of the case of Sheuchan, however, it might seem to give them some

No. 26. directing parties therein to argue the pleas of prescription, and the effect of the act 1695, c. 24,* as applicable to the present case.

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The cause was then advised.

LORD BALGRAY.†—From the way and manner in which this case has been treated on the part of the defender, and from the multifarious authorities referred to, this has become a case of great perplexity and difficulty. I have, therefore, been under the necessity of resorting to a due and careful consideration of the original titles and documents produced.

It humbly appears to me, that the first great question to be considered is this,—Has the pursuer produced such a title, as, by the known principles of the law of Scotland, entitles him to bruck and enjoy the lands in question? It does occur to me, that he has produced that title, particularly when it is admitted upon all hands, that that title has been fortified by forty years' possession. It is in vain to contend that such title was imperfect, and that, however good it might have been, or may be, as to the dominium directum, yet that it could not extend to the dominium utile. The answer to this is plain and satisfactory. Perhaps it may be an anomaly in the law and practice of Scotland, that the dispositive clause of a conveyance of the superiority is precisely the same with that of the conveyance to the dominium utile. It is a conveyance of the lands themselves out and out; and the legal effect, either of the one or of the other, is to be ascertained by the corporeal possession; and by resorting to that ostensible test, there is neither doubt nor practical difficulty. The title here produced by the pursuer is a direct and specific conveyance to the lands themselves, and the pursuer is specially infeft in these lands. From this it obviously follows, that, as the pursuer and his authors have possessed for forty years, in virtue of an infeftment flowing from the title alluded to, the pursuer is entitled now to maintain his right of property against all mortals, whether it be third parties or heirs.

It is quite unnecessary to say more upon the subject of title, because I consider that point to be completely set at rest by the decision of the Court in the case of *Middleton v. the Earl of Dunmore*, 22d December, 1774, and the case of *Aytoun v. Magistrates of Kirkaldy*, 4th June, 1833;¹ also the case of *Grieve v. Walker*, mentioned in the cases, and that of *Waddel*, 19th June, 1828.² These afford such a series of adjudged cases, that it is quite vain to contend that the pursuer has here produced no preferable title.

The statute 1617, c. 12, one of the most valuable in the law of Scotland for the protection of land rights, requires two things: 1st, that there shall be a title; 2d, that there shall be real, actual, and ostensible possession, exclusively in virtue of that title. When these concur, the law has broadly and well said, that the pos-

aid. The case of *Syme against Ranaldson Dickson* was clearly quite different as to this point.

"It seems to be unnecessary to advert to any of the other points of argument in the revised cases. On the whole, the Lord Ordinary thinks the cause difficult and important."

* This plea was scarcely noticed in the Cases, and not at all in the opinions of the Court, as the lands were held to be within the entail.

† These opinions were revised by the Judges.

¹ Ante, XL 876.

² Ante, VI 999.

essor shall be protected against all mortals. But the defender in this case contends, that the pursuer is not entitled to the benefit of the possession he has enjoyed, and so is not entitled to plead prescription; because—

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1st, That there were two titles in the persons of the heirs of entail, the one limited and the other unlimited, and that the possession must be ascribed to both titles.

2d, Because this, it is alleged by him, is a question inter hæredes; and that, where such questions occur, prescription is not pleadable.

These propositions may be very much doubted; and it is apprehended that the defender is here under a mistake, and that these pleas, were they better founded than they really are, are not applicable to the circumstances of this case.

Here it may be observed, that it is necessary to attend to the situation of matters as they stood in 1776, when Patrick Lord Elibank executed his procuratory of resignation, containing the entail of Ballencrieff.

Patrick was absolute proprietor, in fee-simple, of all the lands in question. In 1760 he created, for what special purpose is not explained, a feu-right in favour of Mr Samuel Mitchelson, his confidential agent; and upon this Mr Mitchelson was infeft, thus producing a proper base fee in the lands so conveyed. In a very few weeks thereafter, Mr Mitchelson reconveyed these lands to his author, with procuratory and precept; but upon this reconveyance Lord Patrick did not think fit to execute any procuratory of resignation, or to execute the precept of seisin, either of which he was entitled to do, in strict form. Hence, in this state of matters, when Lord Patrick executed his entail in 1776, the lands in Mr Mitchelson's conveyance stood in this situation: 1st, the base fee, or infeftment in the lands, stood in the person of Mr Samuel Mitchelson; and, 2d, the personal right, or title to defeat Mr Mitchelson's infeftment, was vested in the person of Patrick Lord Elibank; so that, at making the entail, the real right of the lands of Stantalane was vested in the person of Samuel Mitchelson, and the personal right in Patrick Lord Elibank. Now, from this it is argued, that here there were two titles vested in the heirs of entail upon which possession could be assumed; and, in consequence of the existence of these two titles, the pursuer must be excluded from the benefit of prescription.

I demur as to this plea of the defender. First, I doubt the existence of two titles at all; and, second, I doubt of the transmission of the personal right in the way and manner contended for by the defender.

First, I doubt the existence of two titles at all, because the title referred to in law, so as to enable a competition to take place, is not a personal right, which, no doubt, has certain effects; but the title, in the eye of law, to enable a person to compete, and claim possession, is an infeftment or seisin. The possession must ever be ascribed to the infeftment; and it is an erroneous application of the word to call a personal right a title, in questions of this nature. Now, it so happens in this case, that no infeftment has, to this hour, been taken on Samuel Mitchelson's reconveyance; and that base fee remains in hæreditate jacenti of his heirs at this moment. Therefore, supposing Lord Patrick and his heirs had continued in possession for a thousand years, they never could have prescribed, under such personal title, a right to these lands. From this it necessarily follows, that two titles really do not at all exist.

Again, supposing that the personal right in Lord Patrick was a title, then the defender's argument is quite erroneous, when he proceeds to maintain that that

No. 26. title was vested in and transmitted to the heirs of entail by the general service of George Lord Elibank in 1779, or was afterwards comprehended in the several special services mentioned in the papers. On this point the defender is totally mistaken.

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Services are strictissimi juris, and justly so, because the consequences of such services are most serious to the individual. In the procedure of service, the most material and essential part of it is the claim of the party. It is this which establishes its measure and extent. If the verdict of the jury, or if the decree of the judge, exhibited by the retour, goes one iota beyond the claim, the same so far is null and void, totally inefficient, and of no avail whatever. The service is a solemn *aditio hæreditatis*. It is an *actus legitimus*, precise in its nature and in its form. When a person claims to be served as heir of provision, in virtue of a certain deed, it is very plain, that, by no process of law or reasoning, can it make him an heir of provision in any other deed. There may be as many heirs of provision or tailzie as there are different deeds or subjects. It is very obvious that a man may choose to be an heir of provision in one settlement, who may not choose to become a representative of the same author in another settlement. This is so plain and obvious a principle of the law of Scotland, that it is almost unnecessary to quote authority. But it so happens that there is one so precisely in point, that it becomes proper to bring it under notice, although not adverted to by the parties. The question occurred in a noted case, relative to the estate of Bargattan,¹ decided by the Court, 20th February, 1784. It was there found, that a service as heir of tailzie and provision would not transmit an estate regulated by simple destination. The circumstances of that case were very similar to the present; for there the entailer, having executed an entail of the lands of Bargattan, with the usual clauses, afterwards purchased the teinds affecting the lands, which, by the law of Scotland, is a pure heritable subject; and when he made the purchase, he took the disposition of these teinds "to himself and his successors in the lands." No infestment followed upon this disposition; so, at the entailer's death, he had nothing but a pure personal right to the teinds. The intention of the entailer to join the teinds with the lands was quite manifest. The entailer died without issue; and his next heir, his sister Margaret Lawrie, expedie a service as heir of tailzie and provision. Thereafter, a creditor of the entailer appeared, and claimed the teinds as the property of his debtor; and so it came to be considered by the Court, what was the effect of the service of Margaret Lawrie, as an heir of tailzie and provision, in virtue of a certain deed. The Court found, that a special service as heir of entail would not transmit the personal right, though destined to the same series of heirs.

The strict nature of services and their true effect were fully elucidated and explained in the celebrated case of the Earl of Cassilis, 24th November, 1807.²

From this it may be stated, that the defender is entirely in the wrong when he assumes that the service of George Lord Elibank carried the personal right which Lord Patrick had, under Samuel Mitchelson's reconveyance, of the lands in question. It is not so in point of law; and, of course, the heirs of entail never had a double title in the way and manner pleaded by the defender.

But, when the nature of the deeds is attended to, it appears to me that the personal right has been carried to the heirs of entail in a different way, and which has not been adverted to by either of the parties, and has been entirely overlooked.

¹ *Spalding v. Lawrie* (14461). ² *Cathcart's Trustees v. Earl Cassilis* (R. C.)

ay it down as a general proposition of the law of Scotland, that all procuratories of resignation, or in favorem, and all precepts of assine, go to assignees, unassignees are specially excluded. This is evident from the statute 1693, c. 35, No. 26.
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v. Campbell. it is declared, that all such deeds, "either already granted or to be granted, in all time coming, continue in full force, and shall be sufficient warranda, nly for making of resignations and taking seisins in favours of the parties to they are or shall be granted, but likewise in favours of their heirs, assignees, accessors, having right to the said procuratories and precepts, either by a geservice, or by disposition and assignation, or by adjudication, as well after as the death of the granters, or parties to whom they are granted, or both; ſing always, that the instruments of resignation and seisins taken after the of either party express the titles of those in whose favours the resignation is, and to whom the seisin is granted, and that the same be deduced therein, wise to be void and null."

w, under this act, the question may occur, whether such personal rights are erred by disposition or assignation? This will depend upon the deed executed. This leads me, therefore, to call the attention of the Court to the terms of ocuratory of resignation executed by Patrick Lord Elibank.

procuratory of resignation is a deed of a peculiar nature. It is a sort of dison, and it is very ordinarily resorted to, particularly in making entails and in ng destinations, following upon contracts of marriage. There is hardly an im Scotland, of any consequence, that does not stand upon a deed of that . The deed is peculiar in this way, that the granter creates direct and legal tions against himself, and also against all those who are pointed out by him to in virtue of that deed. No doubt, every disposition may create obligations; a the case of a procuratory of resignation, these obligations are direct, imme- and personal, and, of course, lie in gremio of the right. Now, it is proper the Court should have in view the special terms of the procuratory in this and the deed of entail; for, Lord Patrick binds himself, his heirs, and succes- to resign certain lands specified in the deed, but with this further obligation, he shall resign them, "together with all right, title, and interest which we or can pretend, to the lands, barony, milns, teinds, and others before speci- or to any part or portion thereof."

ow, this clause is intended for the very purpose of transmitting to the heirs in eed, all personal, all subordinate, all collateral, and all imperfect feudal rights, h may be vested in the person of the granter. He thereby obliges himself to and convey all such rights. But the granter here has not been satisfied with obligation against himself; but Patrick Lord Elibank in this deed has further ded and declared, "that our said heirs-male shall use any other rights which may happen to have or acquire thereto, as additional or collateral securities itles for strengthening and supporting this deed of taillie only, and for no other ooe whatsoever."

is apprehended from this, that the personal right, vested in Lord Patrick, was and legally conveyed by him to his heirs of entail; and, of course, when they up the entailed lands, they necessarily became bound to make up legal and l titles to all other rights in their persons, or in that of the granter, and that r all the provisions, conditions, and obligations which he thought fit to impose them.

his is a case which is not without precedent, and has been already solemn-

No. 98. ly decided by the Court; and, in fact, it appears to me to put an end to this cause. The case to which I allude is that of Robert Smith against Alexander Oliphant Murray, decided 9th December, 1814,¹ where it was solemnly found, "that where an entail conditions that the heirs of entail shall not possess the lands contained in it under any other title than the entail, an heir, served heir of provision and of entail, and making up titles to part of the lands contained in the entail, becomes bound to possess, by the same title, any other lands contained in the entail, to which he acquires a personal right by a general service."

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From all this, then, it is quite plain, either that there was no second title in the person of the heirs, as alleged by the defender, or that the personal right, or the second title, must be held as conveyed under all the obligations of the entail; and, of course, the entail must be effectual against the defender, even upon that ground.

In the second place, it has been maintained by the defender, that prescription is not pleadable where the question is *inter hæredes*. But to this proposition, in this case, several objections occur.

First, there does not appear to be any authority for any such distinction. The act 1617, c. 12, the great protector of our land rights, points out no such distinction. It makes no reference to titles being limited or unlimited, neither does it say that there is to be a distinction in questions between third parties, and those where it occurs between heirs. It simply and broadly declares, "that whosoever have brooked, by themselves, their tenants, and others having their rights, their lands, baronies, annualrents, and other heritages, by virtue of their heritable infeftments, for the space of forty years continually and together, following and ensuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein, during the said space of forty years, that such persons, their heirs and successors, shall never be troubled, pursued, nor inquieted in the heritable right and property of their said lands and heritages foresaids, by his Majesty, or others their superiors and authors, their heirs and successors, nor by any other person pretending right to the same."

Secondly, it is doubted how far the allegation of the defender is consistent with the truth; for, upon examining the cases referred to, some of them do appear to have been questions *inter hæredes*. In particular, the case of Bruce v. Bruce, in 1770, and affirmed in the House of Lords, was a question betwixt the heir of line and the heir of entail; and others appear to be in the same situation.

Thirdly, I cannot discover any question here between heirs; the only question is one betwixt a creditor of Alexander the second and the heir of entail. And, moreover, that creditor has not attached the subject in any way or manner known by the law of Scotland; and it is that creditor, having no feudal title, who is insisting to turn the heir of entail out of possession, who has enjoyed the lands for more than forty years, in virtue of a legal infeftment. This appears to be contrary to all our principles of law regarding heritage.

Before concluding, it may be proper to notice a peculiarity which certainly distinguishes this from ordinary cases. It is evident that the conveyance by Patrick Lord Elibank to Mr Samuel Mitchelson, in 1760, was a trust and confidential conveyance. It is likely that it was intended for the purpose of creating freehold qualifications. At the same time, this is by no means explained by the parties; but that

it was a trust-conveyance is perfectly evident from the terms of the reconveyance. The conveyance to Mr Mitchelson is executed in April, 1760. Infestment is immediately taken. In a few weeks thereafter, the very same subjects are reconveyed to Patrick Lord Elibank. In that reconveyance, no price is specified. No term of entry is mentioned. Particular pains are taken to exclude Mr Mitchelson from drawing one farthing of rent, and, of course, he never was in possession for one hour. Again, there is no absolute warrandice; on the contrary, there is a special clause of warrandice from fact and deed alienary. These afford indubitable evidence that there was no onerous transaction between the parties, but a mere fictitious conveyance and reconveyance between Patrick Lord Elibank and his confidential agent. Under these circumstances, it is not surprising, that when Patrick Lord Elibank executed his entail in 1776, he should have thought that he had full and complete power to dispose of the lands of Stantalane in question, just as completely as he had of other lands, of which he was then in the actual possession.

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In cases of this kind, the Court have been accustomed to view the right of the truster in the most favourable way. The question cannot be better illustrated than by the case of *Rose v. Fraser*, 26th January, 1790. There the proprietor of an estate had conveyed property to hold base, so as to create freehold qualifications, and, as in this case, a reconveyance was executed, but not followed by sasine. In these circumstances, the widow of the grantor claimed a terce, and, of course, the question came to be, what was the nature of the right which was held by Mr Rose, the husband of the claimant. Now the Court held, particularly the Lord President Campbell, "that the reconveyance, though not completed by sasine, was sufficient to transfer the substantial right in contradistinction to the nominal title of his trustee." If such be the law, then Patrick Lord Elibank, having unquestionably the substantial right, was entitled to make the entail 1776 of the lands in question.

It is likely that Mr Samuel Mitchelson viewed it in this light, because he was one of the most esteemed feudal conveyancers of his time; and it is not likely he would have allowed his constituents to make an entail upon an imperfect right. It is very possible also that he might have been misled by the opinion of the Court, in a case decided not long before the transaction in question, 11th March, 1756, *Dalzell v. Dalzell*, and *George Henderson*, wherein they found that a trust could be declared after the death of the truster, and that, without the form of a service, proper titles could be made up by the authority of the Court, and so the right of the truster completely supported. It is very likely that such a judgment might have led Mr Mitchelson to suppose that every thing was done by him to reinstate Patrick Lord Elibank in his property, when he granted to him his reconveyance.

I have only further to observe, that the defender has, with great talent and ability, brought forward a great number of cases as favourable to his pleas. From the way and manner in which these are brought forward and treated, the argument deduced from them is extremely imposing; but upon due consideration, it is apprehended that the view taken of those cases is somewhat erroneous. They are brought to bear upon the point of prescription. Now, upon some of them, it is perfectly evident that the matter of prescription, however argued by counsel, in their anxiety for their clients, was plainly not applicable at all, or the fact was, that in place of questions of prescription, the decision turned upon pure questions of succession. In the case of the *Marquis of Tweeddale v. the Earl of Dundonald*, in 1726, so much founded upon, and so fully illustrated, it is humbly thought that

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the Court most properly "repelled the allegiance of prescription pled for the Marquis of Tweeddale," because in that case both titles were equally good titles of possession, as well that against which the prescription was pleaded, viz. the base infeftment of 1753 and 1756, in favour of William Lord Cochrane, as the crown charter and infeftment of 1680, in favour of John Earl of Dundonald, upon which the Marquis of Tweeddale founded his title; and so the actual and corporeal possession afforded an equal support to both rights, and could not be founded on by either party to the prejudice of the others. Besides, William Earl of Dundonald, the common ancestor, had a reserved liferent, under which he, as proprietor, continued in possession down to his death, in 1685, and in consequence of deducting his liferent, the forty years had not run on the investiture of 1680, when the rights of the parties came under discussion. That circumstance alone affords a complete answer to the argument so fully enforced upon the part of the defender in this case.

Whatever difference of opinion may be formed upon the collateral views of this case, there still remains one, in which all must concur, and which is perfectly conclusive in this case, although it has not been adverted to by either of the parties.

Samuel Mitchelson, out of whose person or his heirs the base fee of the lands of Stantalane and others has never yet been taken, died upon 14th June, 1788. The sale of these lands by Alexander (2) Lord Elibank to the defender, was not made till 1829, and the action of reduction was not brought till 1830. Of course, more than forty years have elapsed since Mr Samuel Mitchelson's death, and during all that period, these lands have been openly, publicly, and exclusively possessed by the proper superior, upon a title flowing from the Crown, the proper authority. Under these circumstances, I humbly maintain that the base feudal right, formerly in the person of Mr Samuel Mitchelson, is now sopite, extinguished, and annihilated, and can be revived by no human being. It no longer exists in *rerum natura*. I am therefore of opinion that the action of reduction is well founded.

LORD CRAIGIE.—This case never appeared to me to be attended with much difficulty, although, from the nature and variety of the proceedings, it is necessary, with great care to attend to the state of the title-deeds and documents referred to.

In April, 1760, Patrick Lord Elibank, holding the estate and barony of Ballencrieff, as it would appear, in fee-simple, and by crown charter and infeftment, entered into a transaction as to a part of the lands called Stantalane, the import of which, by lapse of time and other circumstances, cannot with perfect certainty be determined. The writing then executed by him, was in the form of those deeds of trust, which were employed in creating freehold qualifications upon rights of superiority.

The conveyance was to the late Mr Samuel Mitchelson, the ordinary agent of Lord Elibank, and bears to be for "certain onerous causes and good considerations," and to be holden of Lord Elibank: no term of entry is mentioned; there is a power retained of dividing the right of superiority into different parts; and there is no assignation to the rents. Infeftment followed, 3d and 5th April, 1760.

It does not appear, however, that any freehold qualifications were granted at this time, and it is possible, that, after going so far, Lord Elibank had altered his purpose. Mr Mitchelson in the following month (10th May, 1760) granted a reconveyance, expressed in general terms, as in the preceding deed, "for certain onerous causes and good considerations." There is an obligation to infeft, and a precept of sasine, and there is also a procuratory of resignation, and an assignation of the rents and duties for crop 1759, and all future crops, plainly intimating that

or heirs and disponees whatsoever."

May, 1776, Patrick Lord Elibank executed a deed of entail, by which he, in the form of a procuratory of resignation, the barony of Ballencrieff and particularly "all and whole that half of the mains of Ballencrieff Stantalane, with the corn mill lands and others, in favour of himself and the heirs of his body; whom failing, to certain persons, being heirs-male of his line, under several various conditions and limitations, which it is not necessary at this time to state at length."

It was declared that the heirs of tailzie "shall take and possess the lands above mentioned upon this taillie only, and upon no other right and title whatsoever, and shall use any other rights which they may happen to have or acquire as additional or collateral securities and titles for strengthening and supporting the deed of taillie only, and for no other purpose whatsoever." Upon this charter and infeftment followed, and was duly recorded.

At the death of Lord Patrick, the entailer, in 1778, his brother, Lord George, succeeded to the title to the estate under the entail, his claim being "as nearest lawful heir-male and provision to the said Patrick Lord Elibank, his brother-german, and conform to a disposition and taillie, dated 22d May, 1776, and entered in the register of entails in July, 1777, whereby he became bound to make a formal resignation of all and whole the lands and barony of Ballencrieff, therein mentioned." It must have been thought, at this time, that the resignation of Stantalane to Mr Mitchelson had been wholly done away. Without doubt there would have been a separate service, in virtue of the reconveyance, which, if any conveyance to Mr Mitchelson had been understood to create any right, could have been effected by a service expressed in the above recited terms.

From that period downwards, the possession of the lands of Stantalane could be ascribed to the retour and infeftment of George Lord Elibank under the entail including these lands. As a superior, he had no right but to the feu-duties

No. 26. the entail. The successive heirs could not exercise the rights of proprietorship under any other title. They could not remove a tenant, or grant a lease, or levy the rents, or indeed perform any deed where an infeftment in the property was required, if, at the time, they had in their persons no more than a right of superiority.

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On the other hand, it will occur, that, during the period already mentioned, two different prescriptions were current, 1st, and holding the property of the lands of Stantalane, to remain in Mr Mitchelson while he lived, and to be in his hereditas jacens, after his death, that right must have been extinguished by prescription, both positive and negative; and, 2d, as to any right which the heir of entail could have, by means of an action against Mr Mitchelson and his heirs, it was equally excluded; neither Mr Mitchelson nor his heirs having any right in the lands which could be taken from them.

Under all these circumstances, I am humbly of opinion—

First, That the original charter and infeftment on the entail, expressly comprehending the lands of Stantalane, with the possession which followed, were sufficient to bring under their operation the whole rights belonging to the entailer at the time, however imperfect the right might be, as not being completed by infeftment; and although it had not contained a warrant for that purpose, it was sufficient to exclude the heirs at law, and still more the heirs of entail who had no other right. If previously the entailer had nothing more than a lease, or, indeed, no right at all, or although he had previously sold the dominium utile, and still more if the lands had been under a trust in favour of the entailer, or under an obligation upon the possessor to reconvey, still, notwithstanding any objection to the form of the right, or any defect in the original right,—in all these cases, by virtue of prescription, both positive and negative, a complete entail would be formed if duly registered, in terms of the statute, followed as in this case with the requisite possession.

Second, In this case there is real evidence, that by the conveyance to Mr Mitchelson in 1760, no real or substantial right to the lands was given to him, but that the whole right remained in Patrick Lord Elibank as before. It is proved by the tenor of the writings, and the conduct of the parties, that Mr Mitchelson had only a nominal title, and that he never for one hour took or claimed possession. He could not, without being guilty of fraud and stellionate, convey the lands to a third party after his conveyance to Lord Patrick; and before a creditor could adjudge, if that was at all practicable, Lord Elibank would have taken infeftment so as to render such a measure ineffectual.

And holding the conveyance to Mr Mitchelson as a trust, it is now fixed law, that, notwithstanding the appearance of the right, the truster alone is to be considered as the proprietor in every question, whether with the trustee, or his heirs or creditors. So the point was decided in the case, *Rose v. Fraser*, 26th January, 1790, where, it may be observed, there was, as in this case, a reconveyance, but without infeftment. It is true that the successful party was the widow of the truster, who, by the equitable interposition of the Supreme Court, is enabled to claim an allowance equal to her terce, where the husband has omitted to take infeftment on his property, or where he has so divested himself, as to prevent his widow from being served to her terce. But the judgment of the Court was rested upon the state of the husband's right, as including the absolute property, although conveyed, as in this case, to a trustee without any apparent qualification. The

import of the decision is thus given in the Lord President Campbell's copy of the Faculty Reports. "The nominal fee in Lewis Rose (the trustee) was held as equivalent to an actual fee in Hugh Rose, the pursuer's husband."

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It might be observed too, that, in a case occurring before the conveyance to Mr Mitchelson, (*Henderson v. Dalziel*, 11th March, 1756,) the effect of a trust-right of lands, and the form of establishing the right in the persons benefited, was solemnly ascertained, and it was held that this might, after the death of the trustor, be established in a declaratory action, and without the form of a service; and although there the character of the trustee was apparent from the terms of the deed, this was considered as of no importance where the party claiming was unquestionably entitled to the benefit claimed by him. And the principle was followed in the case of *Burrell v. Burrell*,¹ and many others to be found in the reported Decisions, *Voce Trust*.

The case of *Fairlie v. Sir James Fergusson and others*, 11th July, 1827,² which has been referred to, does not at all affect the principles here laid down. Lord Hermand held a trust-fee from his brother, Sir Adam Fergusson, for political purposes. Sir Adam Fergusson afterwards executed a strict entail of the lands. After his brother's death, Lord Hermand executed a deed, referring to the trust, and introducing an entail in the same terms with the previous one, which was followed with infestment, but not recorded in the register of entails. A creditor of Sir James, the heir in possession, raised an action for having it found that the lands, contained in this entail, were liable for his debts, but the single point decided was that the entail by Lord Hermand, taken by itself, not having been recorded in the proper register, was not effectual against the creditors of Sir James Fergusson. Indeed, he had no authority by the deed, to make an entail at all. There was no appearance for the heirs of entail, the question with them being left to be discussed when the creditors had used diligence for attaching the lands.

Third, Supposing that, from the want of infestment upon the reconveyance by Mr Mitchelson, the entail could not be effectual at the time, still that objection would, in this case, be cured by prescription, both positive and negative. That this is the fact, in regard to Mr Mitchelson and his heirs, cannot be disputed; and if so, it is not easy to see how third parties, who can only take by claiming in Mr Mitchelson's right, should be in a better situation. But separately, and supposing that the defenders' constituent might have had a claim to the property, independently altogether of the transaction with Mr Mitchelson, the rights of the parties, in the existing circumstances, would still be the same.

The doctrine of consolidation has been introduced and argued upon at great length, but, as it humbly appears, to little or no purpose. There could be here no question of consolidation, because there were here, in truth and substance, no separate rights; but if it be held that there was no trust, and no consolidation, the property or dominium utile could not be carried by any of the services obtained by the different heirs of entail, but would remain in hereditate jacenti of Mr Mitchelson, until transmitted by a service under the reconveyance from him, which could not be obtained by the defender after his constituent's death.

And the argument with regard to possession upon limited and unlimited titles, is equally inadmissible. Where there are two distinct and separate titles, and there

¹ *Ante IV. 314.*

² *Ante, V. 937.*

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is no declaration of the party, whether his possession is to be ascribed to the one or to the other, the Court have listened to presumptions, some of them, as appears to Lord Corehouse, as well as to other eminent Judges, altogether unfounded. But here there can be no room for doubt, the different heirs of entail having unquestionably possessed in virtue of the right of property, and not merely as superiors of the lands. In fact, as already observed, they could exercise no act but as proprietors, not having occasion to give an entry, nor to levy the feu-duties, and the right of superiority being unquestionably vested in their person; but they exercised, without hesitation or challenge, every right competent to a proprietor acting under a deed of entail containing limitations and fetters.

To conclude, if the entail did not include the property of Stantalane, and if the reconveyance by Mr Mitchelson has been put an end to, by the negative as well as by the positive prescription, the lands in question might still be claimed by the descendants of George Lord Elibank, as heirs-at-law of the entailer as well as of their father. If, again, as alleged by the defender, the services of the different persons called by the entail, could not carry right to these lands, but to the superiority only, the infeftment taken by them could not warrant the possession which followed, and every plea of prescription urged by them would, from defect in title, be of no avail.

LORD GILLIES.—I agree very much in the views which have been expressed, and I do not consider this a case to be attended with serious difficulty. The only puzzle arises from the ingenuity and learning with which the defence has been pleaded, and attempted to be supported by some doctrines in the law of prescription of a very extraordinary nature; doctrines which are not merely new, but startling and inconsistent with the known operation of the statute 1617, c. 12. Such, for example, is the plea that prescription has no place in questions inter heredes, except in the solitary and limited instance stated by the defenders. In order to test this principle, look to some of its consequences. The defenders admit that prescription had run upon the entail, in any question with a third party, and that a creditor, attempting to adjudge the dominium utile of Stantalane, would be effectually barred by the entail. Upon what ground could the creditor be so barred? Upon no other ground than this, that consolidation of the property and superiority had taken place, and that thus the dominium utile was effectually covered by the entail. There is no other ground on which the creditor could be defeated. Is it possible, then, to maintain, that, at the same moment, the same estates can be consolidated, and non-consolidated? They must be consolidated, or the creditor is not barred from attaching the dominium utile; and if they be consolidated, the heir of entail is as effectually fettered quoad the whole, as if consolidation had taken place in the person of the entailer, before executing the entail. But if he be effectually fettered as to the whole, how can he recur to any fee-simple right of a part? Or suppose that there had been no entail in the present case, and that, as soon as forty years had run on the charter and sasine, the heir in possession had sold the barony, and granted a procuratory of resignation, under which the purchaser expedite a charter, and was infeft. If the purchaser's right to the dominium utile of Stantalane were instantly thereafter challenged by any third party, it is not disputed that he might defend on his charter, and that of his author, as containing both the property and superiority of Stantalane. But on what principle is it that he could do so, except that consolidation of the dominium utile with the dominium directum had taken place in the person of the heir, his author? It must be admitted, if the purchaser's title

that consolidation had taken place, although there was no resignation admitted, for otherwise the purchaser's title would be defective. But if it has been, in virtue of the heir's possession, so that a purchaser from the heir can on it, how can it be denied that it had taken place, supposing the heir's possession to have continued, without any sale? If the heir's possession operated at all, it could not do so the less because the heir himself (and not his heirs) was to found upon it. Yet the doctrine of prescription having no effect against the heirs, would lead to this inconsistency, that the very same possession would be effectual in favour of an heir's disponee, would not be effectual in the heir himself.

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incongruous and dangerous consequences which would result from this doctrine are apparent, and the defender's reasoning is founded on an erroneous notion of some of the leading cases in which questions have arisen as to the mode of possession by a series of heirs having a double set of titles in them, in which case the defenders maintain, that, with one very limited exception, the defender cannot plead prescription on either title, or, as it is said, on the one title or the other. I have repeatedly had occasion to express regret at the tenor of these decisions, in pronouncing which, it humbly appears to me that the court, however distinguished, would have acted more safely had they followed the doctrine of such lawyers as Stair, or Craig, in place of adopting new doctrines of their own. But the doctrine of these cases should not be extended; although they seem to lend some countenance to the pleas of the defenders, yet, in part of the views expressed in the Lord Ordinary's note, I think they do so in appearance, and not in reality. For the doctrine does not truly go further than this, that where a party, having full power over his estate, disposes of it himself in a marriage-contract to provide it, in favour of a certain series of heirs, leaving each heir full power to alter at pleasure, and where these heirs, under the old investiture, make up titles, under the old investiture, forty years together, they are still held not to have effectually repudiated the express destination. Their power to alter was unquestioned; the court held that the steps which they took did not prove their intention to alter were not an effectual exercise of their power to alter.

For example, from the case of Smith and Bogle no farther doctrine is deduced than this, that where a disposition of an estate is executed, by a party having full power, destining it in full property to a certain series of heirs; and where the heirs of this destination are also heirs of line, and serve in that character, they thereby alter the destination under the deed. Each service placed the heir in the room of his predecessor, and thus in the room of the party who granted the destination, and if the heirs die without taking any step for altering the destination, the deed will regulate their succession, so soon as the heir of line shall be not also the heir of destination, precisely as it would have regulated the succession of the grantor, in case his heir of line had not also been his heir of line. The case of Durham is of a similar nature, and the argument which was successful in that case was, in so many words, that "a service as heir is not a mode of altering the settlements of an estate." The case of Zuille, 4th Dec. 1813, is of the same import. That is the whole length of these decisions; they are not in point to the present case, for in them there was no question as to the power of the heirs possessing, to have altered the destination, had they chosen to do so, either before or after their possession had endured for the full period of

No. 26. prescription. It was merely found that service as heir of line to the grantor of a disposition (or to his heirs) is not a competent mode of altering the destination contained in that disposition. Properly speaking, it was a *questio voluntatis*, which arose as to the succession of the party who last held in himself the double character of heir under the destination, and heir whatsoever. And the question was, whether the power of altering the destination, which was undoubtedly possessed by the heirs, had been competently exercised by them. It was found that there had been no competent exercise of the power.

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In these decisions no question of prescription was properly involved; and in the case of *Bald*, which has been much insisted on, no course of prescription had run. I am reported to have expressed this opinion in deciding a former case some years ago. At this distance of time, I have no recollection of what then passed on the bench, but I am satisfied that such an opinion is well-founded. I shall now advert to the details of the case of *Bald* a little more minutely, in consequence of the defenders having pressed strongly on the Court, that prescription had run. Archibald Buchanan, a vassal infeft in the lands of Cameron, purchased the superiority of these lands, and took a Crown charter, conveying them to him in liferent, and to his son, William, in fee, but reserving power to himself to alter and dispoise at pleasure. Infeftment followed in 1705. In 1730, in William's contract of marriage, his father, Archibald, disposed to him absolutely the dominium utile of the same lands, and William was infeft under this disposition, so that he possessed two rights affecting the lands. He was *fiar* of the superiority, or dominium directum, in virtue of the Crown charter under which his father was liferenter, with a power to alter at pleasure; he was also *fiar* of the dominium utile in virtue of an absolute and onerous conveyance in the marriage-contract. He predeceased his father, and his heir made up titles to him by special service, and by infeftment on a precept from Chancery. Subsequent heirs did the same. One of these heirs executed a deed, which was challenged by the heir-at-law of William, as inept to carry the dominium utile, in respect that it was still in hereditate jacenti of William, having never been consolidated with the superiority, and titles having been made up to the superiority alone. Thus one main question raised, and in truth it was the only one requiring to be decided, was, whether consolidation operated *ipso jure*. On this point the opinions of the Court were delivered. Prescription was also pleaded, but there was no ground for it. Archibald Buchanan, the liferenter, lived till 1760, having survived his son William. The action was raised within twenty-five years after the death of Archibald. If possession by the liferenter could be reckoned the possession of the *fiar*, (and I hold that it cannot in the case of a liferent by reservation,) then forty years' possession had taken place. But under what title? Under the Crown-charter, not under the marriage-contract. In order to found prescription, therefore, the possession of the son and his heirs must have been ascribed to the defeasible in place of the absolute title; to the title which was revocable at the pleasure of Archibald Buchanan while he lived, and not to the title which was absolute and irrevocable from the first. But possession on the former title must have been of necessity precarious; and possession, obtained or held, *vi, clam, aut precario*, cannot found prescription. After deducting the period during which the possession, if ascribed to the charter, must have been precarious, there did not remain a course of possession at all approaching to the term of the long prescription.

I therefore consider that the case of *Bald* is not an authority against the doctrine that consolidation is effected, where a course of prescription has run upon titles

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ning the lands, out and out, *tanquam optimum maximum*, while a prior sub-right has remained entirely neglected. And I know of no decision against doctrine. It is true that the useful and important law of prescription has been really much endangered by the ingenuity and subtlety of some comparatively lawyers. Among the opinions delivered at deciding the case of Bald, I was inclined to hold that of Lord Eskgrove, who differed from Lord Braxfield the other Judges, as containing the sound view of the law of Scotland, but I apprehend it to be, that there has been a tendency among our later lawyers to too much physical refinement and speculation in their views. They were too much led to the discovering, or the invention, of what they called the true principles of feudal law, and, as corollaries from these principles, they deduced doctrines quite at variance with Craig, and in opposition to Stair, the authors to Lord Eskgrove appeals, and who probably understood the principles of the law fully as well as any of our more immediate predecessors.

I have been led into these observations by the turn which part of the defenders' case took; and now I would point out, shortly, the circumstances in the present case which appear to be decisive in favour of the pursuer.

Patrick conveyed the dominium utile of Stantalane to Mr Mitchelson, for one month, reconveyed it to his Lordship. Had there been no reconveyance, it is indisputable that prescription must have run upon the entail title, clear, and it is undisputed, because then the possession of the heirs of entail was ascribed to no other title. It would be strange if the mere existence of conveyance should have the effect of destroying the basis of any prescription, thereby defeating the intention of the party in whose favour it was granted; it seems altogether impossible to allow this effect to it, if the Court are satisfied it was the intention of the entailer, and of every heir of entail for forty years after the infestment of Lord George, that possession should be upon the entail only, and *de facto*, their possession is imputable to that title exclusively. The intention of the entailer appears to be clear; his procuratory is free from all ambiguity, and he binds his heirs to resign the whole lands, and to give up right or title to them, and to possess under the entail alone, and to use every right they have, or may acquire, as mere collateral rights to strengthen their possession under the entail. In precise conformity with these injunctions, Lord George and the other heirs of entail, make up titles, and enter into possession. It is said, that each service took up the personal right under Mitchelson's resignation: even if it did, it does not follow that the possession of the heirs of entail was thereby thrown loose, and rendered applicable to either the feudal or the entail title, according to the pleasure of each, though undeclared till after prescription had run. For, even if the heirs took up the title, the very service under the entail of 1776 (which is said to have carried it to them) laid them under an express obligation to use it, not as an independent title of possession, but solely and exclusively as a means of fortifying their possession under the entail. The intention of the entailer being clear that the property and superiority of the whole lands should remain in the entail, and the procuratory of entail being conceived in terms sufficiently to express his *enixa voluntas*, the heirs who took the rest of the estate were bound to give effect to that intention, and to comply with that express injunction. It is clear, and it is not a question of feudal law at all, but merely an application of the familiar doctrine of *approbate and reprobate*. Had the heirs not possessed ex-

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clusively upon the entail—had Lord George, for example, indicated an intention to avail himself of his right to the dominium utile in fee-simple, he might have been compelled, by an action at the instance of the next heir, to fulfil the obligation, which was clearly incumbent on him,¹ and to bring it under the fetters of the entail. This I conceive to be decisive of the present question; and this view has always appeared to me to be the shortest, and, at the same time, the strongest which can be taken of the case.

But to proceed to another point, I think, that in consequence of the service of Lord George, as heir of entail under the deed 1776, and of the services of succeeding heirs under the same deed, coupled with their possession for forty years, the lands of Stantalane, both property and superiority, are now within the entail. Against this view it is pleaded, that there are no termini habiles for prescription, in questions inter hæredes, except in the special case where it runs on an unlimited and feudalised title against a latent and limited personal title. I demur to the doctrine in itself, and have already in part disposed of this branch of the defender's argument. I also doubt its application to the present case, when the two titles are contrasted, on the one of which, it is said, no prescription could run against the other. The one title gave a right to the whole lands, property and superiority, *tanquam optimum maximum*; the other was a subaltern right to a part, a mere burden upon the whole. But this is not all; the first title, being duly feudalised by charter and sasine, was a title on which prescription could run, and which would, by prescription, be rendered unchallengeable. The other title could never found prescription, for no party was ever infeft under the reconveyance of Mitchelson. It seems to me, therefore, to be impossible for the Court to ascribe the possession which has taken place to this last title, which never could be fortified by prescription, in place of ascribing it to the former, which would thereby be rendered valid and unimpeachable.

There is just one other point to which I shall advert. The argument that the possession of the heirs should be ascribed to their right under the reconveyance by Mitchelson, rests mainly upon the assumption that the service of each successive heir of entail, as heir of taillie and provision under the procuratory 1776, carried the personal right under another deed, the reconveyance of Mitchelson. I do not hold that the service could have such effect. The service under the procuratory 1776 would carry what was contained in that deed, but it would carry nothing else; and this precise point was decided in the case of Spalding. On this subject I concur with Lord Balgray, as I do generally in what fell from his Lordship.

The heirs of Lord Patrick were bound to make up titles under the entail to the whole lands out and out, and having done so, they were bound to possess on the entail. They did make up a feudal title, in terms of their obligation; and it would now be equally contrary to law and justice to hold that their consequent possession can be ascribed to any other title than their charter and sasine, the only one upon which prescription could run.

LORD PRESIDENT.—I concur generally in the views which have been expressed, and in the conclusions at which your Lordships have arrived. But there is a separate ground, which has not yet been noticed at the bar, or on the bench, which would appear to me to be sufficient of itself to support the reduction, even if the



¹ *Carmichael*, Nov. 15, 1810 (F. C.); *Smith*, Dec. 9, 1814 (F. C.)

long prescription, after deducting minorities as required by 1617, c. 12, had not been applicable to this case. I allude to the effect of the previous statute 1594, c. 218, upon which it is often useful to found, when the interruption of minority could prevent the other statute from applying.* The preamble of the statute 1594 sets forth that sundry of the lieges have brooked their lands by virtue of the infeftments of themselves and their predecessors for forty years together, "notwithstanding whereof, the said infeftments are sundry times drawn in question for want of procuratories of resignation, instruments of resignation, precepts of clare constat, or other precepts of seisin which are not extant." The statute declares, "That nane of his Hienes's lieges may be compelled, after the space of forty years, to produce procuratories or instruments of resignation, precepts of clare constat, or other precepts of seisin of lands, &c., whereof the present heritable possessors and their predecessors, &c. are and were in possession by the space of forty years together, and that the wanting, and in-lack thereof, nor nane of them, sall be na cause of reduction of the infeftments granted to the proprietors or their predecessors, or of the lands whereof the charter (making mention of the resignation) and the instrument of seisin (making mention of the precept of seisin, by virtue whereof the seisin was given) are extant." The act is expressly extended "to all procuratories, and instruments of resignation, &c., the wanting whereof, nor nane of them, all be na cause of reduction or quarrel whatsoever after the space of forty years; where infeftment has taken effect by possession, by the said space of forty years, in manner above rehearsed, and where the charters and instruments of seisin are extant as said is."

Both Erskine¹ and Stair² treat of this act as remaining in force, and available to the lieges. There was occasion to consider this very maturely in disposing of the great Annandale cause in 1739, between the Marquis of Annandale and John Lord Hope. The first counsel of their time, Mr Charles Erskine of Tinwald, and Mr Robert Dundas of Arniston, pleaded the cause, and the statute was then founded on without any objection to its validity. It was indeed held not to be applicable to that case, as the full term of forty years had not run, and also, as the deed wanting was a disposition, and that is not one of the deeds specified in the statute; but the validity of the statute was never impeached.

Assuming, therefore, that the statute remains in full force, I think it is available to the pursuer, Lord Elibank, in obviating the defender's plea, that the dominium utile of Stantalane was never resigned after Mitchelson's reconveyance, and therefore, was never consolidated with the dominium directum. For the full term of forty years had run, before the accession of the last Lord Elibank, whether it be computed from the time when the reconveyance was executed, or from the time when George Lord Elibank, as heir of entail, expedited a charter of resignation, containing ex facie the lands of Stantalane, out and out, tanquam optimum maximum. When, therefore, it is objected that no resignation was ever made under the procu-

* It was, at one stage of the cause, proposed by the defenders to open up the record, and state that the course of the long prescription had been interrupted by minority in the person of the heir against whom it was running. Mutual minutes were ordered on the competency of allowing the record to be opened up; before advising which, the defenders withdrew their motion.

¹ II. 7. 25.

² Brodie's Ed. p. 402, § 15, and p. 440, § 10.

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ratory in Mitchelson's reconveyance, the pursuer may plead the statute, and maintain that the want of the instrument of resignation is not to be made a ground of reduction or quarrel against him. The charters and infeftments produced by the Lords Elibank, contain the actual lands of Stantalane; for there is no such thing in feudal law as infeftment in the superiority without the lands, the superiority being in law the dominium directum et eminens of the lands themselves. Standing on their charters and infeftments, therefore, the Lords Elibank are not liable to challenge, although they fail to produce any instrument of resignation under Mitchelson's procuratory. One cause assigned in the preamble of the statute for the disappearance of such a writ is the lapse of time; another is, that the writ may have been lost or destroyed as being no longer of any use. Considering the words of the statute, therefore, the Court cannot now presume, at this distance of time, from the non-appearance of an instrument of resignation, that there never was resignation made; they can only hold that though made, the writ has disappeared, but that the pursuer is no longer open to challenge from its non-appearance. For, supposing resignation to have been made, Lord Elibank was under no obligation to record it. If he chose to run the risk of Mitchelson's good faith and responsibility, as guaranteeing him against creditors or purchasers, his Lordship might have burnt the instrument of resignation the day after it was executed, and taken his stand exclusively upon his infeftment in the lands. And, indeed, that very infeftment is precisely the thing on which he must still have taken his stand, even if a resignation ad remanentiam had been executed. For, no new infeftment could have followed on the resignation; his Lordship, as superior, and, in feudal law, true proprietor, was already invested in the lands by infeftment under the Crown-charter; and the resignation of the feu-right could have operated no new infeftment in his favour, but would merely have discharged a burden previously existing on his infeftment.

Upon this separate ground, therefore, I am of opinion, that the defenders cannot effectually plead that there was no resignation executed under Mitchelson's procuratory. And as such resignation would at once have destroyed the groundwork of the defender's argument as to Stantalane, I think the pursuer entitled to prevail, by aid of the statute 1594, c. 218. But there are other grounds for supporting this conclusion, and I shall shortly notice them, though I have been in some degree anticipated by the opinions already delivered.

And, first, I consider that the defender's own title rests on the infeftment of his author, the late Lord Elibank. In so far, therefore, as the defenders could succeed in proving that a subject was not covered by that infeftment, they would just be demonstrating that they themselves were without a title to it. This seems clearly to arise from the fact, that the late Lord executed the trust-disposition and minute of sale to the defenders, expressly in his character of feudal proprietor, infeft in the barony of Ballencreiff, which contained, inter alia, Stantalane. But his Lordship had no infeftment except as heir of entail. If, therefore, the defenders could show that Stantalane was not within the entail, they would at the same time prove that their own conveyance to it was inept, as flowing a non habente. If the dominium utile of the lands of Stantalane be not within the entail, it never was taken up by the late Lord Elibank, and he never was in condition to dispose it. It must now be lying in hereditate jacenti of the entailer, Lord Patrick. However good the plea of the defenders might be, if stated by the heir of line of Lord Patrick, it cannot be urged by the defenders without destroying their own title.

But, second, though neither Mitchelson nor his heirs had ever executed a re-

in the case of Grieve,² the Court found that a superior's infeftment in the land, followed by forty years' possession, was sufficient, (although there had previously been a subaltern infeftment,) to entitle the superior to grant to a purchaser a title to both property and superiority. There is another case of Waddell,³ bearing doctrine of a similar import.

There are two other cases which deserve attention in reference to this branch of discussion; I mean those of Bruce, Dec. 6, 1770, and Middleton, Dec. 22, 1771. In the first of these, which was affirmed on appeal, the Court found that Thomas Bruce was infeft in the lands in virtue of the precept of clare constat; and he and his successors had possessed them absolutely for forty years, without acknowledging the right of the vassal, the full property was thereby vested in them, and the dominium utile effectually consolidated with the superiority. And I observe, in reference to another part of the present discussion, that the case was a question among heirs.

In the second case, Middleton's, the Court found, in a question with a third party, "that the right of the superior is a right to the lands ex facie, simple and absolute; and as the right of the vassal is no more than a burden on the dominium utile, so, when the superior, in virtue of his infeftment in the lands, has had possession of the dominium utile for forty years, without challenge or interruption, the vassal's right is thereby totally extinguished, and the superior's right is effectually disburdened of it. His possession of the dominium utile for forty years is effectual for extinguishing the right of the vassal, as a resignation made by the vassal." In this case, I may notice that Lord Braxfield and Mr Lockhart were counsel for the parties.

According to these decisions, I hold it to be clear, both on principle and authority, that Lord Elbank, the superior, by an exclusive possession of forty years, would effectually work off the prior grant of the feu-right to Mitchelson, suppo-

No. 26. have given a good title to Stantalane, both property and superiority, to a purchaser, even supposing his Lordship's feudal titles to have been precisely on the same footing as that on which they were when he sold to the defenders. This is evident from the cases above quoted, and it is admitted, and even contended for by the defenders themselves, who maintain (as they must maintain) that their author, the late Lord, gave them a good title by his disposition in their favour. But if the late Lord's titles were such as to enable him to give a good conveyance to a purchaser, they must have been such as to vest the whole subject in himself. He could not convey to a purchaser what was not previously in himself. But so soon as this is kept in view, together with the fact that he had made up no titles except as heir of entail, the only remaining question comes to be, not whether he was invested in the property as well as the superiority, (for that is implied, if his conveyance would have carried both to a purchaser,) but simply whether the fetters of the entail were good to defeat a sale. And this point of the case has been previously disposed of.

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It has been pleaded, however, that there is no room for prescriptive possession in this case, 1st, Because there are no termini habiles for prescription inter heredes, except in one special and limited class of cases instanced by the defenders; and, 2d, Because the Court cannot presume possession to have run on the tailzied title as against the unlimited title.

In regard to the first plea, I think it erroneous in itself, and opposed to authority. The defenders admit that there is one class of cases at least, in which prescription may run on one title against another, even in questions inter heredes. And the decisions instruct this to a larger extent than the defenders' admission concedes. Look, for instance, to the case of Bruce, above quoted, which was decided in 1770, and which was a question inter heredes. And within four years thereafter, the Court decided the case of Middleton, also above quoted, which was a question with third parties; thereby evincing in the clearest manner, that the useful and important effect of prescription is not limited, as the defenders contend, but has place in questions inter heredes, as well as with third parties. But besides this, I do not see that a proper question inter heredes arises in this case, as there is no competition between heirs of different characters, but only between one heir and the purchaser from a preceding heir of the same kind. And, therefore, even supposing all the decisions which have been quoted on this branch of the defenders' case to be well founded, they do not appear to touch this cause: and I may add, that if the question were still an open one, I should doubt whether these decisions were in accordance with the principles of the law of Scotland, and the terms of 1617, c. 12.

As to the second plea, that the Court cannot presume possession on the tailzied title against the unlimited, I think it is not well founded. In every question of evidence like this, the maxim applies, *presumptio credit veritati*. Now I apprehend that the facts of the case amount to a complete proof that the possession was upon the tailzied title, and upon no other. The Lords Elibank feudalised that title, while they allowed the right under Mitchelson's reconveyance to remain a bare personal right, and one which they never took up. Under their feudalised right they could grant tacks, remove tenants, provide wives and children, and exercise every act of property not prohibited by the entail. Under the other, they could merely have drawn the rents payable by pre-existing tacks. Looking, therefore, to the fact that the Lords Elibank generally exercised all acts of proprietor-

ship during the period of prescription, I conceive it to be no longer a question of presumption, whether they did so in virtue of the feudal title which they actually made up, or in virtue of any other. There was no other to warrant them in exercising the rights of proprietors; and when it is considered that they were bound by the entail to make up a feudal title as heirs of entail, I conceive it to be proved beyond question that their possession was exclusively applicable to their tailzied title, and to it alone.

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Upon these grounds, as well as upon those which have been already stated by your Lordships, I am of opinion that a complete feudal title under the entail was vested in the Lords Elibank prior to the accession of the late Lord, to all effects whatever, whether against third parties or against heirs. I consider the defences to be ill-founded, and that they ought to be repelled.

THE COURT pronounced this interlocutor:—"The Lords, having resumed consideration of the conjoined actions of reduction improbation and declarator, and heard counsel, and advised the whole cause, with the cases for the parties, Repel the defences, and reduce, decern, and declare, in terms of the conclusions of the said conjoined libels, in so far as the same conclude for reduction of the conveyance in trust libelled on, of the whole lands, barony, and estate of Ballencrieff, contained in the deed of entail libelled, and in the charters, retours, precepts, and infeftments following thereon, comprehending, inter alia, West Mains of Ballencrieff, Lochhill, Stand-the-lane, and Myreton, both property and superiority, and also of the seisin thereon, and all that has followed, or is competent to follow thereon, and also of the sale thereof, as libelled: And find and declare, that the pursuer had the only good and undoubted right to the said subjects, and to complete the titles thereto, as heir of entail to his deceased father, and to possess the same, and uplift the rents which have fallen due since the decease of the late Lord Elibank, his father; and that the defenders have no right or title thereto, and decern: And farther, in respect the pursuer claims in this action merely as heir of entail aforesaid, Find that the other subjects and funds, contained in the said trust-disposition, are in nowise affected by the preceding finding of this interlocutor, and therefore repel the reasons of reduction quoad such separate funds and subjects, and decern: and find the defenders liable in expenses to the pursuer."

A. ROLLAND, W.S.—J. YOUNG, S.S.C.—Agents.

ROBERT THRESHIE, Advocate.—*D. F. Hope*—*G. G. Bell*.
GEORGE HYSLOP, Respondent.—*Jameson*—*Christison*.

No. 27.

Road Act—Proof—Obligation.—A party who lends money to road trustees, is entitled to rely on the terms of the bond granted to him, and of the statute under which they act; and he is not affected by previous resolutions of the trustees which were not communicated to him.

By the road act for the county of Dumfries, passed in 1809, the roads are divided into five districts, and the fifth district is described as containing the "road from Gretna by Annan, Dumfries, and Sanquhar, to the
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confines of the county of Ayr, with the several branches of road therefrom, herein after mentioned; that is to say, the branch of road leading from the east end of the town of Annan, through Annan Common and Stapleton, by the bridge over the water of Kirtle at Beltenmont," &c. Another clause in the act empowered the trustees "to borrow the sum of £5000 upon the credit of the tolls of the first district of roads;" £3000 on the credit of the tolls of the second district, &c.; "and £10,500 upon the credit of the tolls of the fifth district." It was directed that each sum should be expended wholly within its own respective district.

The trustees were empowered, at any general or district meeting, to assign "the whole or any part of the tolls," as a security for the sums so borrowed; and at either of the first two general annual meetings, to allocate the tolls "towards repairing the roads in such manner as they think fit"—such allocation not to be altered, unless with the consent of two consecutive general annual meetings. The trustees were not to be held personally liable for loans, the security of the tolls being the sole security to the lender. At the first general annual meeting under the act, it was resolved, that "the fifth district of road shall be divided into two districts, as they have ever been, and that the tolls and duties to be levied on the said two districts shall be wholly applied within the same respectively: That the sum to be borrowed on the credit of the tolls and duties to be collected at the bars on the said lower district, shall be £1600 sterling; and on the said upper district, the sum of £4000 sterling: That the tolls to be levied on the first branch of road in said fifth district, from Annan to Stapleton, to Beltenmont, &c., shall be wholly applied thereon, and the sum to be borrowed on the credit of these tolls shall be £1050." Other five branches were then specified—the tolls of each to be applied in favour of itself, and the sum fixed, which was "to be respectively borrowed on the credit of the tolls on each of the lines of road." Separate committees were appointed for the lower and upper divisions of the fifth district. At a general annual meeting of the trustees of the lower district, on 7th September, 1810, a report was approved of as to a proposed repair of the road by Stapleton to Beltenmont Bridge, and it was resolved to borrow for the purpose, "upon a security to be granted by the burgh of Annan, William Graham of Mossknow, and R. W. Batty of Broats." A committee was appointed to carry the resolution of the meeting into effect. The money was borrowed from George Hyslop of Rosetrees, to whom a bond was granted of the following tenor: "Know all men by these presents, that we, William Graham, Esq. of Mossknow, Richard William Batty, Esq. of Broats, and James Scott, Esq., Provost of Annan, specially authorized by, and as taking burden on me for, the Magistrates and Town Council of the burgh of Annan, three and a quorum of a committee of the trustees appointed by act of Parliament, for making and repairing the turnpike road from Annan by Stapleton to Beltenmont, appointed by the last general annual meeting:

said trustees, held at Annan upon the 7th day of September last, have **No. 27.**
~~received from~~ George Hyslop of Rosetrees, in the parish of Kirkan- **Nov. 21, 1828**
~~ows,~~ all and whole the principal sum of £400 sterling, the receipt **Threshie v.**
 ereof we do all hereby acknowledge, renouncing every exception to **Hyslop.**
 contrary; which sum of £400 sterling, with the legal interest thereof,
 n the 21st day of December instant, to the term of payment after men-
 ed, we hereby bind and oblige us, and the whole other trustees of the
 l turnpike road, to content and repay to the said George Hyslop." No
 action was made by any of the trustees to the bond thus granted, and Mr
 yslope received payment of the interest on it till 1827. As the payment
 en ceased, and the tolls on the first branch of the fifth district, being the
 id from Annan by Stapleton to Beltenmont, were inadequate for Hys-
 's security, he raised an action before the Sheriff of Dumfries-shire,
 inst Mr Threshie, the treasurer, as representing the road trustees for
 county of Dumfries, concluding for payment out of the tolls of the
 de fifth district.

The defender pleaded, that by the terms of the bond itself, the tolls
 the road from Annan by Stapleton to Beltenmont, were alone con-
 ed in security of the loan; and that this was confirmed by considering
 minutes of the road trustees, which divided the fifth district, at the
 amencement of the act, into upper and lower sections, conformably
 previous divisions; and authorized only the tolls on the Stapleton
 nch of road to be assigned to the lender. Besides, the accounts of the
 pleton road, and of each of the other branches, had been always kept
 arate and distinct from each other; and it was therefore ultra vires for
 parties who signed the bond to assign any other tolls in security, even
 he terms of the bond could be held to refer to any tolls other than
 Stapleton branch.

Hyslop answered, that the bond was granted by "a quorum of the com-
 tee of the trustees appointed by act of Parliament for making and repair-
 the turnpike road from Annan by Stapleton to Beltenmont, appointed
 he last general annual meeting of said trustees, held at Annan upon the
 day of September, 1810." There were no trustees named by the act
 usively for the Stapleton branch of the fifth district. Therefore,
 n the obligants bound themselves, "and the whole other trustees of
 said turnpike road," this referred to the trustees for the county gene-
 r. Accordingly, the trustees composing the meeting of 7th Septem-
 1810, were not limited to the Stapleton branch, but were the trustees
 he whole lower section of the fifth district. But, independently of
 Hyslop had no access to the minutes or accounts of the trustees, and
 entitled to rely upon the terms of the bond, and those of the act of
 liament, in reference to which the tolls of the whole fifth district were
 gned in security to him. After payment of interest on the bond for
 many years without objection, it was now too late to plead that it was
 a vires of the obligants to grant it.

No. 27. The Sheriff found, "that the pursuer's security extends over the whole tolls of the fifth district of roads in said district, as described in the act 1809."
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Threshie brought an advocacy, in which the Lord Ordinary "found that the act 1809, after dividing the roads of the county of Dumfries into certain districts, authorizes the borrowing of the sum of '£10,500 sterling, upon the credit of the tolls or duties to be collected upon the fifth district of the said roads,' &c.; that the bond granted to the respondent, though referring to a particular line of road, situate in the fifth district, does not contain any limitation of the security to the tolls and duties leviable on that particular line; that it is not averred that the proceedings of the meeting of trustees, directing such limitation, ever were intimated to the respondent; that in these circumstances, the respondent, in advancing his money, was entitled to count upon the security authorized by the statute, viz. that 'of the tolls and duties to be collected upon the fifth district of the said roads,' and that the bond must be construed accordingly, as constituting a security upon the said tolls and duties; that as the bond, framed in these terms, has been sanctioned by the trustees receiving the money and paying the interest for many years, it is not competent now to challenge the power of the committee to grant a bond producing such an effect; and, therefore, repelled the reasons of advocacy, remitted the case simpliciter to the Sheriff of Dumfries-shire, and decerned; found the advocator liable in expenses."*

* "NOTE.—The question is by no means free from difficulty. It is clear, from the minutes of the meetings of trustees, that their object was to limit the security for the money borrowed to finish the Stapleton road, to the tolls on that particular line; and the Lord Ordinary does not think that they were prevented from doing so by the statute; but it is admitted, that the minutes of those meetings were not communicated to the lender—and the bond, though bearing to be granted by 'a committee of the trustees appointed by act of Parliament for making and repairing the turnpike road from Annan by Stapleton,' &c., and binding and obliging 'us and the whole other trustees of the said road to pay,' &c. does not, either expressly or by implication, abridge the security contemplated by the clause of the act, namely, that of the whole tolls and duties of the fifth district. The bond, indeed, is not very correctly expressed. There were no trustees specially named, either for the Stapleton road or for any other particular road. The trustees were named generally for the whole county. The only meaning, then, that the term, 'the trustees on the said road,' used in the obligatory clause in the bond, can receive is, 'the general trustees of the county, acting in relation to the said road,'—a meaning perfectly consistent with the extent of the security authorized by the statute. The Lord Ordinary therefore thinks, that the lender was entitled to count upon that security, and that the bond must be construed as a bond borrowing money for the making or repairing the Stapleton road, but on the security of the whole tolls in the fifth district.

"The advocator, besides contesting this construction of the bond, maintains, that the bond, if bearing this construction, was beyond the powers of the committee, who, it is said, were authorized to pledge no more than the tolls leviable on the particular line on which the borrowed money was to be expended. But if the respondent

Threshie reclaimed.

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LORD GILLIES.—I think the bond was not limited to the tolls of the Stapleton ranch alone; it extended to the tolls of that district.

LORD PRESIDENT.—I am clearly of the opinion, that Hyslop's security is not of the limited nature contended for by the advocator.

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THE COURT, without hearing the respondent's counsel, adhered.

W. STEWART, W.S.—T. JOHNSTONE, S.S.C.—Agents.

WILLIAM LAWSON, Pursuer.—*Cuninghame—Robinson.*

No. 28.

CHARLES LAWSON, and Curator ad Litem, Defender.—*Ivory.*

Cessio Bonorum.—Circumstances in which the benefit of cessio refused to a party who had been seven months in jail.

THE brother of the pursuer, William Lawson, died in 1809, leaving a son, the defender, Charles Lawson, in infancy. He had been tenant in a farm, called Tullochvenus, held by him at a rent of £35, under a lease, of which fourteen years were still to run, and by an arrangement with the widow, the pursuer was allowed to enter to the farm, upon an agreement to pay, for behoof of the pupil, a surplus rent of £14 per annum, and to make the stocking at an appraisement, which was accordingly made, and amounted to £189. The pursuer thereafter possessed the farm till the expiry of the lease in 1823, when he removed, carrying the stock with him to another farm, called Bandeen, possessed by his father, who died in 1826. On the expiry of his father's lease in 1828, the pursuer got a new lease of Bandeen, in name of his third son, a child of eight years old, and he professed since that to have lived with that child. He had never paid his debt to his nephew, and when decree therefor with interest was obtained, and a poinding executed of the stocking on the farm of Bandeen, an application for an interdict against the sale was presented in name of the child, the nominal tenant, as proprietor thereof. On this the pursuer was, in April last, incarcerated on the decree above-mentioned; and having applied for aliment under the Act of Grace, he emitted a deposition, giving a very unsatisfactory account of the manner in which his son's name came to be inserted in the lease of Bandeen as the tenant, and as to the sources from which he alleged the farm had been stocked. An aliment of 9d. a-day was awarded him, and thereafter he brought this process of cessio, in which he was opposed by his nephew and curator. The court, last Summer Session, refused the benefit of cessio in hoc statu; and he now reclaimed, having been seven months in jail.

Nov. 21, 1833
2^d Division.
R.

It is right in his construction of the bond, it is too late to challenge the powers of the committee after the money has been received, applied to one of the purposes of the trust, and interest paid on it for nearly twenty years."

No. 28.

Nov. 21, 1833.
M'Ewen v.
Graham.

THE COURT allowed him to amend his condescendence, but on advising it with answers, refused his reclaiming note.

J. SOUTER, W.S.—H. INGLIS and DONALD, W.S.—Agents.

No. 29.

ANDREW M'EWEEN, Advocate.—*Sol.-Gen. Cockburn—Wilson.*
WILLIAM GRAHAM, Respondent.—*D. F. Hope—Sandford.*

Bill of Exchange—Writ—Proof.—1. The Court, satisfied by ocular inspection that a name had been erased from below that of the apparent acceptor of a bill, refused action thereon. 2. Circumstances considered to afford sufficient proof that a party was not an onerous bona fide holder, without the necessity of resorting to his writ or oath.

Nov. 21, 1833.

2D DIVISION.
J.D. Mackenzie.
T.

WILLIAM GRAHAM, baron-officer of Graham of Gartmore, in May 1826, raised an action before the Sheriff of Stirling, against Andrew M'Ewen, tenant in a small farm belonging to Gartmore, for payment of a bill for £250, at three months, dated May 13, 1823, and bearing to be drawn by Graham, upon, and to be accepted by M'Ewen. This bill was indorsed by Graham, and it had been discounted with the Renfrewshire Bank, on a letter from Mr Speirs of Culcreuch, Gartmore's brother-in-law, to the Bank, requesting them to discount it, and "give the proceeds to the bearer;" but it did not appear who the bearer had been. In the bill-book of Gartmore, this bill was entered among those to be provided for by him, and it was not denied that he was in the practice of getting accommodation by bills from his tenants. When retired from the bank the entry in the bill-book had been scored, but there was no evidence as to the party by whom it had been retired. M'Ewen, in defence, denied that he had accepted any bill to Graham, or received any part of the proceeds; and he stated that he had, at Graham's request, and for the accommodation of Gartmore, signed a blank bill as drawer—the sum intended being £50, and being written in figures at the upper corner of the stamp which, however, was capable of covering a bill for £250; that Graham had signed under him as acceptor; that in a previous action of count and reckoning by Graham against him, the former had given in a state of his claims upon him, in which no mention was made of this bill; that the figure "2" in the sum "£250," had obviously been inserted *ex post facto*; and that an erasure was apparent immediately under his name where clearly Graham's name had stood; and that Graham's name was now crowded in above his, so as to stand as drawer, making M'Ewen acceptor, contrary to the original state of the bill. He therefore pleaded 1. That the bill being vitiated was void; and, 2. That the circumstances clearly proved Graham not to be an onerous bona fide holder. On the other hand, Graham alleged that he had signed the bill for its present amount of £250, as drawer, for the accommodation of M'Ewen, by whom he alleged it was discounted, and that he had retired it from the bank; and

he contended, that there truly was no vitiation, and that the allegation of his not being an onerous bona fide holder, could only be proved by his writ or oath.

No. 29.

Nov. 21, 1834
M'Ewen v.
Graham.

The Sheriff pronounced this interlocutor:—"Finds, from the evidence adduced, that the bill in question was discounted by the Renfrewshire Bank on the credit chiefly, if not solely, of the late Mr Speirs of Culcrauch, the brother-in-law of Gartmore; that the bill is entered in Gartmore's bill-book apparently as one of his own, and scored as retired: finds that these circumstances tend much to instruct that the said bill was granted for Gartmore's accommodation, and was retired by him: but finds, that they do not afford sufficient legal evidence, and that there is not otherwise evidence, of the pursuer, who is the drawer of said bill, and in possession of it, not being the onerous holder thereof: therefore repels the defences, and decerns against the defender, in terms of the conclusions of the libel, and finds him liable in the fees of extract, but finds no expenses of plea due."

M'Ewen thereupon brought an advocacy, in which the Lord Ordinary advocated and assolized with expenses, both in this and the Inferior Court, adding the subjoined note.*

* (1.) There is apparent on the bill some alteration of the sum originally written in figures; but as the sum in words, in the body of the bill, is *ex facie* right, and suitable to the stamp, the Lord Ordinary does not think that material.

"(2.) There is an erasure below the name of the acceptor, and the drawer's name is now written very close to the last line of the draft. The Lord Ordinary cannot make out the letters deleted, but thinks it must be inferred that they expressed the name of an acceptor, either the only one, or a co-acceptor, and most likely the name of William Graham, as averred by the advocator. In either view, the erasure seems material, and sufficient to vitiate the bill. It plainly was made before the discount of the bill, which was done on the letter of Mr Speirs, (having which letter, the bank probably cared little about the faults of the bill;) but there is no evidence that it was made before the bill went out of the hands of the advocator, nor any thing like a fair explanation of it.

"(3.) The facts appearing on the bill, record, and process produced, seem to the Lord Ordinary sufficient to infer, without further reference to the oath of the respondent, that he is not the bona fide onerous holder of this bill. The respondent is Gartmore's baron-officer. Gartmore was in the practice of getting accommodation by bills, on which his tenants put their names,—(not denied.) The advocator is tenant of Gartmore on a small farm. This bill was signed by the advocator, without any reason averred why he and the respondent should enter into a bill transaction to so large an amount for the accommodation of the advocator. The bill was discounted on a letter of Mr Speirs, the brother-in-law of Gartmore, who is not said to have had the remotest connexion with, or interest in the advocator, in any way, or any reason whatever for taking the responsibility of accommodating him to so considerable an amount. There is no protest against the advocator, as acceptor, for non-payment. There is no marking that the bill was paid to the bank, or to his indorsee, by the respondent. No demand is made for some years by the respondent, for repayment to him of so considerable a sum as £250, paid for the advocator on this bill. An action for payment of a gathered account is raised by

No. 29. Graham reclaimed, and the Court having themselves inspected the bill—

Nov. 21, 1833.
Browne v.
Robertson.

LORD CRINGLETIE.—The erasure is perfectly clear, and I distinctly see the letters “W.” and “Gr.” where the erased words stood—I can have no doubt that the interlocutor is right.

LORDS GLENLEE and MEADOWBANK concurred.

LORD JUSTICE-CLERK.—I also agree; and besides the erasure, the letter of Mr Speirs, Gartmore’s brother-in-law, and the entry in Gartmore’s book, clearly show that there was no true transaction between Graham and M’Ewen.

THE COURT accordingly adhered.

WM. MERCER, W.S.—GEO. DUNLOP, W.S.—Agents.

No. 30. EDWARD BROWNE and Others, Pursuers.—*Jardine—Anderson.*
A. ROBERTSON and J. BENNET, W.S., Defenders.—*Jameson—Robertson.*

Process—Reclaiming Note—Expenses.—Certain documents appended to a reclaiming note being alleged not to have been before the Lord Ordinary, the Court remitted to his Lordship to point out what documents had been before him; and his Lordship having made a return, that all, except one of little importance, which was ordered to be withdrawn, had been before him, and the party taking the objection having ultimately gained the cause with expenses, the expense of this remit disallowed, except as to a small sum, held to effeer to the document ordered to be withdrawn.

Nov. 21, 1833.

2d Division.
J. Mackenzie.
T.

IN an action at the instance of Browne, &c., trustees for the Royal Exchange Assurance Company, against Robertson and Bennet, W.S., for payment of a debt due them by George Pentland, under decrees of maills and duties obtained by them against him, as tenant of the lands of Bachilton, (over which the Assurance Company held a conveyance as security from their debtors, the proprietors, Lord and Lady Elibank,) under a guarantee granted by Robertson and Bennet, as the condition of their staying the execution of diligence they had taken out against him, the Lord Ordinary decerned against them, the Assurance Company granting an assignation, as had been stipulated for in a minute of agreement between the parties. Robertson and Bennet reclaimed, and appended to their reclaiming note certain documents which the Assurance Company objected to as not having been before the Lord Ordinary. The Court

the respondent against the advocator, in which not a word is said of any claim on this bill. Lastly, There is the entry in the books of Gartmore, the respondent’s employer, which the respondent admits to have been made there, and does not say was made unfairly, and of which he does not offer any explanation whatever, and which, the Lord Ordinary thinks, may at least be taken to the extent of showing that Gartmore, as well as Mr Speirs had—certainly that he stated himself to have—something to do with this bill. In all these circumstances, the Lord Ordinary is unable to have any doubt that the respondent’s account of the matter is false, and that he is not a bona fide onerous holder of the bill, as he says.”

on this remitted to his Lordship "to say, whether the documents in the appendix, and objected to, were before his Lordship at advising the cause, and whether they can be competently founded on in this cause?"

No. 30.

Nov. 22, 1833.

Crawford v.
Ballantine's
Trustees.

The Lord Ordinary thereupon pronounced this interlocutor:—"Finds that the documents in the appendix, and which were objected to, with the exception of the last document, were before the Lord Ordinary, and considered by him as competent to be produced in this process, and, with this finding, makes great avizandum to the Lords of the Second Division."

M'Micking v.
Grahame.

The Court on this ordered the last document (a letter of little consequence) to be withdrawn. On the merits they adhered to the Lord Ordinary's interlocutor, and found additional expenses due. When the auditor's report came to be considered, Robertson and Bennet objected to the Assurance Company being allowed charges to the extent of £7, 7s. for the remit to the Lord Ordinary, which they had obtained by an unfounded allegation, that the documents appended to the reclaiming note had not been before his Lordship. The Court disallowed £4, 4s., and allowed £3, 3s., in respect of the single document reported not to have been before his Lordship.

WALTER DICKSON, W.S.—JAS. BENNET, W.S.—Agents.

MISS JANET CRAWFURD, Pursuer.—*Cowan*.

No. 31.

BALLANTINE'S TRUSTEES, Defenders.—*A. Wood*.

Process—Interim Decree.—An admission in defences held to warrant interim decree although a record not closed.

WHERE a party admitted in his defences that interest upon a sum of £500 was due, and did not allege that a less rate of interest than 3½ per cent was exigible, interim decree granted for a sum of arrears of interest at that rate, while a record was made up quoad ultra.

Nov. 22, 1833.
1st Division.
Ld. Fullerton.
S.

W. PATRICK, W.S.—R. COWAN, W.S.—Agents.

THOMAS M'MICKING, Pursuer.—*Jameson—More*.

No. 32.

ARCHIBALD GRAHAME, Defender.—*Monteith*.

Sale—Partnership.—A party who held forty shares in the stock of a Company incorporated by statute, marked in the books as Nos. 55 to 94 inclusive, after selling thirty to several purchasers, without specifying their numbers, sold ten to another, who refused to pay the price, unless the proper number of each share was specified in the transfer; held, in reference to the terms of the statute, that this was not a relevant defence.

By the statute 5 Geo. IV. c. 69, incorporating the joint stock company called the London Street Company, in Glasgow, it is provided (§ 18), that "the transfer of a share may be in the words following, or words to

Nov. 22, 1833.
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S.

No. 32. the like effect: I, A B of , in considera
 tion of paid to me by C D of
 Nov. 22, 1833. , do hereby sell, assign, and transfer to the said C D, the
 M'Micking v. sum of , being shares of the capita
 Grahame. stock of the commissioners for making a new street in the city of Glas
 gow, called London Street, to hold to the said C D."—"Such convey
 ance shall be entered by the clerk in a book, to be kept for the purpose,
 and "until such entry of such conveyance, such purchasers shall have n
 right to the shares thereby conveyed." It is also provided, that the divi
 dends shall be paid to the persons appearing to be proprietors in the
 said books; and (§ 38) that the "committee of management shall, and
 they are hereby required to cause the names and designations of the
 several persons who shall be entitled to shares in the said street or under
 taking, with the number of the shares, and also the proper number by
 which every share shall be distinguished, to be fairly and distinctly en
 tered in a book to be kept by their clerk; and, after such entry, to cause
 the same to be signed by their chairman, and shall also cause a certificate
 so signed by the chairman and clerk, to be delivered to every proprietor
 on demand, specifying the share or shares to which he or she is entitled
 in the said undertaking; and such certificate shall be admitted in all
 courts whatever as evidence of the title of such proprietor or proprietors,
 his, her, or their executors, administrators, and assigns, to, the share or
 shares therein specified; but the want of such certificate shall not hinder
 or prevent the owner of any of the said shares from selling or disposing
 thereof."

The late Mr James Andrew was a holder of forty shares in the con
 cern, corresponding to Nos. 55 to 94 inclusive. He sold ten of these
 shares to each of three individuals, and executed transfers in their
 favour, without individualising the numbers belonging to each lot of
 shares. At this time all the shares were of equal value. Afterwards,
 on 23d January, 1826, he addressed the following letter to Mr Archibald
 Grahame, writer in Glasgow: "Sir—I hereby make offer to you
 of ten shares belonging to me in the London Street Joint Stock Com
 pany, at the price of £250 sterling, payable at Whitsunday, 1831, with
 the lawful interest thereof from Martinmas last till payment; and upon
 receiving payment of the said price, and interest thereof, of which I
 oblige myself to accept at any time before the said term of payment, I
 become bound to grant you a valid and legal conveyance to the said ten
 shares, and whole profits and emoluments thereof since the commence
 ment of the said Company." Grahame replied that he "accepted the
 said offer, and bound himself accordingly." Andrew having died before
 the term of payment arrived, Mr Thomas M'Micking was appointed fac
 tor loco tutoris to the younger children, and having expedited a confirma
 tion in their favour as next of kin, he tendered to Grahame a transfer of
 the remaining ten, out of the original forty shares of the Company, and
 claimed payment of the price. Grahame objected that the transfer

to be registered, and to draw dividends; that this was implied by the schedule of transfer given in the statute, where the blank before the "shares" was meant to be filled in with a numerical notation of so as to individualise the subject transferred; and that this required lately become important, in consequence of an act passed in 1831, provided, that the property was to be divided by lot among the owners. M'Micking answered, that the blank in the schedule might aptly be filled up by the one word "ten," prefixed to the word "shares," as in any other manner; that it was expressly provided, that the certificate of entry of a share with its proper number, should prevent the owner of any share from selling and disposing thereof; that the date of the exchange of missives, Grahame should have required the numbers to be specified, if he was ever to insist for it, at which time there could have been no difficulty in arranging this, as it was then a matter of indifference how the shares were numbered; that, in point of law, it was still immaterial which of the numbers was affixed to each share, that the other three purchasers had got an assignation precisely on the same terms now tendered to Grahame; and that Grahame should deal with the other three purchasers as to their respective numbers, and the pursuer could do nothing farther, and had done all that was required by the missive of sale.

The Lord Ordinary, "in respect of the clause of the statute founded on by the defender, finds, that the pursuer is bound to specify the ten shares sold by their numbers, and appoints him to lodge in process a draft conveyance, in terms of the statute, and containing such specifica-

No. 32. The pursuer reclaimed.

Nov. 22, 1833.
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Grahame.

LORD PRESIDENT.—I think each share ought to have its own proper number. The late Mr Andrew should have specified what numbers composed each lot of ten, when he sold them to the three first purchasers, and then there could have been no difficulty as to the remaining ten sold to the defender. It was no fault of the defender that Mr Andrew omitted to do this; and if a difficulty occurs as to arranging what numbers belong to each purchaser, I do not think it lies with the defender to remove this, but with the pursuer, if he means to compel payment of the price.

LORD GILLIES.—I at first took a similar view, but my opinion has changed. The terms of the statutory schedule of transfer appear to me favourable to the argument, that the special number of each share is not essential to the effectual transfer, in favour of the defender, of the ten shares which were the subject of his purchase. He bought a lot of ten shares, without reference to their peculiar numbers; and the assignation tendered will transfer ten shares to him. It is true that the late Mr Andrew might have gone and had his name, and his forty shares, with their proper numbers, entered in the book referred to in the statute, and he might have obtained a certificate of the entry so made. He should have done this; but it is provided that the want of such certificate "shall not hinder or prevent the owner of any of the said shares from selling or disposing thereof." I think the defender instructs nothing to bar the sale. There is a valid sale, and a transfer in terms of the act, and the price must be paid.

Monteith, for defender.—In point of fact, the whole forty shares of the late Mr Andrew were severally numbered and registered.

LORD GILLIES.—Then I see nothing instructed to qualify any interest in the defender to have ten of these forty shares bearing one set of numbers, rather than ten of them bearing other numbers. The purchasers should arrange as to their respective numbers, as there appears to be no legitimate obstacle or interest to prevent their doing this.

LORD CRAIGIE.—I think no sufficient ground is stated to warrant the defender in refusing payment of the price.

LORD BALGRAY.—I see no trace of the defender having ever made any attempt to get an arrangement with his co-purchasers as to their respective numbers. I think the interlocutor should be altered.

THE COURT altered the interlocutor, and decerned in terms of the libel, with expenses.

J. and W. DRYMOCK, W.S.—T. GRAHAME, W.S.—Agents.

as, that this created no impediment to the purchaser making his holding
and consequently that he had no title to reduce the heir's titles so made up.
By having threatened to challenge a sale by his father, found liable in the
of raising an action to have its validity declared, though before it was
satisfied that he would not oppose, if the conclusion for expenses were
from.

late Charles Hamilton, father of the defender, held the estate of Nov. 22, 1833.
in, under the fetters of a strict entail. In 1807, he carried through 2^d DIVISION.
of a portion of it called Sunnyside, under the 42 Geo. III. c. 116, 1st Ed. Moncreiff.
emption of the land-tax, and granted to the purchaser a disposition
double manner of holding, and containing procuratory and precept.
after the purchaser, declaring that he had made the purchase in
Hamilton himself, executed a disposition and assignation in his
in virtue of which, Hamilton took infeftment on the precept con-
in his own disposition to the purchaser. He subsequently convey-
property so disentailed, by disposition containing procuratory and
to, to Claud Russell, accountant in Edinburgh, in trust for payment
debts. Mr Russell took infeftment on the precept, and in 1811,
he lands to Archibald Keir of Avenholm, granting a disposition
procuratory and precept, and on that precept Keir was infeft. Finally,
having become insolvent, conveyed the property, by disposition con-
procuratory and precept, to the pursuer, Fullarton, as trustee for
creditors, who took infeftment thereupon. Charles Hamilton died in
leaving a son, the defender, then in minority, who succeeded him
of entail, and who made up his titles under the entail as heir to
her, by precept of clare constat from the superior, the Duke of

No. 33.
 Nov. 22, 1893.
 Fullarton v.
 Hamilton.

effectual, and that he (Fullarton) had the only right to those lands; and further, containing a conclusion for expenses. On this summons being served, the defender's agents wrote to Fullarton's, stating that they would offer no opposition to decree being pronounced, provided an amendment were made, so as specially to limit to Sunnyside the reductive conclusions which they considered to embrace the defender's titles to the whole estate; and to conclude for expenses against such only of the defenders as should appear and oppose. This Fullarton refused, and the summons was accordingly called. Defences were then given in for the defender, pleading—

1. That as he did not now dispute the validity of the sale, or of Fullarton's title, the conclusion for expenses against him in an action to have the validity declared was unwarranted.

2. That Fullarton had no title to insist for reduction of the defender's titles, inasmuch as while Fullarton continued to hold Sunnyside base, the defender was entitled to enter with the overlord in the whole lands, and the taking up the mid-superiority of Sunnyside was so far a completion of the title of Fullarton, and no obstacle was thereby opposed to his obtaining confirmation from the overlord, or executing the procuratory in the original disposition of Charles Hamilton, which it was still equally competent to do, as while that party was alive, notwithstanding the infeftment of the defender on the precept of clare constat from the overlord. And,

3. That at all events Fullarton was not entitled to call for a total reduction of the defender's titles, as it was contended he truly had done in this summons.

On the other side it was pleaded—

The summons is sufficiently qualified so as to apply only to the defender's titles to the lands of Sunnyside, and as to these, Fullarton has a proper title and interest to insist to have them set aside, inasmuch as by the defender's infeftment therein under the overlord's precept of clare constat, the immediate fee under the overlord is full, so as to create a mid-impediment to Fullarton's resigning on the procuratory in the original disposition, and so becoming the immediate vassal of the overlord, which he has right to become under that disposition, and from which the defender was not entitled to exclude him. Then as to expenses, the defender having once intimated an intention to challenge his right, he was entitled to bring a declarator of the validity thereof, and to conclude for expenses against the party whose threat had rendered it necessary.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: *—"Having considered the summons and defences, and heard parties'

* "It was anxiously maintained by the pursuer's counsel, that the defender was not entitled to include the lands in question in the precept of clare constat, and that the title so made creates a mid-impediment, to prevent the pursuer from obtaining the

ors, particularly on the second and third defences, which consist
 ons to the pursuer's title to insist in the reduction; in respect
 pursuer stands infeft in the lands in question by base holding,
 : several conveyances mentioned in the defences, flowing from
 al disposition by the deceased Charles Hamilton, father of the
 and containing procuratory of resignation and precept of sasine,
 neither the pursuer, nor any of his authors, has completed any
 :signation, or confirmation, to be held of the superior of the said
 Hamilton; and, in respect that the title made up by the defender,
 ir of the said Charles Hamilton, by precept of clare constat,
 any manner interfere with, or affect either the title of the pur-
 sue property, as held by his subaltern infeftment, or his right to
 a title to be held of the superior of the said Charles Hamilton
 efender, his heir, under the disposition and procuratory of re-
 granted by the said Charles Hamilton: Finds that the pursuer
 le or interest to call for or reduce the precept of clare constat,

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 Hamilton.

procuratory of resignation, or obtaining a title by confirmation. The
 jury, from respect to the statements so urged, has taken time to consider
 carefully. But he cannot see either that while the subvassal continued
 e, there was any thing to prevent the heir of the grantor of the procura-
 taking, or the superior from granting, a mere renewal of the investiture
 on of the heir, or that such renewal can present any obstacle whatever
 uer rendering his right public by resignation, or obtaining a confirmation.
 investiture is plainly a part of his own title, as long as he chooses to hold
 grantor; and so far from being an injury to him, it is an advantage, in so
 ee of the mid-superiority is thereby full. In fact, the only party who could
 an interest to object to the precept of clare was the over-superior; but he
 sen to grant it, no injury can thereby arise to the pursuer, who, by exe-
 procuratory, can at any time supersede the infeftment of the defender
 : of the grantor, as effectually as he could have superseded that of the
 mself in his lifetime. The procuratory is just as effectual after the death
 and, as the defender in this point clearly represents him, and is eadem
 : is equally effectual against him.

admitted, and taken for granted on all hands, in the case of Dundas v.
 3, February 10, 1769, that it was quite competent for the heir of the
 such a procuratory, to obtain a renewal of the investiture in his own per-
 dy question being, whether the grantor, holding by base infeftment, could
 n to do so: and, indeed, how can there be a doubt of this, when it is
 at if the grantor of the procuratory had not been himself entered with
 r, the grantor could compel the heir, as he could have compelled the
 o take an entry; in which case, he would come precisely into the situa-
 ich the defender now stands in regard to the pursuer.

ard Ordinary thinks that the pursuer is entitled to the expense of his
 , whether the disputed letter, stated by the defender to have been sent,
 by the pursuer, was really sent and received or not; because, by the
 timations of an intention to challenge the title, he disturbed the validity
 rendered a declarator necessary; and, though he thinks him wrong as to
 len, he does not think there is ground for subjecting him in the past ex-
 that account."

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Hamilton.

and instrument of sasine mentioned in the summons, and so far sustains the second defence: Finds, that if the pursuer were otherwise entitled to insist in the reduction, the conclusions of the summons are sufficiently qualified to prevent its application to any lands contained in the deeds called for, other than those held by the pursuer, and, therefore, subject to the previous findings; repels the third defence as unnecessary: Finds that the pursuer has a sufficient title and interest to insist in the declaratory conclusions of the summons, and for expenses; and, in respect that the defender states, that he does not object to decree of declarator being pronounced, finds it unnecessary to allow a record; and finds, decerns, and declares in terms of the libel, in the declaratory conclusions thereof: Finds the pursuer entitled to the expense of raising the summons as a summons of declarator, and bringing the same into Court, and of supporting the same against the defence on the point of expenses; and finds no other expenses due to either party."

Both parties reclaimed—Fullarton on the merits, and the defender as to the expenses awarded against him.

LORD CRINGLETIE.—I think the pursuer ought to have restricted his libel, so as to apply the reduction to the lands of Sunnyside only, because the precept of clare in favour of the defender is a catholic right, and unimpeachable as to the other lands contained in it, for although the narrative may be held to limit the conclusions, a restriction would have made it more distinct. Being so restricted, I think that the precept and infeftment ought to be reduced, in so far as relates to Sunnyside, and decret of declarator pronounced in terms of the libel. I think that on this the superior is entitled to grant a charter to the pursuer. Otherwise, I doubt the right of the superior to grant a charter of resignation to the purchaser from the pursuer's father, after having accepted the defender as his vassal. Quo modo constat, that the pursuer may not have renounced his right to execute the procuratory. Put the case that the defender had sold the superiority to a third party, who was received by the superior, would the pursuer's resigning, on the procuratory of resignation granted by the defender's father, annul the defender's infeftment, and that of the purchaser, from him? Certainly not. The first infeftment would carry the subject; and the effect of the defender having taken infeftment on the precept of clare constat, appears to be exactly the same, with this difference, that the defender would be obliged to denude, and convey to the pursuer, whereas the purchaser from the defender would not. By the death of Charles Hamilton, the fee returned to the superior, just as it would have done by resignation; and the defender's infeftment on his precept appears to me to be valid, and, in my opinion, it requires to be taken out of the way, either by a reduction or a voluntary reconveyance. The superior having given infeftment to his vassal, has filled the fee, and it will require a resignation in his hands to enable him to give it away to another. The defender therefore must reconvey to the pursuer, or his right must be reduced, in order to vacate the fee, and entitle the superior to grant a charter in terms of Charles Hamilton's resignation. As to the expenses, when one reads the correspondence, I think these should be given, as the action was really rendered necessary by threats from the defender to challenge the pursuer's right.

D GLENLEE.—I am inclined to adhere on the grounds stated in the interlocutor. **No. 33.**
 Infestment was immediately taken, and so the purchaser was secured in the
 same title; and the dominium directum was full during the lifetime of the purchaser. **Nov. 22, 1833**
 , just as it is now, and nothing could be done to prejudice his right to the property. **Borthwick v.**
 same title. The Duke, however, must give the purchaser a charter of resignation. **Bremner.**
 and he may get it now, whenever he likes. The infestment of the heir is no **Henderson v.**
 ground, and there is nothing wrong in the tutor making up titles under the entail; **Geddes.**
 see no reason to alter the interlocutor on either point. Hamilton gave
 rise to the action being brought, and so became liable for the expense of raising.

D MEADOWBANK.—I am of the same opinion.

D JUSTICE-CLERK.—I entirely agree.

THE COURT accordingly adhered.

JOHN ELDER, W.S.—M'INTOSH and DUCAT, W.S.—Agents.

RICK BORTHWICK, for NATIONAL BANK, Pursuer.—Shene—More. No. 34.
JAMES BREMNER, Defender.—Cuninghame—Robinson.

of Exchange—Retention.—A bill of exchange having been transmitted, indorsed
 to a bank for discount, and the bank having declined to discount, but not having
 returned the bill—held, that they could not retain it in security of any claims for
 which they could not specially instruct that it was agreed to be allowed to be so
 retained.

QUEL of the case mentioned ante, XI. 716, which see. **The Bank Nov. 22, 1833**
 failed to prove that they had been authorized to retain the bill **2d Division**
 in security for any sum except the £20, which had been repaid, **Ld. Medwyn**
 Lord Ordinary, in respect thereof, sustained the defence, “that the **T.**
 pursuer is not an onerous indorsee of said bill,” and assoilzied, but with-
 out expenses, in consideration of the defences originally pleaded having
 been well founded.

Both parties reclaimed—the pursuer on the merits, and the defender
 on his not being found entitled to expenses. The Court adhered on
 the merits, but allowed the defender his expenses since the former inter-
 locutor.

GOLDIE and PONTON, W.S.—J. and F. SOUTER, W.S.—Agents.

JOHN HENDERSON, Pursuer.—More.

No. 35.

JOHN GEDDES, Defender.—A. Wood.

next and Client.—GEDDES employed Henderson, Solicitor in **Exche- Nov. 22, 1833**
 , to conduct his defence in a prosecution for penalties under the **2d Division**
 same acts, at the instance of the Crown, in which a verdict was ob- **Ld. Medwyn**
 tained in his favour, but he refused to pay Henderson's account, on the **R.**

No. 35. ground, that had he conducted the cause properly, he might have obtained an abandonment of it from the Crown, without incurring the expense of a trial. In an action by Henderson, the Lord Ordinary decerned against Geddes, with expenses; and the Court, satisfied that his objections were utterly groundless, and that Henderson had conducted the cause judiciously and properly, and according to his instructions, adhered.

ov. 23, 1833.
Crombie v.
Landale.

W. A. G. and R. ELLIE, W.S.—A. FLEMING, W.S.—Agents.

No. 36.

JOHN CROMBIE, Pursuer.—*Wilson*.
JAMES LANDALE, and ANDREW PRIDE, Defenders.—*Deas*.

Process—Justice of Peace.—It is incompetent to call a summons of reduction of a Justice of Peace decree, on the grounds of malice and oppression, unless the pursuer has previously found caution for expenses, in terms of 6 Geo. IV. c. 48, § 15; (the Small Debt Act.)

ov. 23, 1833. CROMBIE raised an action against Landale and Pride, to reduce a decree pronounced by the Justices of the Peace, under the Small Debt Act, (6 Geo. III. c. 48,) in the county of Fife, for a sum of 12s. 6d. He set forth, that he had sent 12½ bolls of oats to be grinded into meal, at the mill of Woodmill, of which James Landale was tenant, having Andrew Pride for his servant; that he paid the dues, being 12s., and got a receipt, holograph of Pride; that he had nevertheless been summoned by Pride, acting for Landale, before the Justices, to pay the same dues over again, and, though he produced the receipt, "the Justices paid no attention to it as any kind of legal evidence of the payment of the sum claimed, although admitted to be holograph of, and signed by, the said Andrew Pride, but pronounced the decree now sought to be reduced, by which the said Justices of Peace, in their capacity of judges in the said Justice of Peace Court, acted maliciously and oppressively towards the pursuer;" that in consequence of this decree, he had been incarcerated; and that these proceedings were "irregular, unwarrantable, and oppressive in the highest degree." He therefore concluded for reduction of the decree, in respect that it "had been maliciously pronounced by the Justices of the Peace, in their capacity as judges;" and for damages, in consequence of the incarceration.

17 DIVISION.
1. Moncreiff.
B.

By the above statute, § 15, it is enacted, that, "In a case of reduction on the alleged ground of malice and oppression, the pursuer shall, before the summons of reduction is called, be obliged to find sufficient caution in the hands of the clerk of Court, for payment of such expenses as may be awarded against him."

The summons was called without caution being previously found for expenses. The defenders pleaded several preliminary defences. The first was, that as it was not libelled that the Justices had been acting out

the statute, they were entitled to its protection; and therefore the summons was inept, as no relevant grounds of malice and oppression had been laid. The third preliminary defence was, that caution not having been found for expenses, though this was expressly required by 6 Geo. IV. c. 48, § 15, it was incompetent to call the summons, and the action must be dismissed, as there was no summons legally before the Court.

The Lord Ordinary "sustained the third preliminary defence; found that the calling of the summons was incompetent, in respect that caution had not been previously found, in terms of the express enactment of the 15th section of the statute 6 Geo. IV. c. 48; found, that the action is not legally in Court by the summons so called, and dismissed the same, without prejudice to any other summons which may be duly brought into Court, and decerned; and found the pursuer liable in expenses."*

The pursuer reclaimed. The Court unanimously adhered.

J. ANDERSON, S.S.C.—RICHARDSON and LANDALE, W.S.—Agents.

* NOTE.—The Lord Ordinary is very clearly of opinion, that the first preliminary defence is also well founded, and that there is a total incompetency in the return under the summons, as libelled; because it is neither laid on any violation of the statute in the form of the proceedings, nor is any statement made relevant to malice and oppression on the part of the Justices. The facts represented, at the utmost, amount to error in judgment, whether in regard to the title of the party prosecuting, or the merits of the case; though, as to the title, it is not even said that there was a defect of title. To sustain such a summons, would render reduction of any small debt decree competent, and defeat the statute. There is no reduction of the diligence or execution.

"But the Lord Ordinary, conceiving the 15th section of the statute to be one of great importance, thinks it his duty to give judgment on that, as exclusive of every thing else. The pursuer's counsel stated that caution had been found. But the Lord Ordinary has ascertained the state of the fact from the clerks. No caution commenced had been either found or tendered, when the summons was called in Court on the 30th day of May last. But long after this, and after defences were lodged, and before enrolment, a bond of caution was offered in the office of Mr Bell, the Inner-House clerk, on the 21st of June. But by Mr Bell's direction, it was refused to be acknowledged as good caution, the cautioner not being held sufficient. This, however, is not the proper point on which the defence rests. By the statute, the Lord Ordinary understands it, it was incompetent to call the summons at all, no caution having been previously found. The Lord Ordinary must consider the pointed enactment, which differs essentially from that in the previous statute, 30 and 40 Geo. III. c. 48, as intended for an important purpose; and therefore it cannot be competent for a party, libelling malice and oppression against a judge, to evade the statute by getting his summons called in violation of it, by deceiving the officers of Court, and then say he will supply the defect by finding caution after the summons has been thus illegally brought into Court. If the clause of the act is to have effect, it must be precisely observed, otherwise there is no summons. There had been no caution offered even when these defences were lodged."

No. 36.

Nov. 23, 1831
Crombie v.
Landale.

No. 37.

WILLIAM ADAMSON, Suspender.—*Cuninghame*,
THOMAS PORTEOUS, Charger.

iv. 23, 1833.
Adamson v.
Porteous.

Diligence—Decree in Foro.—1. A clerical error, by writing “for” instead of “per,” in extracting a decree, not sufficient to invalidate it and the diligence raised thereon
2. Bill of a suspension on the merits of an inferior court decree in foro not to be passed without caution.

iv. 23, 1833.

DIVISION.
II. Chamber.
Lord Meadow-
bank.
F.

THE charger, Porteous, raised an action before the Sheriff of Ayrshire against the suspender, Adamson, concluding for payment of the price of two parcels of leather, as sold and delivered to him, “per William How,” by two parties, Paterson and Smart, whose assignee he (Porteous) was. In defence, Adamson pleaded, that the leather had been sold to him by How, acting on his own account, and not for Paterson and Smart, and that he had paid the price to How in shoes. The Sheriff allowed a proof and thereafter decerned against Adamson. The decree was extracted but, in making the extract, the clerk wrote “for William How,” instead of “per William How;” and letters of horning and caption having been expedited, containing, of course, the same error, and Adamson having been incarcerated, he presented a bill of suspension and liberation, but without caution or consignation, on the grounds—

1. That the Sheriff’s decree was wrong on the merits.
2. That, on the face of the extracted decree and diligence, the leather being set forth as sold by Paterson and Smart, “for” William How there clearly could be no debt due to them, or their assignee, Porteous. And,
3. That the decree and diligence were inept, being disconform to the warrant, the summons, which bore the leather to have been sold by Paterson and Smart, “per William How,” while the decree and diligence bore it to have been sold by them “for William How.”

To this it was answered—

1. There are no grounds stated for passing a bill of suspension of the decree, which was in foro, on the merits of it, without caution.

2 and 3. The trifling clerical error in narrating the summons in the extracted decree, does not affect the validity of it; and the letters of horning and caption are in exact conformity to the extracted decree, which is their proper warrant.

The Lord Ordinary, “in respect caution is not offered,” refused the bill.

THE COURT adhered.

GREGG and MORTON, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

MISS MARGARET SMELLIE, Pursuer.—*Jameson*.
 THOMAS GILLESPIE, Defender.—*Sandford*.

No. 38.

Nov. 23, 18:
 Smellie v.
 Gillespie.

Proof.—A sister-in-law having offered to prove that she had taken charge of the children of her brother-in-law, on an agreement or understanding that she was to be remunerated for her services—held competent to prove this agreement or understanding *prout de jure*.

THE pursuer, daughter of a farmer deceased, raised an action against Gillespie, her brother-in-law, setting forth, that, in 1821, she had been employed by him as housekeeper or governess, to take charge of his children while attending school at Linlithgow; that, from that period till 1829, she had done so accordingly, she and the children residing in a house in Linlithgow, taken for that purpose; that the expense of the establishment was borne by Gillespie and two other brothers-in-law, whose children also resided with her, but that she had never received any remuneration for her own trouble and services; and concluding for £15 a-year from Gillespie, as a fair remuneration for her services in regard to his children. In defence, Gillespie stated, that the pursuer, on the death of her father, in 1819, being left in indigent circumstances, was for two years received by him and two other farmers, Miller and Cochrane, (who had also married sisters of the pursuer,) into their houses by turns; that, in 1821, they had agreed to take a house for her in Linlithgow, where their children might reside while attending school, they bearing the whole expense of the establishment, but making no further allowance to the pursuer, who by this arrangement had the benefit of free house and maintenance; and that no demand had been made for remuneration till after the last of the children had been taken home, when the pursuer wrote asking £5 a-year, (not £15, as now concluded for)—and he pleaded, 1. Prescription; and, 2. That no remuneration was stipulated for or due to the pursuer. A record was thereafter made up, in which Gillespie dropped his plea of prescription, and the pursuer averred, that she had agreed to go to Linlithgow, only on the understanding that she was to be allowed a liberal remuneration for her services, though the amount was not fixed; and that the house had been chiefly furnished with furniture belonging to her; but she admitted that she had made no demand for remuneration till after the last of the children had left her.

The Lord Ordinary, after hearing parties, appointed “the cause to be called, that the pursuer may state in what way she will prove the averment in the first article of her condescendence.” His Lordship added the subjoined note.*

* “The Lord Ordinary does not think that the triennial prescription applies in this case, as the defender does not admit that the pursuer was engaged for wages, but

No. 38. Thereafter the cause being called, his Lordship pronounced this interlocutor:—"Having heard counsel for the parties, allows the pursuer to prove, scripto vel juramento, the promise stated in the first article of her condescendence."

Nov. 23, 1833.
Smellie v.
Gillespie.

The pursuer thereupon reclaimed, and contended, that the services being admitted to have been performed, the presumption was, that they were not gratuitously given, and the onus, therefore, lay on Gillespie to prove that they were so, and not upon the pursuer to prove that they were not; and, at all events, that, if the onus lay on her, she was entitled to a proof prout de jure, and could not be limited to one scripto vel juramento.

alleges that the agreement which was made was fulfilled. The pursuer states in the summons, that she was applied to by the defender to go to Linlithgow as a housekeeper or governess, for the purpose of taking charge of his children, and admits that no specific agreement was made in regard to the amount of salary, at the time of entering into the said agreement, nor during its currency, and claims remuneration on the ground of trouble of the charge, and benefit to the defender. On the other hand, it is stated in defence, that, after her father's death, the pursuer having no home, the two defenders in two similar actions (and the defender in this action, who are all married to sisters of the pursuer, joined in the proposal) agreed to take a house for the pursuer in Linlithgow, and to pay the rent and taxes, to keep a maid-servant, and pay the whole expenses of housekeeping, provided the pursuer kept house for the children of the defenders, her own nephews, when attending the school; and that it was distinctly understood that the maintenance thus afforded to the pursuer, providing her with clothes, and occasional presents of money, was to be the recompense for looking after the children. It is distinctly stated by the defender, that 'she never made any demand, during the whole time the children lived with her, in name of salary or otherwise,' and that it was not till after the defender had taken home the children that she wrote the defender, demanding payment of £5 per annum, for taking charge of them. There is no denial of this explicit averment. It is only 'denied that the pursuer never before demanded an adequate remuneration for her services and use of her property.' And then there is an admission as to the letter in 1829. Under these circumstances, the Lord Ordinary does not think that the pursuer has any legal claim against the defender. If she had intended to make any farther demand than the maintenance, &c. afforded to her, it was her duty to have done so during the eight years she was thus maintained by her brothers-in-law. If she was not satisfied with this, she was bound to have told them so, and to have made a specific agreement with them, and she cannot now come against them, and make a claim for large arrears, while they were all along impressed with the idea that they had fully satisfied her expectations. As to being governess for her nephews, the productions in process exclude that idea. In the first article of the condescendence, however, she says, 'There was no specific agreement made as to the amount of the remuneration which she was to receive; but it was stated, and fully understood between them, that it was to be liberal, and adequate for the services expected and performed.' This is a relevant averment, and, if proved, will be sufficient to support the pursuer's action; but it is denied, and therefore it is incumbent on the pursuer to prove it. The pursuer surely has been ill advised in raising her demand from £5 to £15. This is the more unfortunate, as it may have prevented her settling with her brothers-in-law out of Court, who seem to have been very desirous of doing so."

LORD JUSTICE-CLERK.—This case is not clear in point of principle. The making no demand, I do not think sufficient to cut the pursuer out of her claim altogether. The services were important; and I cannot presume, especially in the face of the averment that she provided the furniture, &c., that no remuneration was to be allowed, and refuse to admit her to prove, except by oath of the defender. This is not a case of long contract, but *de anno in annum*; and I think her entitled to a proof *prout de jure*. No. 38.
Nov. 23, 183
Smellie v.
Gillespie.
A. B. v. C. I

LORD MEADOWBANK.—I am inclined to agree.

LORD CRINGLETIE.—I think that she is not to be limited to her mode of proof.

LORD GLENLEE.—This is just an ordinary claim for wages for services performed, and each year runs a course of prescription; and my difficulty was, that the constitution is denied, and, consequently, that the only mode of proof is by writ or oath. But I am not very clear.

LORD MEADOWBANK.—Prescription is dropped in the pleas.

THE COURT altered, and remitted to the Lord Ordinary to allow a proof *prout de jure*.

WORTHESPOON and MACK, W.S.—J. B. WATT, S.S.C.—Agents.

A. B., Petitioner.—*Milne*.

No. 39.

C. D., Respondent.—*Anderson*.

Poor's-Roll.—An applicant for the benefit of the poor's-roll, having got his certificate signed by two parties, designing themselves elders, and also by the minister of the parish—held, that the subscription of the minister implied his attestation that the other subscribers were elders, and therefore that the petition should be remitted to the lawyers for the poor, notwithstanding an allegation that these parties had never been ordained elders.

It was objected to a petition for the benefit of the poor's-roll, that the certificate, produced along with the application, though apparently signed by two elders, was not so in reality, as the parties had never been ordained. The petitioner replied, that the parties had designated themselves elders at subscribing; that they were in the habit of acting as elders in all respects, and were understood to be regularly ordained; and that he was not bound to produce any other certificate. Nov. 26, 183
1st DIVISION

LORD GILLIES.—The minister of the parish signs the certificate along with these parties who subscribe as elders. He thereby virtually attests the fact of their being elders, and that is *ex facie* evidence sufficient to entitle the Court to remit the case to the consideration of the lawyers for the poor.

Case remitted accordingly to the lawyers for the poor.

No. 40.

WILLIAM HOWE and Others, Petitioners.—*Ivory.*
ALEXANDER MANN, Respondent.—*Jameson—Neaves.*

Nov. 26, 1833.
Howe v. Mann.

Bankruptcy—Sequestration—Process.—1. When the first ten months have elapsed after sequestration, and the commissioners have audited the trustee's accounts, fixed his commission, and ascertained the first dividend—any creditors who have not produced their claims and grounds of debt prior to the minute of the commissioners, are excluded from all share of that dividend. 2. Petition by the postponed creditors to ordain the trustee to rank them on the first dividend, disposed of on answers, without closing a record, or remitting to the Lord Ordinary.

Nov. 26, 1833.

1st Division.
B.

ON November 28, 1832, the estates of Campbell and Co. were sequestrated, and Alexander Mann was appointed trustee. At the end of ten months the trustee submitted his accounts to the commissioners, who, on October 4, 1833, audited them, and, by minute in the sederunt-book, fixed “the sum to be divided among the creditors of the said James Campbell and Co., at £872, 16s. 6d., (which will yield a dividend of about 2s. 3d. per pound on the claims lodged;) which, after deducting the trustee's commission, will leave a balance in the trustee's hands, amounting to £119, 1s. 5d., to meet contingent expenses.” Of the same date, the trustee drew up a scheme of ranking, of the creditors on the fund. He then duly advertised that the state and scheme should lie in his hands till November 29, 1833, “when a first dividend will be paid to those creditors who have ranked and proved their claims in terms of the statute.”

Thereafter claims were lodged between October 16 and November 15, by William Howe and others, amounting to £2468. The claimants offered to indemnify the estate for any expense occasioned by their delay, and they insisted on their right to be ranked upon the fund appropriated for the first dividend. The trustee refused this, and they presented a petition, craving the Court to ordain the trustee “to rank them for their respective debts upon the funds realized, and to assign to them dividends corresponding to the said debts proportionally along with the other creditors of the bankrupt, under deduction only of such expense as may have been occasioned by the neglect of the petitioners to lodge their claims within the first ten months after the date of the sequestration; and in the meantime to interdict the said Alexander Mann from paying the dividend which has been declared, without retaining sufficient to afford a dividend to the petitioners equal to that to be paid to the other creditors.” In support of the petition, they stated that there was no probability of funds being afterwards recovered sufficient to place them on an equality with the other creditors, if they were excluded from the first dividend.

The trustee pleaded, that by the 32d, 45th, and 46th sections of the Bankrupt Act, it was declared, that the nett proceeds of the estate, *recovered at the expiration of the first ten months*, should be considered

as exclusively belonging to the creditors who had produced their claims No. 40.
and grounds of debt, prior to the date of the minute by the commissioners, Nov. 26, 1833.
auditing the trustee's accounts, fixing his commission, and ascertaining Muir v. An-
the dividend. The petitioners were thus cut off from all share in the derson
first dividend, and must, in the meantime, be postponed.

The Court, on advising petition and answers, without closing a record,
or remitting to the Lord Ordinary, refused the petition with expenses.

LORD PRESIDENT.—The petitioners appear to have hung back until they saw
that a sum had been realized by the exertions and at the risk of others, and then
to have come forward to claim a share of it. But the statute cuts off a claim which
is so tardily made as theirs, at least so far as concerns the first dividend at the end
of the year.

LORD BALGRAY.—The trustee has acted with great propriety. The claim in
the petition is not sanctioned by the statute, and it was his duty to disallow it.

LORDS CRAIGIE and GILLIES concurred.

W. MILLER, S.S.C.—G. BINNY, W.S.—Agents.

JOHN MUIR, Advocator.—*D. F. Hope—Thomson.*

No. 41.

WILLIAM ANDERSON, Respondent.—*Cuninghame.*

Proof—Judicial Remit—Process.—Where two inspectors, under a judicial remit,
were at issue with each other, and had returned an incomplete report, the Court
enjoined a third party with them, and remitted of new.

A DISPUTE having occurred as to the expense of the mason work of a Nov. 26, 1833.
house, the original plan of which was altered during the course of its
erection, and an action having been raised by William Anderson, the 1st Division.
builder, against John Muir, the proprietor, the Sheriff made a remit to Ld. Corehouse.
two men of skill to examine and report. They returned a report, and D.
afterwards emitted relative depositions. The Sheriff pronounced a de-
cree, which Muir brought under advocacy. As the inspectors were at
issue with each other in several respects, and had returned an incomplete
report, the Court remitted to the Sheriff to conjoin a third party with
them, and to obtain a new report.

R. WELSH, S.S.C.—J. WILSON, W.S.—Agents.

No. 42.

J. OWEN and J. MORRISON, Suspenders.—*Maitland—J. Anderson.*CHARLES BRYSSON, Charger.—*D. F. Hope—Wilson.*Nov. 26, 1833.
Owen v. Brys-
son.

Cautioner—Bill of Exchange.—A cautioner for payment of a composition by instalments, at different dates, indorsed the instalment bills, and obtained from the bankrupt an assignation to a certain amount of effects to meet them, and charged the bankrupt on one of these bills which he had retired—Held a sufficient ground of suspension that he would at the date of the charge have had sufficient funds wherewith to have retired this bill out of the proceeds of the effects impressed into his hands, had he not retired certain other of the instalment bills before they fell due.

Nov. 26, 1833.

2d Division.
Ld. Mackenzie.
R.

THE affairs of the suspender, Owen, having become embarrassed, he called a meeting of creditors in December, 1826, and made offer to them of a composition of 11s. in the pound, payable by three equal instalments, at three, six, and nine months, the other suspender, Morrison, and the charger, Brysson, becoming bound as cautioners. This offer was agreed to, and bills were accordingly granted to the several creditors for the respective instalments, at three, six, and nine months, accepted by Owen and Morrison, and indorsed by Brysson, who was to be entitled to relief from the two former, and to whom, for the purpose of meeting the instalment bills, there was assigned over by Owen effects to the amount of £610. Brysson having charged Owen and Morrison for payment of one of those instalment bills which he had retired, they brought a suspension, on the ground that, at the date of the charge, the funds in his hands were not exhausted. The determination of this point depended on whether Brysson was to be allowed to take credit for the amount of the third instalment bills of certain creditors, which had not then fallen due, and which he had paid during their currency. The Lord Ordinary and the Court, holding that he was not entitled to have credit for the amount of those bills at the date of the charge, suspended simpliciter.

R. KENNEDY, W.S.—D. GRAY, W.S.—Agents.

Nov. 27, 1833.

1st Division.

Poor's Roll.—The Lord President intimated to the lawyers for the poor, that he had received a communication from four accountants in Edinburgh, stating their willingness to render their gratuitous professional services available to parties who required the benefit of the poor's roll. His Lordship requested the clerk to make an entry of this on the record of the Court, and took occasion to express his approbation of the liberal spirit in which the spontaneous offer had been made, of a species of assistance which was so often found necessary in the preparation of causes.

sement by the oath of the proprietor.

pursuer, Rait, proprietor of the lands of Forthill of Balgillo, Nov. 26, 1833.
agreed, in 1827, to grant the defender, Galloway, a feu of up-
three acres of these lands. Galloway entered into possession
any feu-contract, or other writing, and he paid as feu-duty for
two years at the rate of £4, 1s. 9d. per Scots acre. In the mean-
while a particular half-year's feu-duty was settled, Rait presented
him to the Sheriff of Forfarshire, praying for sequestration, and
forth in general terms that Galloway possessed the lands "feued
from the petitioner at the yearly feu-duty of £15, 9s. 9d.," this
at the rate of £4, 1s. 9d. per acre. Thereafter Rait offered a feu-
in which the feu-duty was specified as at the rate of £4, 1s. 9d.
for the first two years, and £8 thereafter. Galloway refused
to contend, that the agreement had been for a feu at the former
without any increase after two years. Rait then raised an action
in the Sheriff, narrating the alleged agreement as for a feu at the rate
of £4, 1s. 9d. for the first two years, and £8 thereafter, and concluding
that he was entitled to the ground at that rate. This being resisted by Galloway, Rait brought
an action of removing, which was conjoined with the action for pay-
ment of the feu-duty thereafter pronounced an interlocutor, finding that
the petitioner was entitled to the ground at the rate of £4, 1s. 9d. per
acre, and that Galloway's title was not proved by his (Galloway's) oath. Rait then instituted in the
Court of Session a declarator, that he had the only right to the ground
thereof, and that Galloway illegally retained possession thereof, with-
out title, and ought to be removed therefrom; ob contingentiam of

2D DIVISION.
Ld. Medwyn.
T.

No. 43. by any declaration that the feu-duty was to be increased after two years, and affords sufficient title, when followed by a rei interventus, to prevent Rait from resiling from the contract as there set forth, and his present averment to the contrary can only be proved by Galloway's oath.

Nov. 26, 1833.
Rait v. Gal-
loway.

The Lord Ordinary advocated the Sheriff-Court process, and recalled the Sheriff's interlocutor therein; and in the declarator, found "it incumbent on the defender to prove by the oath of the pursuer his averment as to the rate of feu-duty." His Lordship added the subjoined note.*

Galloway reclaimed.

LORD GLENLEE.—I certainly could never have had any idea that the prayer of the note—that the terms of the agreement should be referred to the defender's oath—could possibly be listened to. At first, however, I thought that each should prove their own averments; but now I am satisfied that the interlocutor is right. How can property be transferred without a written title? And there being no writing, Galloway must either take the feu as the proprietor offers it, or not at all. I am for adhering.

LORD CRINGLETIE.—I agree. In bargains as to land, parole proof is incompetent.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly adhered.

WILLIAM MILLER, S.S.C.—R. SMITH—Agents.

* "Although the facts stated by the pursuer in the condescendence do not support to the full extent the narrative in the summons, as it is averred that the defender unwarrantably took possession; but on the contrary, it is admitted that he was allowed to enter into possession by the pursuer, who even accommodated him with his horses and servants for ploughing the ground, still it is true that the defender is possessing without any written title to the feu; therefore he must remove, unless he can prove an agreement followed by rei interventus, and he must prove the terms and conditions of that agreement. If he cannot do this scripto, he must do it by the pursuer's oath. The evidence which he has founded on, namely, proceedings in processes for payment of the two first years' feu-duty, and ubi hoc non agebatur, is inconclusive and insufficient.

"If the case were reversed, and the defender were desirous of removing, while the pursuer attempted to hold him bound as vassal, the onus probandi of the terms of the contract would lie on the pursuer, and if no written evidence could be adduced, it would be incumbent on him to refer the matter to the defender's oath.

"It is stated that the pursuer has admitted that there was a verbal bargain, and that possession followed upon it. But if the defender founds upon the pursuer's admission, he must take it with all its qualifications, and in particular, with that as to the amount of the feu-duty. If he rejects that statement, there is no admission of a verbal bargain at all, and nothing to which the rei interventus is to apply and validate."

heritable property. 2. A destination in an heritable bond taken by me to himself and his wife, for her liferent use allenary, and to his heirs and in fee—held to import a revocation of the previous settlement, which we carried the fee to her.

WILLIAM HENDERSON, a shopkeeper in Thurso, and Mrs Menie Nov. 27, 1833.
; or Henderson, were married some time prior to 1802, with-
contract of marriage, and Mrs Henderson, so far as appear-
ught no tocher to her husband. Having no children, they, in
executed a mutual disposition and assignation, 'whereby, failing
of the marriage existing at the death of the predeceaser, they
ed to each other, mutually and reciprocally, and to the survivor,
ole property, heritable and moveable, which might belong to
espectively or in communion, at the period of the predeceaser's
with an obligation to infest, and reserving to each their liferent
remises, and to Henderson " full power to sell and dispose of
ontract onerous debts upon the heritable subjects at present be-
to me, or which may hereafter belong to me, and that with-
consent of the said Menie Sinclair, and to both of us, with mu-
sent, to alter these presents, as we may hereafter incline." At
e Henderson was proprietor of a feu, with a house which he had
thereon; but it did not appear what was the extent of his move-
operty. In March, 1819, he lent £3000 to Sinclair of Forss,
from him an heritable bond, the destination in which was " to the
William Henderson, and Mrs Menie Sinclair, or Henderson, his
and the longest liver of them two, in conjunct fee and liferent
said Menie Henderson, her liferent use of the interest thereof

2D DIVISION.
Ld. Mackenzie.
R.

No. 44.
Nov. 27, 1833.
Henderson v.
Tulloch.

derson died in July, 1829, without having executed any deed of settlement, leaving moveable funds to the extent of £2315, and heritage (including the bond above mentioned) of the value, according to the pursuers, of about £4000, and, according to the defenders, of nearly £6000. Mrs Henderson entered into possession of her husband's estate, and drew the interest of the bond during her life, but never took any steps towards making up a title thereto, although she consulted counsel as to her right to the fee of it. In 1828 she died, leaving a trust-conveyance of all her property, specially narrating this bond as part of it, in favour of the pursuers as trustees, who thereupon brought the present action against the defenders, Tulloch and Ross, as heirs-portioners of Henderson, concluding to have them decerned to make up titles to the deceased, and dispose the bond to them, as trustees of Mrs Henderson, and as such having right thereto under the mutual disposition executed by the spouses in 1802.

In defence, Tulloch and Ross pleaded, that the mutual deed of 1802 was revocable, at least to the extent of the fee of the heritage thereby given to the wife, being to that extent clearly *donatio inter virum et uxorem*; and that the destination in the bond in question, taken by Henderson from Sinclair of Forss, containing an express limitation of Mrs Henderson's right to a liferent *allenary*, and a destination of the fee to his own heirs and assignees, was an effectual revocation of the mutual deed, so far as regarded the bond, or, at least, that it was a valid exercise of the power to "dispose of" his property reserved in the deed.

The Lord Ordinary (Fullerton) found, "that the terms of the heritable bond granted by James Sinclair, Esq. of Forss, to the late William Henderson, do not import a revocation by the said William Henderson, of the mutual settlement executed by him and his late wife, Menie Sinclair, or Henderson," and therefore decerned in terms of the libel, adding the subjoined note.*

* "Considering the situation of the parties, and the nature of the mutual deed of settlement, the Lord Ordinary thinks it very questionable how far William Henderson had a power to revoke it. But, at all events, revocation of such a deed is not to be easily presumed. In the present case, there was no deed of settlement ever executed by William Henderson, altering or recalling that in favour of his wife; and the revocation is supposed to arise from the terms of the bond, taken by Mr Henderson from Mr Sinclair of Forss. Now, a document of debt certainly may contain an effectual destination of the right of credit; and if, in the bond in question, there had been a special destination in favour of persons there named, there could have been no doubt of the revocation thereby intended of Mr Henderson's former settlement. But, considering the presumptions given effect to by the Court in analogous cases, the Lord Ordinary does not think that the devolution in the ordinary words of style to heirs and assignees in a bond, can be held to import a revocation of a former settlement. As a document of debt is not the natural or ordinary instrument for the expression of the testamentary arrangements of the testator, the intention to make it so must be most clearly and unequivocally ex-

abandoned, in consequence of the objections of the debtor, who would not take the loan, 'unless the bond were taken to Mr Henderson's heirs and assignees, thus admitted to be the act, not of the creditor, but of the debtor, was intended to revoke, or had the effect of revoking, the testator's former settlement." The Lord Ordinary thinks that the destination of an heritable bond, by the execution of it taken by the creditor, must be held to have the same effect as if the creditor executed a destination thereof under his own hand, or as if the debtor executed himself generally in the bond to the creditor to pay to his nominees in a separate writ under his hand, and he executed such separate writ. If, therefore, the destination in such a bond imply a revocation in reference to that bond of a prior settlement, the Lord Ordinary has no doubt that it must have the effect of a revocation. Accordingly, if the destination in this bond had been simply to William Henderson, whom failing, to Mr John Brown of Oatfield, and his heirs, there could have been no question that the general settlement was revoked quoad feudum. But is the inference less certain from the actual destination in this case, to William Henderson in liferent alienably, and to William Henderson's heirs and assignees? In the supposed case, the ratio would have been, that unless the general settlement were revoked, pro tanto, there could have been no use in giving the bond to Mr John Brown; so in the actual case, unless the general settlement were revoked, pro tanto, there could have been no use in limiting his wife's right in the bond to liferent alienably. The inference in the one case seems as certain as in the other.

For what can be more inconsistent than limiting, by a subsequent deed, a husband's interest to a liferent only, and leaving a former revocable deed standing which gives that same party both liferent and fee? The statement of the pursuer, too, seems to make the matter still worse for them. They say that Mr William Henderson (with the approval of his wife) intended to give the fee to certain charitable institutions, and had inserted a destination of the fee to these institutions accordingly, but that the debtor objected to any other form of destination than that which now stands in the bond; and that thereupon Mr William Hender-

No. 44. the mutual settlement executed by the late William Henderson and his late wife, Menie Sinclair, or Henderson, by which they dispoise, assign, and convey to each other, and to the survivor of them, all property, heritable or moveable, which should be in communion between them, or belong to either of them, at the time of death, was a donatio inter virum et uxorem, in as far as it exceeded a reasonable provision for his wife, taking into consideration the conveyance by her in his favour, and the whole circumstances of the parties at the time when the said deed was executed: finds that the said mutual settlement, on the part of the said William Henderson, was so excessive, in as far as it conveyed to the wife, in case of her survivance, not the liferent only, but the fee of the whole of her husband's heritable property; and that it would have been at least a sufficient provision for her, although it had not given to her the said fee, but only the said liferent, along with the fee of the whole moveables: finds, that it was therefore in the power of the said William Henderson to revoke the said mutual settlement, in so far as related to the said fee of heritage, and a fortiori in relation to part thereof; and in particular, finds, that at the time he took the heritable bond for £3000 from Sinclair of Forss, he, the said William Henderson, had power to revoke the said mutual settlement, in so far as to limit the right which his wife was to acquire by surviving him, to a liferent only of the said heritable bond: finds, that accordingly in the said heritable bond the said William Henderson did take the debtor bound to pay the money, and grant infeftment to the 'said William Henderson, and Menie Sinclair or Henderson, his spouse, and longest liver of them two, in conjunct fee and liferent, for her liferent use of the annualrent thereof allennarly, and his heirs or assignees whomsoever in fee:' finds, that this express limitation of the right constituted in favour of his wife to the liferent only of this bond, implies a revocation of the settlement by him on her of the fee of his property, in

past all question, have been intended ultimately and absolutely to exclude the wife from the fee, i. e. to revoke the general settlement to that extent. If so, it could not change its meaning, if instead of the charitable institutions, William Henderson's own heirs were substituted, the limitation of the wife's right remaining untouched. It is said that William Henderson afterwards contemplated executing, conjointly with his wife, a settlement of the fee on these charitable institutions, and took the destination to his heirs and assignees, with this view. If so, he could not intend that the general settlement on her was to remain unrevoked, as far as related to this fee. But there is no legal evidence that he had such contemplation. He executed no such settlement in favour of these charities, and certain it is, that he never executed any deed, which he might have done at any time, recalling the limitation of her interest to a liferent allennarly, or directing that his heirs should make over to her the fee also, which had been taken from her. As to the plea of acquiescence, it seems incompetent to decide on that, when it is found that the party had no right to give up. But the Lord Ordinary, if there had been room for the question, would have repelled that plea."

mutually conveyed—it being enough to protect the deed that there
oneros consideration, although, when weighed against the coun-
it might not be a true equivalent; and on that principle, there
be no doubt of the onerous consideration here—Mrs Henderson
conveyed her half of the goods in communion, which, otherwise,
being no contract, would have gone to her next of kin; and, at all
there was no such gross inequality as to have rendered revocable
ed, which was truly a postnuptial contract of marriage; and,
The terms of the destination in a bond taken, as bonds always are,
urity, and not to regulate succession, cannot be held to revoke a
r deed of settlement, nor, if admissible to that effect, do they import
ation; for the destination to heirs and assignees must be construed
d explained with reference to the deed of 1802, which was the
eed regulating his succession left by the deceased; and under the
l terms, “heirs and assignees,” the bond must still be held to have
to Mrs Henderson, as designated by the settlement 1802.

this it was answered—

The opinion of the Lord Chancellor, in Hepburn v. Brown, merely
o this, that the relative value of the interests conveyed are not to
ghed in “nice scales;” but it throws no doubt on the well esta-
l rule, that wherever there is a clear excess, that must be held to be
tion said to be so far revocable; and although the judgment of this
was reversed, it was on a different view as to the question whether
was a clear excess in that particular case, and not from any differ-
a principle as to the legal rule. In the present case, the excess is

No. 44. him of the succession thereto, and a revocation of any prior settlement inconsistent therewith.

Nov. 28, 1833.
Fraser v. Hill.

LORD JUSTICE-CLERK.—On both points I have formed a clear opinion, in concurrence with that of the Lord Ordinary. We will not depart from the principle of the case of Hepburn, as laid down in the House of Lords, if applicable. But that case did not at all interfere with the doctrine of the law of Scotland, as to donations inter virum et uxorem. There is no doubt that the Lord Chancellor put the fair construction on the deed, that it was not gratuitous; and he merely puts it that we are not to weigh the relative value of what is respectively given “in nice scales,” and he is right in that. But looking at the present case, the wife having no heritage, and having made no contribution to the funds in communion, and there being an express power to sell, dispose of, and contract debt, without her consent, I have no doubt as to the power of revocation as to the fee of the heritage. Then the bond expressly declares that the wife’s right is to be confined to her *lifereant* use *allenary*, which is just an exercise of the power, even if we did not hold the conveyance of the fee of the heritage to her to be a donation. But, on the general ground, I think it clear that it is a donation, and we do not need to weigh the rights respectively conveyed by the deed 1802 “in nice scales,” for take the very clumsiest, and the one will kick the beam. I have no doubt that the interlocutor is right.

LORD GLENLEE.—I entirely agree. This is an exercise of reserved power, and the deed 1802 is not a marriage-contract, but merely a deed of mutual donation.

LORD CRINGLETIE.—I have not the smallest doubt.

LORD MEADOWBANK.—I also agree.

THE COURT accordingly adhered.

JOSEPH GORDON, W.S.—J. and L. DAVIDSON and SYME, W.S.—Agents.

J. J. FRASER, W.S., Pursuer.—*D. F. Hope.*

No. 45.

ROBERT HILL and WILLIAM PAUL, Defenders.—*Pyper.*

Process—Record—Expenses.—Where unusual delay had occurred in the preparation of a cause, and, after *avizandum* had been made with a view to close the record, the pursuer made production of several hundred documents, alleging that they were not previously within his power; held, that he was entitled to do so at payment of such expenses as the Lord Ordinary should consider reasonable.

Nov. 28, 1833.

1st Division.
Ed. Fullerton.

IN 1825, J. J. Fraser, W.S., raised an action against Robert Hill, W.S. and William Paul, trustee on his sequestrated estate, for payment of business accounts, and advances said to be due by Hill, amounting to £2000. In February, 1826, Fraser obtained a diligence against *havers*, for recovery of the accounts betwixt Hill and himself, and the vouchers thereof, which he stated to have been lent by him to Hill. The process fell asleep, but was awakened, and in December, 1828, Fraser was ordained to produce the accounts libelled on. The process again fell asleep, but was awakened.

avizandum was made with the view of closing the record, Fraser
: voluminous production of documents, in reference to which the
Ordinary pronounced the following interlocutor:—" Finds, that
avizandum was made, with the view of closing the record, the pur-
suer made a new production of documents to the amount of some hun-

Finds, that the motion of the defender for expenses in consequence
lateness of this production, is resisted by the pursuer, upon the
l that these documents were not within his power before avizandum
ade : Finds, that on this supposition, the pursuer will be entitled
luce these documents after the record is closed : Therefore, and in
t of the great delay which has already taken place in the prosecu-
f this action, appoints these productions to be withdrawn in hoc
and appoints the pursuer to close the record within ten days from
te, reserving his right to tender production of these documents
he record is closed, on the ground above stated, and to the defender
ections thereto."

er afterwards lodged a minute, offering to pay " such expenses as
fairly arise in consequence of the documents not having been lodged
usly," but objecting to close the record without lodging them.

: Lord Ordinary then pronounced this interlocutor, " In respect the
r has failed to close the record in terms of the order to that effect,
ly pronounced, sustains the defences, assoilzies the defender from
nclusions of the action, and decerns ; finds expenses due."

er reclaimed, and the Court recalled the Lord Ordinary's interlo-
and remitted to the Lord Ordinary to allow the productions to be
ed on payment of such expenses as his Lordship should consider

No. 46.

SIR WINDHAM CARMICHAEL ANSTRUTHER.—*Rutherford.*MRS MARIAN ANSTRUTHER and HUSBAND.—*H. Bruce.*

Competing.

Nov. 28, 1833.
Anstruther v.
Anstruther.

Heir and Executor—Collation—Entail.—The heir-male and of line of a peer ceased, being one of his nearest of kin, and succeeding in the character of heir to certain entailed estates, in which the deceased had been infeft under entail cut by a predecessor in favour of heirs-male, held not entitled to claim a share of the executry, without collating his life interest in the entailed estates.

Nov. 28, 1833. THE late Sir John Carmichael Anstruther succeeded to, and was

2^d Division.
Lord Medwyn.
T.

in certain landed estates held under the fetters of strict entails, executed by his predecessors, and containing destinations in favour of heirs-male. He died in pupillarity in 1831, leaving, besides these entailed estates, £60,000 in money, formed by the accumulation of the rents, and also certain superiorities held in fee-simple. His uncle, Sir Windham Anstruther, and his aunt, Mrs Marian Anstruther, being the brother and the sister of his father, were his nearest in kin. Sir Windham succeeded to the title, was heir of line, and as heir-male and of tailzie, he made up the entailed estates. He further made a claim to one-half of the moveables, in his character of one of the next of kin, which was resisted by his sister, Mrs Anstruther; and in consequence an application was made to the Court to sequester the moveable estate, and appoint a judicial factor. This was accordingly done, and thereafter the judicial factor brought in a multiplepoinding, for the purpose of having the rights of the parties determined.

Sir Windham claimed half of the executry, offering to collate the moveable estate, and fee-simple property, to which he had right in his character of heir of line, but refusing to collate his life interest in the entailed estates, on the general grounds pleaded by the unsuccessful party, in the case of *Little Gilmour*.¹ The rule laid down in that case, he contended, was not in conformity with the correct principle of law, and had been adopted in some degree from the question having arisen as to the succession of children, so that the idea of the executry being the legitima portio of the younger children, and a weight given to it, to which in principle it was not entitled, would not have received in a case of succession by collaterals; he further contended, that the present case differed from that of *Little Gilmour*, inasmuch as the destination of the entail there was to exclude the same order of heirs which would have succeeded at common law, whereas the destination here was to heirs-male, in which character alone, and as heir of line, Sir Windham was entitled to the entailed estates.

¹ Dec. 13, 1809, (F.C.)

ought not now to be unsettled; and that there was no distinction
between the two cases, one of the entails in that of Little Gilmour having
a destination to heirs-male, which difference, besides, if it had existed,
led no room for any distinction in principle.

The Lord Ordinary reported the cause on Cases; and the Court, hold-
ing the question to be settled by the decision in the case of Little Gil-
mour; which they considered well decided, found, that Sir Windham
rather, being heir of entail and provision to his nephew in the en-
tailed estates, and being also heir of line to him, could not claim a share
in moveable estate amongst with Mrs Anstruther, without collating the
entailed estates, and preferred Mrs Anstruther to the fund in medio.

KER and DICKSON, W.S.—HUNTER, CAMPBELL, and CATHCART, W.S.—Agents.

THOMAS FREEN and Others, Pursuers.—*D. F. Hope—Penney.*
WILLIAM BEVERIDGE, Defender.—*Christison.*

No. 47.

Issue—Title to Pursue.—1. A deed of devolution of a trust-estate being reduced,
the reduction being under appeal, and one of the trustees having declined, when
specially called on, to state whether he meant to resume the trust—held, in an
account of count and reckoning raised by the other trustees and beneficiaries under
trust, against a party alleged to have had intromissions with the trust-estate, and
had instituted a counter-action to constitute a debt against the trust-estate, that
issue, founded on the want of the concurrence of the trustee, was not relevant,
in respect that his conduct was adopted to support the views of the defender,
to prevent justice being done between him and the trust-estate; and in respect
of the nature and form of the action raised by the defender.

No. 47. land, whose agent at Dunfermline was William Beveridge. In 1831 Taylor and Roxburgh executed a deed of devolution of the trust-est in favour of Alexander Beveridge, brother of William, as trustee for Bank of Scotland, and other creditors of the colliery, and for Mr and Mrs Clarkson, and their children. Freen (who was no party to the deed of devolution), Mr and Mrs Clarkson, and their children, raised an action of reduction of it in 1831, against Alexander Beveridge, as ultra vires, as having been obtained by fraud and circumvention, and concluding count and reckoning, on the allegation that produce of the colliery, to amount of £60,000, had been intromitted with. The Court decerned the reduction, and remitted to the Lord Ordinary to proceed in the conclusions of count and reckoning.¹ Alexander Beveridge entered an appeal; and a petition for interim execution being presented, the estate were of consent sequestrated, and a judicial factor was appointed.²

Nov. 29, 1833.
Freen v. Beveridge.

In the meantime Roxburgh, one of the original marriage-trustees died. Freen, who lived in London, being desirous of assuming co-trustees under the powers conferred in the marriage-contract, applied to Taylor to concur in this proceeding, and intimated that he should be Taylor as declining to resume the office of trustee at all, unless he received an express intimation to the contrary. This not being given, Freen assumed two co-trustees, Mansfield and Whyte.

On 10th October, 1832, William Beveridge raised an action of constitution against Freen and Taylor, as the surviving marriage-trustees and against Mr and Mrs Clarkson and their children, and also against Mansfield and Whyte, the co-trustees assumed by Freen. He concluded for payment of a sum of above £5000, consisting of bills, &c., due by Halbeath Colliery, which had been assigned to him by the Bank of Scotland.

On the other hand, the parties who were defenders in the action of constitution, except Taylor, raised a summons of count and reckoning against William Beveridge, setting forth that he had been the real trustee under the deed of devolution, and the true intromitter with the trust effects, under cover of the name of his brother Alexander.

Beveridge pleaded as a preliminary defence—

1. As Robert Taylor, one of the surviving marriage-trustees, had been necessarily re-invested with his original character of trustee, by the deed of reduction of the deed of devolution, the act of Freen, in assuming co-trustees without Taylor's concurrence, was null, as being ultra vires and as Taylor did not concur in this action, there was no title to pursue on the part of the marriage-trustees; and none of the other parties could insist without them. 2. Pending the appeal, the only party entitled

¹ June 28, 1832 (*ante*, X. 727).

Dec. 4, 1832 (*ante*, XL. 141).

to the trust-estate, and against the pursuers of this action, it would be a most unfair result if their counter-action were to be stopped in consequence of Taylor's non-concurrence. But, independently of the fact, Mr and Mrs Clarkson and their children had a right to pursue their intromissions falling under the action were prior to the appointment of the judicial factor; and the marriage-trustees, and the beneficiaries under the trust, were entitled to call to account an intromitter with trust-funds.

The Lord Ordinary, before answer upon the plea of the pursuers in relation to the defender's dilatory defence, appointed intimation of the defence of the present action to be made to Mr Taylor; and appointed within eight days, to state whether he does or does not decline to act in relation to the trust in question.

Taylor stated that he conceived the effect of the reduction of the deed of revocation, was to entitle Freen and himself to re-assume the character of trustees, and a right to the trust-estate; and that the pending action had been raised by persons who had no right to interfere, and therefore should not concur in it, so long as any but Freen remained a party; that the pursuers had previously intimated to him that they held him to have renounced the trust; but, if the decree reducing the deed of devolution should be affirmed in the House of Lords, and if it should be held, in the pending action, that he had not already renounced the trust, he was ready to resume his active duties as one of the original marriage-trustees.

The Lord Ordinary "having again heard parties' procurators on the dilatory defence, stated, that Mr Robert Taylor, one of the trustees

No. 47. William Beveridge, against the present pursuers, repelled the said preliminary defence : and having heard parties' procurators on the other preliminary defence, repelled the same."

Nov. 29, 1833.
Freen v. Beveridge.

Beveridge reclaimed.

LORD PRESIDENT.—Unless Mr Beveridge is to plead, that he is entitled to pursue for payment against Messrs Freen and others in his action, while, under the cover of Mr Taylor's name, he debars them from taking a step in their relative counter-action against him, I think it would be unjust to sustain his objection to their title to pursue. If Mr Taylor be still undenuded of the original character of trustee, I think he might be compelled, on the principle established in the case of Ouchterlony, to give his concurrence to any action which it was necessary to prosecute for behoof of the trust-estate. But I am decidedly inclined, in the special circumstances of the case, to adhere to the interlocutor of the Lord Ordinary.

LORD GILLIES.—I am not free of doubt as to this. There is a distinction between this case and that of Ouchterlony, as the trustee there was a party in the action where decree was pronounced, compelling him to give his concurrence in all acts of necessary administration. But Mr Taylor is not a party to this process, and it would be premature to ordain him now to concur. I incline, however, to regard him as still clothed with the character of trustee. When a party once accepts and acts as a trustee, it is not a light matter to lay the character down again. The deed of devolution certainly showed the desire of the party to transfer the trust to another; but *delegatus non potest delegare*, and that deed has been reduced. Indeed the very act of conveyance in that deed was an attempt to exercise the trust powers in the highest degree. It stamped Mr Taylor with the character of an original trustee in the most formal manner. And now that the deed of devolution is reduced, I feel it difficult to doubt that the character of trustee revives, or rather that the temporary sopiting of it has ceased. I am, therefore, at a loss to hold the assumption of co-trustees by the act of Mr Freen, to be valid without the concurrence of Mr Taylor. It is true, that if Taylor be still a trustee, his concurrence may be compelled, in regular form, to all acts of necessary administration. But I am not fully prepared, as yet, to decide on the footing of his being a trustee. I rather think it would be premature to proceed farther till he is called as a party to the action.

The Court "before answer, granted warrant to macers of Court and messengers at arms to serve this reclaiming note, with this deliverance; upon the within-mentioned Robert Taylor, and ordained him explicitly to answer within eight days after service, whether he means to give or to refuse his concurrence to this action."

Mr Taylor answered, "that he refused to give his concurrence," but that "his words were not to be extended beyond an explicit and precise answer to the order of their Lordships."

The cause was again advised along with this answer.

LORD GILLIES.—I do not see any satisfactory ground for altering the interlocutor. So far as Mr Taylor can decline, he seems to have done so. Indeed I do not know what is meant by declining to act, if there be no positive declination here;

and this may be proved by a party's conduct, as clearly as by any words. Mr Taylor refuses to concur in the action, and he will neither say one thing or another as to his acting quoad ultra as trustee. No. 47.

LORD CRAIGIE.—It appears to me that the answer of Mr Taylor is so unsatisfactory, that he should be examined at the bar of the Court, before disposing of this question. Nov. 29, 1833
Heriot v. Thomson.

LORD PRESIDENT.—I think there is enough before the Court to entitle them to adhere to the interlocutor of the Lord Ordinary.

LORD BALGRAY concurred with the Lords President and Gillies.

THE COURT adhered, and allowed additional expenses to the pursuers.

SMITH and KINNEAR, W.S.—W. Renny, W.S.—Agents.

ANDREW HERIOT, Pursuer.—*Skene—Marshall.*
DR ADAM THOMSON, Defender.—*Whigham.*

No. 48.

Expenses.—A defender not having tendered the sum ultimately found to be due by the verdict of a jury, though less than the amount sued for, found liable in expenses; and Observed, that this course should be followed as a general rule.

HERIOT raised action against Thomson, concluding for £352, as the balance due him under a contract for building a house for him, together with £90, as a charge for extra work thereon. Thomson defended on the ground that the work was not properly executed, and that the charges for extra work were overrated, but he made no tender of any sum as that which he admitted to be due. On a trial before a jury, a verdict was found for Heriot for the balance claimed under the contract, and £49 for extra work. He now moved for expenses, which was resisted by Thomson, on the ground that he had failed to obtain his full demand, and that the result of the action justified his having defended against the claim, though his defence had not been sustained to the full extent. Nov. 29, 1833
2^d Division.
Ld. Medwyn.

The Court not having been previously acquainted with the cause, required the attendance of the Lord Ordinary, who made a statement as to his views of the conduct of the parties.

LORD JUSTICE-CLERK.—The pursuer has substantially succeeded, and the sum now found to have been due, not having been tendered by Thomson, I think he should be made liable for expenses.

LORD CRINGLETIE.—On that principle expenses ought certainly to be given. It is a general principle, and should be enforced; while, on the other hand, if a party tender a sum, and the tender be rejected, and less be found due, the party making the tender should get expenses.

LORD MEADOWBANK.—I agree. When a party gains his cause, he ought to get expenses as a matter of course, unless the losing party can show good reason for withholding them, and the onus lies on him to show cause why he should not be found liable in them. I must take this opportunity of observing on the absurd-

No. 48. dity of the statute requiring the Inner-House to decide questions of expenses such as this, of which the present case is a striking instance.

Nov. 29, 1833.

Johns v.
Munro's
Trustees.

THE COURT accordingly awarded expenses.

No. 49. MRS ANNA JOHNS OF MACKENZIE, Pursuer.—*Shene—J. Anderson.*
MUNRO'S TRUSTEES, Defenders.—*D. F. Hope—M'Neill.*

Testament—Vesting—Clause.—Terms of a clause in a testament which held to suspend the term of payment of a legacy merely, and not the vesting.

Nov. 29, 1833. THE late Colonel Munro, by trust-deed of settlement, conveyed a

2d DIVISION.
Lord Medwyn.
F.

his property to the defenders as trustees, for the purpose of being vested under deduction of his debts and certain legacies, in a landed estate to be entailed on his brother, Duncan Munro, and his heirs-male; whom failing, on his nephew, Colonel Fleming, and his heirs-male; whom failing on another nephew, the late James Johns, and his heirs-male. Among the bequests, was one in favour of Johns, contained in one of the purposes of the trust, thus expressed:—"In the fifth place, for payment to James Johns, my nephew, lieutenant in the Royal Marine corps, in the event aftermentioned, of the sum of £1000 sterling, and that at the first ten of Whitsunday or Martinmas after the expiry of a twelvemonth from my death and the death of the said Duncan Munro, with the legal interest thereof from the first term of Whitsunday or Martinmas after my death and during the not payment thereof, declaring that this sum of £1000 sterling is over and above any sum I may have given him by way of loan for the purpose of carrying on his business prior to this date; but in regard the said James Johns some time ago entered into a contract of copartnery with Adam Reid, manufacturer in Glasgow, for the purpose of carrying on business under the firm of Reid and Johns, that the said company of Reid and Johns have lately been obliged to stop payments and a sequestration taken out against them, and as the affairs of the said company of Reid and Johns are not wound up, whereby it is uncertain whether the funds of the said company will ultimately pay the company debts, and being unwilling that any part of the funds and property belonging to me shall fall to the creditors of the said company, therefore I am hereby specially provided and declared that my said trustees shall not pay over any part of the foresaid sum of £1000 sterling, to the said James Johns, until the debts of the said company of Reid and Johns are paid off, or until the said James Johns is fully and completely discharged thereof; and in the event some time will elapse after my death before the debts of the said company are paid off, or the said James Johns fully and completely discharged thereof, I hereby appoint my said trustees to hold the capital of the foresaid provision of £1000 in trust for behoof of

James Johns, and to pay to the said James Johns the legal interest as an alimentary provision for his support, and that half-yearly at the terms of Whitsunday and Martinmas, beginning the first payment thereof at the first term of Whitsunday or Martinmas after the death of the said James Johns, and so on half-yearly thereafter, until the debts of the said company are paid, or the said James Johns shall be fully and completely discharged thereof, declaring that the principal sum of £1000, or the said alimentary provision in the event that the said sum shall not be attachable by the diligence of the creditors of the company of Reid and Johns, or the creditors of the said James Johns, present or otherwise, nor shall the said James Johns have the power of assigning to others the foresaid alimentary provision or any part thereof, and in the event that the creditors of the said company of Reid and Johns shall decline to discharge the said James Johns, then I appoint trustees to lay out the foresaid capital sum of £1000 on good security, taking the security thereof payable to themselves, for the purposes aforesaid; and under this farther declaration, that in the event that James Fleming, after designed, shall die during the lifetime of the said Duncan Munro, by whose death the said James Johns comes to be heir to my whole property after the said Duncan Munro's death, then, and in that event, I hereby recall the foresaid legacy of £1000, and declare that the said James Johns's right of succession shall be restricted to the interest of the said sum of £1000, or to an annuity of £50 sterling per annum, to him half-yearly, as aforesaid; and I farther direct my said trustees to hold the possession of the said sum of £1000 during the lifetime of the said Duncan Munro, until this condition shall be purified."

Munro died in 1828, being survived by his brother, Duncan, and his nephews, Colonel Fleming and Johns. Duncan Munro and Colonel Fleming were still alive. Johns died in 1831, after his legal creditors and the creditors of the company of Reid and Jones accepted of a composition, and a discharge had been granted by the court on the usual terms; but it was alleged that the composition on the said debts had not yet been paid. The pursuer, Mrs Johns, sister of the said James Johns, and his sole nearest of kin, confirmed as his executrix; but she refused to pay her the £1000 bequeathed to her brother or the interest thereon, on the ground that it was conditional on the event that the said Duncan Munro should die before Johns, and that as the latter had predeceased him, it had never vested. Mrs Johns thereupon raised the present action, concluding for payment, and contending, that the condition in the said bequest as to the death of Duncan Munro applied merely to the term of payment and not to the vesting, and that the only contingency which prevented the vesting, viz. Johns becoming next heir to Duncan Munro in the said residue by Colonel Fleming predeceasing him, never having happened, she was entitled to decree for payment of the principal, the

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No. 49. term of payment being first come and gone by Duncan Munro's death and for immediate payment of the interest due and as it should fall due
 Nov. 29, 1833.

Johns
 v. Munro's
 Trustees.

The Lord Ordinary pronounced this interlocutor :—" Finds that James Johns, the legatee, having survived the testator, Lieutenant-Colonel Munro, the legacy of £1000 sterling in question became vested in him at the death of the said testator, and that the legal interest falling due on the sum of £1000 sterling, from the first term of Whitsunday or Martinmas after Colonel Munro's death, viz. from the term of Whitsunday 1828 and in time coming thereafter during the non-payment of the principal sum, is due and payable to the pursuer as the representative of the said James Johns, under deduction always of such partial payments as trustees, defenders, shall instruct to have been made to or for the said now deceased James Johns, or to or for the pursuer, his representative Finds, that although the said sum of £1000 became vested in the said James Johns as aforesaid, the same is not payable till the first term of Whitsunday or Martinmas after the expiry of a twelvemonth from the death of Duncan Munro : Decerns against the trustees, defenders, payment of the said principal sum of £1000 sterling accordingly, said term of payment being always first come and bygone ; but before decerning for payment of the accruing interest since the said term of Whitsunday 1828, appoints the defenders, and that within fourteen days to give in a state of the partial payments made by them toward extinction thereof : Finds no expenses hitherto incurred due to either party."

Both parties reclaimed; the trustees on the merits, and Mrs John on expenses.

LORD JUSTICE-CLERK.—There is a provision here for payment of the interest to Johns, and it is not the case of a common conditional legacy. Looking at the whole deed, I am satisfied that it was in the contemplation of the testator to give to Johns and his representatives this legacy, unless Johns should have become, by predecease of Colonel Fleming, the next heir to Duncan Munro in the entire estate, though not to be payable till the death of the latter ; and I think this party should have her expenses.

The other Judges concurring,

THE COURT refused the reclaiming note for the trustees, and on the other side altered and allowed expenses.

J. LIVINGSTONE, W.S.—R. MACKENZIE, W.S.—Agents.

MRS ORME OF SCARMAN, Suspender.—*Robertson.*
 MRS DIFFORS, Charger.—*Rutherford—Macdougall.*

No. 50.

Nov. 30, 1833
 Orme v.
 Diffors.

Husband and Wife—Diligence.—A married woman whose husband resided in England, and who, for several years, had carried on an independent business on her own account in Scotland—held liable to personal diligence under a bill which she accepted, though not in the course of her trade. Observed, that the case of Churnside has been acted on ever since, and that it cannot now be called in question.

Husband and Wife—Proof.—Question, what presumptive evidence of marriage would suffice to warrant the Court in passing a bill of suspension on the ground that a woman was married?

MRS ORME came from London to Edinburgh, along with a family of daughters, and opened a boarding-school. After having thus been engaged in business for several years in Edinburgh, she accepted a bill for £14, 10s. in favour of a jeweller, from whom she purchased a gold watch. He indorsed the bill to Mrs Diffors, who raised diligence upon it, and Mrs Orme offered a bill of suspension, on the ground that she was a married woman, and that her husband was still alive, and resident in London. In evidence of this she produced a deed of agreement, executed in June, 1833, between Mr Orme and herself, which set forth that they had intermarried in 1802; that, in consequence of his embarrassments, she had separated and lived apart from him, and had educated her children at her own expense; that she had recently succeeded to some property left by her brother, Jeremiah Scarman, and that this, so soon as realized, should be divided into three portions, one being kept by Mr Orme, one by Mrs Orme, and one given to the children.

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 Ld. Moncreiff

It also appeared that Mrs Orme had, recently before, proposed to her creditors to convey to them her third share of this succession, on obtaining a discharge. She therefore pleaded, 1. There was sufficient evidence of her being a married woman, both from the express narrative of the deed, and from the nature of the distribution which it made of the property; and if the marriage was thus proved to have been subsisting of so late a date, it must be presumed to subsist still. 2. While the marriage subsisted, personal diligence against her was incompetent.

The charger answered, 1. That it was necessary for the suspender to prove her marriage, and she had not produced such proof: but, 2. That even though the marriage subsisted, she was living permanently separated from her husband, who resided abroad, and had never been in Scotland, and she was carrying on an independent business on her own account.

The case of Churnside was therefore an authoritative precedent.

No. 50. The Lord Ordinary "reported the bill and answers to the Court."*

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Differs.

LORD BALGRAY.—I doubt if there is sufficient evidence before the Court to compel them to treat this as a case in which any marriage is proved, or, at least, proved to be still subsisting; and the difficulty as to this, is caused by the suspender herself. She must know in what part of England she was married, and should have had an extract from the register along with her, or other legal evidence. The mutual acknowledgment of each other as spouses, contained in the deed founded on, will not of itself make a marriage with a man resident in England. However, there is some presumptive evidence of marriage, and if the suspender will find caution, or will consign, it might be considered whether the Court should not pass the bill, and allow her time to prove her marriage.

Rutherford, for Charger.—The Court will observe that such a proof can only be relevant in the event of the Court being prepared to call in question the case of Churnside, upon which the law has now been settled for a period of nearly fifty years. Even if the diligence should ultimately be sustained, yet if the bill was passed in the interim, the law would be considered as thrown loose again, what it has long been relied on as fixed.

LORD PRESIDENT.—I concur with Lord Balgray in thinking the evidence of a subsisting marriage to be insufficient. But the marriage is not material where the husband resides abroad, and the wife carries on an independent trade on her own account in Scotland. She is then liable to personal diligence. I have no doubt as

* "NOTE.—The Lord Ordinary regrets that he cannot comply with the request of the respondent, by at once giving a judgment on the merits of the case. He has considered the point carefully with the view of doing so, but he finds himself so situated that he cannot do so; and, therefore, he can only enable the parties to obtain the judgment of the Court with the least expense possible. It appears to him that, from the deeds produced, there is *prima facie* ground to presume that the complainer is a married woman, and that her husband is alive, though there is not complete evidence of the fact, and this might be enough for passing the bill if the case depended on that fact alone; but it involves a far more important question, viz. Whether a married woman, living apart from her husband, he being resident in England, and the woman carrying on an independent business on her own account, is liable to personal diligence on a bill of exchange granted by her? The case of Churnside, in 1789, certainly sanctions the affirmative, at least if the debt was contracted in the separate trade. But the Lord Ordinary had the misfortune to participate in the doubts expressed by Mr Bell, (Com. II. 167,) and also by Mr Brodie, (Notes on Stair, p. 34,) how far the principle of that case is sound, and how far it can be held to have settled so very important a question of law. He doubts how far it is reconcilable on principle with the grounds on which so many other points in the same department of law have been solemnly settled; and he hesitates the more to repeat so important a judgment, when he observes that, in the English law, after some wavering in the judgments, the point was at last very solemnly settled against the liability of the wife, unless the husband had been actually transported.—*Marshall v. Button*, 8 T. K. 343; *March v. Hutchinson*, 2 B. & P. 326.

"Whether the Court may see, in the facts of this case, any grounds on which it can be decided without involving this very serious question, the Lord Ordinary will not presume to say; but he has not been able to find any such grounds satisfactory to his own mind."

be law on this point. It was fixed by the case of Churnside, as far back as 18, and the country has rested upon that decision as fixing the law ever since. No. 50.

LORD BALGRAY—The case of Churnside was most deliberately considered by the Court. Nov. 30, 1833
M'Kenzie v.
M'Kenzie.

LORD CRAIGIE—The Judges were unanimous in the decision which was then pronounced. I think this Court should pause before it sanctions any proceeding which implies a doubt of that case.

LORD GILLIES—I have always held it to settle the law. If we should consider ourselves still at liberty to treat this as a new question, the only result will be, that the law on this subject is thrown loose, and that the confidence of the country in the law generally would be shaken. For, however solemnly we might now need to decide the question, yet if we open up a decision which has been acted for nearly half a century in the common transactions of business, we have no right to expect that our own judgment will in future be treated with more respect than that which we ourselves have shown to the judgment of our predecessors. In the case of enjoying a known and fixed law, the country would be exposed to a train of fluctuating decisions. I am decidedly of opinion that the bill ought to be refused.

The bill was accordingly refused with expenses.

AINSLIE and MACALLAN, W.S.—J. HATTON, W.S.,—Agents.

THOMAS M'KENZIE, Suspender.—Jameson—A. Dunlop.
REV. JOHN M'KENZIE, Charger.—Sol.-Gen. Cockburn—Maitland.

No. 51.

Kirk—Manse.—A bill of suspension of a decree by a presbytery for additions to the offices of a manse, having been refused by the Lord Ordinary, the Court granted and passed it.

In the year 1821, the charger, the Reverend Mr M'Kenzie, minister of Lochcarron, presented an application to the presbytery of Lochcarron, for repairs and additions to his manse and offices. The heritors agreed to make certain additions and repairs according to specifications laid before the presbytery upon the manse and offices, including the barn, which was merely to be repaired. The charger "being asked by the moderator," (as the minutes of Presbytery bore,) "If he was satisfied with the accommodations as specified particularly in each of the specifications, as now lodged on the presbytery table, did answer that he was," the presbytery accordingly decreed for execution of these repairs and additions, to the value of about £650. The additions and repairs were executed, but there was no deliverance of the presbytery declaring the manse free. In 1832, the charger presented a new application to the presbytery, praying for repairs and further additions. A visitation was consequently held in December, 1832, when the manse and offices were inspected by two tradesmen, the one named by the charger, and the other by the suspender, who returned a report, on considering which, at the subsequent meeting, along with certain plans and specifications lodged Nov. 30, 1833
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Bill-Chamber
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T.

No. 51. by the charger, the presbytery found, 1st, "That the manse of Lochcarron, although it is declared in the tradesmen's report capable of being repaired, is yet, on account of the smallness of the apartments, and the smoking of the chimneys, insufficient and unfit for the comfortable accommodation of the incumbent and his family. 2d, That the barn, even although it were repaired according to the report, would, on account of its sheltered situation, be unfit for seasoning the incumbent's crop, and, from its small size, incapable of containing it. 3d, That there is neither a pigsty nor a poultry house on the glebe of Lochcarron." And they, therefore, resolved,—

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[Kensie v.
[Kensie.

" 1st, That a building of two stories, 28 feet by 19½ feet over walls, to contain two public rooms, the one 10 feet, the other 9 feet high, be erected in front of the manse.

" 2d, That a barn, 50 feet by 19 over walls, 8 feet high in the side-walls, roofed with slate, and part of the sides done with wattling, be erected adjoining the present offices.

" 3d, That a pigsty and poultry-house, each 8 feet by 6 within walls, and of the same height as the present offices, be built in the most convenient situation,—all according to plans and specifications to be hereafter considered."

They further directed plans and estimates to be provided, and offers from contractors to be obtained; and, at a meeting of presbytery, held in May, 1833, they decreed against the heritors for payment of £508, 19s. for the execution of the repairs and additions contained in these plans and specifications. Of these, the addition to the manse was estimated to cost £299—the barn, £151, 5s.—the garden wall, £32, and the repairs, £21, 14s. The suspender had offered, on the part of the heritors, to execute the repairs reported to be necessary, and to build the garden wall, without the necessity of a contract by the presbytery; but he objected to any additions, and, on the above decree being pronounced, he presented a bill of suspension, offering to execute the repairs and garden wall, but contending that the heritors were entitled to execute these themselves, and that as to the decree, quoad ultra, the charger was not entitled to any additions. The Lord Ordinary, (Moncreiff,) on advising this bill, with answers, pronounced the following interlocutor, adding the subjoined note.*

" The Lord Ordinary having considered this bill, with the answers and productions, passes the bill, in so far as it complains of the decree of the presbytery, in regard to additions to be made to the manse, but quoad ultra refuses the bill, but remits to the presbytery, with instructions to

* " There may be ground for making the additions, upon full enquiry; but, at present, the Lord Ordinary thinks it a strong case to demand a new modelling of the manse, after so expensive an adjustment, to the declared satisfaction of the minister and presbytery, so recently as 1822."

the heritors to execute the repairs, the garden wall, and the alterations and repairs on the offices, in terms of the specifications, within a time to be specified; and, failing thereof, to decern anew, in terms of the specifications complained of; the work, if undertaken by the heritors, to be executed to the sight, and to the satisfaction, of the presbytery." No. 51.
Nov. 30, 1833
Napier v. Lang.

inst this interlocutor, so far as it did not pass the bill quoad the alterations and additions to the offices, as well as the addition to the manse, the defender presented a second bill, which, on advising it with answers, the Lord Ordinary, as Ordinary, refused.

The suspender having reclaimed, the Court altered and remitted to pass the bill.

T. M'KENZIE, W.S.—M'KENZIE and M'FARLANE, W.S.—Agents.

DAVID NAPIER, Advocate.—*D. F. Hope—Cowan.*

JAMES LANG, Respondent.—*A. M'Neill.*

No. 52.

ss—Advocation—Record.—A Sheriff Court process instituted before the Lord Ordinary, having been thereafter advocated, and a record on the cause made up in the advocation, and the cause remitted to the Sheriff to hear parties, and decide; and he having pronounced judgment on the record as made up in the Court of Session, and a second advocation being brought, the Court remitted to allow the record to be opened up and a new one prepared.

An action before the Sheriff of Lanarkshire, at the instance of the defender, James Lang, against the advocate Napier, brought prior to the passing of the Judicature act, the Sheriff, subsequent thereto, but without having a record made up in terms thereof, decerned against Napier, and remitted an advocation, in which a record was prepared and closed, and answers on the merits of the cause. On hearing the record, the Lord Ordinary remitted to the Sheriff, with directions to consider the effect of certain productions which had been produced by Napier, but without prejudice to either party recovering other costs. The cause having gone back to the Sheriff, was by him remitted to an accountant, and he thereafter pronounced an interlocutor, finding against Napier for a balance brought out by the accountant as due to him, being within a few shillings of the sum concluded for, and allowing him to decern for. Napier now brought a second advocation, setting up a substantive reason of advocation, that the record was defectively made up, and he accordingly prayed to have it opened, and a new record made up. This was opposed on the ground, that the record having been made up and closed in this Court on the whole cause in the former advocation, it ought not to be allowed to be opened up as if it had been a new record prepared in the Inferior Court.

The Lord Ordinary pronounced this interlocutor, adding the subjoined.

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F.

No. 52. note :*—" In respect that when this cause was formerly brought into this Court by advocacy, a record by revised condescendence and answers of the whole facts and pleas in law was regularly made up and closed upon the whole cause, as no record had been made up in the Inferior Court, in consequence of the cause having commenced there prior to the enactment of the Judicature act,—refuses the application on the part of the advocator to make up a new record, and appoints the cause to be called, that it may be further proceeded with."

Nov. 30, 1833.
Macdowall v.
Gordon.

Napier reclaimed; but the Court adhered.

WM. PATRICK, W.S.—J. CULLEN, W.S.—Agents.

No. 53.

JAMES MACDOWALL, Pursuer.—*Shene*,
JOSEPH GORDON, Defender.—*Cunninghame*.

Expenses—Auditor.—1. A party, who failed in an objection to the title, but gained the cause on the merits and was allowed his expenses—held not entitled to the expense of discussing the objection to the title. 2. Expense of written copies of a summons disallowed, where the summons was afterwards printed, and was so at less expense than it was copied.

Dec. 3, 1833.

1ST DIVISION.

AN action being raised against three trustees, in relation to the trust-estate, one of them alone put in defences. The pursuer stated an objection to his title to appear and defend, and the discussion of this objection was reserved until the record was closed. The Lord Ordinary then decided against the pursuer on the objection to the title, but for him on the merits, and found him entitled to expenses. The Court adhered. At auditing the account, the auditor disallowed that part of it which had been incurred in relation to the objection to the title. He also disallowed the expense of written copies of the summons, because it could have been printed at less expense, and was printed in the course of the action, and the expense of printing was allowed. The pursuer objected to the auditor's report, but the Court repelled the objections.

W. SANDERSON, W.S.—J. GORDON, W.S.—Agents.

* " If, instead of remitting this case to the Inferior Court, after having remodelled it according to the new form, by closing a record regularly, the Lord Ordinary had considered the effect of the documents then produced, and the subsequent productions, and given judgment in the cause, there could have been no pretence for a new record. But when it appeared that no decision on the merits had been pronounced, because the advocator had failed to produce certain writings, which, however, he had produced in this Court—and when it seemed better, as being thought a cheaper and speedier mode of decision, to remit the case again to the Inferior Court, to consider the effect of the documents thus tardily produced—can there be any good reason, when the cause is again brought back, for making up any new record? "

DUNCAN MARTIN, Advocator.—*Sandford.*
 JAMES HADDEN AND OTHERS, Respondents.—*Rutherford.*

No. 54.

Dec. 3, 1833.
 Martin v.
 Hadden.

Process—Expenses.—Circumstances in which a party who was postponed by the Sheriff in a multiplepinding, in consequence of remissness in prosecuting his claim, was allowed, under an advocacy, to insist in his claim, on paying such expenses as the Lord Ordinary should consider reasonable.

A PROCESS of multiplepinding was raised before the Sheriff of Lanarkshire, in 1824, in which several claimants appeared, and among others, Duncan Martin, founding on a bill, and arrestments, dated anterior to an assignation and arrestments founded on by Hadden and others. The common debtor brought a suspension of the diligence of Martin, and there was very considerable remissness on the part of Martin in prosecuting this process to a conclusion, and pending it, the common debtor died. After the Sheriff had repeatedly, and in successive years, delayed the decision of the competing claims in the multiplepinding until the issue of the suspension, and after repeated notice had been given to Martin that decree of preference would be pronounced, if he failed to instruct that he was duly following forth the suspension, the Sheriff, in 1832, pronounced decree preferring Hadden and others. Martin brought an advocacy, and, having now obtained decree in the suspension, sustaining his debt and diligence, he contended, that it was still competent to him to state his claim on the fund in medio in the multiplepinding, and that the only consequence of his remissness was, that he should pay so much of the previous expenses as should be considered reasonable in all the circumstances. Hadden and others contended, that as they had not obtained decree until after the most ample indulgence had been allowed to Martin, under certification that if he failed, decree should be pronounced, he was not now entitled to have the decree opened up.

The Lord Ordinary remitted simpliciter, and found Martin liable in expenses: but the Court altered and remitted to the Lord Ordinary to hear him on his claim, on the condition of his paying such expenses as should appear to be reasonable.

D. FISHER, S.S.C.—DUNDAS AND JAMIESON, W.S.—Agents.

No. 55.

OSWALD'S TRUSTEES, Pursuers.—*Skene—A. Wood.*
 WALTER DICKSON, W.S., Defender.—*D. F. Hope—Anderson.*

Dec. 3, 1833.

Oswald's Trustees v. Dickson.

Compensation—Partnership.—Two copartners having separated—held that one of them was entitled to set off, to the extent of one-half, a debt due to the company against a debt due by him individually to the company's debtor, although the other partner had, after the dissolution, in settling his own accounts with the party, taken credit for the whole.

Dec. 3, 1833.

2ND DIVISION.
 J. Mackenzie
 F.

THE defender, Dickson, W.S., prior to 1820, carried on business in partnership with George Dunlop, W.S., under the firm of Dunlop & Dickson. Among the clients of the company was the late Alexander Oswald from whom Dickson, in 1818, took a house in Duke Street, at the rent of £105, which was settled for by him with the company down to Martinmas, 1819. At Whitsunday, 1820, the partnership was dissolved, at which time there was owing to the company by Mr Oswald, £158, 2s. 2d. while a half-year's rent of the house (£52, 10s.) was due by Dickson to him. Neither of the partners were authorized to uplift and discharge the debts of the company. Dunlop, however, continued to be Oswald's agent after the dissolution, and, in settling his own accounts with him, he took credit for the whole sum due to the company. Mr Oswald died in 1820, leaving a trust-deed in favour of the pursuers, of whom Dunlop was one, and he further was employed by them as their factor and agent. At Martinmas, 1821, Dickson purchased the house, which he still held under the agreement of lease made in 1818. In 1826, Dunlop became bankrupt, at some time thereafter the pursuers raised the present action against Dickson, concluding for payment of the rent of the house from Martinmas 1819, till his entry under the sale. In defence, Dickson alleged that the separation between him and Dunlop, it had been arranged that the debt due by Oswald to the company should be credited to him so as to enable him to set off against it the rents due, and that Dunlop, as one of the trustees, and factor and agent, had consented to this mode of settlement; but the Lord Ordinary being of opinion that there was no sufficient evidence of any settlement having taken place regarding this matter, repelled the defence, and appointed the cause to be enrolled for the purpose of giving a decerniture for the rents due, adding the following note.*

* "What appears to the Lord Ordinary is this:—The account was a debt due to the company of Dunlop and Dickson, and, as such, Mr Dickson had, and has the right to set it against the rent due by himself as an individual. But it is said that Mr Dunlop is the only other partner of Dunlop and Dickson; and that he was one trustee for Mr Oswald, and factor for the other trustees; and that he, in these capacities, agreed that the account should be held as belonging to Mr Dickson, and be levied by him in the way of setting it off against the rents payable by Mr D

Dickson reclaimed.

No. 55.

LORD CRINGLETIE.—I see no evidence of settlement, and on that point I agree with the Lord Ordinary. As to the law, however, if a partner of a dissolved company has the right to discharge a debt of the company, he may set it off against his own debt; but neither Mr Dickson nor Mr Dunlop were authorized to uplift and discharge the company debts, and so it cannot be maintained that Dunlop was entitled to discharge Oswald, and each partner is entitled to discharge his own half, and therefore Mr Dickson is entitled to the benefit of his half of the debt due to the company to set off against his own private debt to Oswald.

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LORD MEADOWBANK.—The case of Salmon¹ settles that point; and, otherwise, I agree.

LORD GLENLEE.—I view it in the same light. There is no evidence of any agreement on the part of Dunlop to let Dickson have credit for the whole debt due to the firm. Then, as to the half, if there were any reason to believe that there was a payment to Dunlop by Oswald's trustees, in a hard case we might hold it enough if made bona fide, but there is only a set-off in their books, and, therefore, I think as the debt was due to the company, which is dissolved, it cannot be applied wholly by giving credit to Dunlop, and that Dickson is entitled to one-half; and this action affords the opportunity of doing justice between the parties.

THE COURT accordingly "alter the interlocutor of the Lord Ordinary submitted to review, in so far as to find that the defender, Mr Dickson, is entitled to plead compensation against the pursuer's claims, to extent of one half of the sum of £158, 2s. 2d. due by the pursuers to the company of Dunlop and Dickson, and remit to the Lord Ordinary to apply this finding, and proceed in the cause as to him shall seem just."

R. WELSH, W.S.—M'KENZIE and SHARPE, W.S.—Agents.

son for the house he held of Mr Oswald, or his trustees. Now, it may be, that such an arrangement (even without executing any express assignation of the amount over to Mr Dickson as an individual) might validly have been made by Mr Dunlop, *rebus et factis*, so as to bind the trustees of Mr Oswald. But the Lord Ordinary is not able to find sufficient evidence that Mr Dunlop ever did agree to any such arrangement. On the contrary, it appears to the Lord Ordinary, that the matter had been allowed to stand in an unsettled state, neither partner having agreed to let this account be held as belonging to the other; and Mr Dunlop never in any way, as factor, discharging the claim of Mr Oswald's estate for rent, as paid by compensation of this account. The Lord Ordinary sees no evidence that Mr Dunlop himself had any authority from the company to levy payment of this account, or ever did levy it. It seems to be still due to the company, unless it has been passed to Mr Dickson by the recent transaction between him and the trustee of Mr Dunlop. But this transaction being made *pendente lite*, cannot affect the merits of the present action."

¹ Dec. 17, 1824 (*ante* III. 406).

No. 56.

WILLIAM CLARK, Suspender.—*D. F. Hope—A. McNeill.*

Dec. 3, 1833.

G. and A. DUNCAN, Chargers.—*A. Wood.*Clark v.
Duncan.

Lease—Cautioner—Diligence—Agent and Client.—1. Caution in a sequestration for rent covers the expenses of process. 2. Agents getting decree against the defender for expenses to go out in their own name, entitled in virtue thereof, as the registered bond granted by the cautioner to the client, to obtain letters of horning, in their own names, against the cautioner.

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MISS BARBARA ROBERTSON of Gossaburgh, in Shetland, and her curators, having duly warned a tenant to remove at Martinmas, 1837, also presented a petition to the Sheriff for sequestration of his crop and stock in security for the rent claimed, and expense of this petition and procedure that may follow thereon." Warrant of sequestration was granted, and answers lodged for the tenant, who disputed the amount of rent demanded, and advanced certain counter claims on his part. After some procedure, the Sheriff pronounced an interlocutor, withdrawing the sequestration, upon the tenant "lodging sufficient caution with the clerk of Court for payment of whatever sum shall ultimately be found due by him under the present process." In terms of this interlocutor, the tenant lodged a bond of caution, containing the usual clause of registration, by the suspender Clark, as cautioner, in these terms:—"I William Clark, merchant in Lerwick, considering, that in a petition and process of sequestration thereon, depending before the Sheriff-depute of Orkney and Zetland, and his Substitute of Zetland, at the instance of Miss Barbara Robertson of Gossaburgh, and her curators, against James Gardner, residing at Gossaburgh, for the sum of £18, 11s. 8d. sterling, as the rents of certain land and houses in Gossaburgh, possessed by the said James Gardner, for the year ending at Martinmas last, upon which, certain subjects upon the lands, and in the house of Gossaburgh, belonging to the said James Gardner, were inventoried and sequestrated, and that, as the said James Gardner was under the necessity of removing from said lands at the term of Martinmas last, while he holds himself entitled to set off against the said claim of rent, certain counter claims which are now under discussion in said process, and that by interlocutor, dated the 7th day of December instant, the Sheriff-substitute pronounced an order, recalling the sequestration, upon the said James Gardner lodging sufficient caution with the clerk of Court, for payment of whatever sum should ultimately be found due by him in that process: Therefore I, the said William Clark, hereby bind and oblige myself, my heirs, executors and successors, as cautioner and surety, acted in the Sheriff-court books of Zetland, for the said James Gardner, that he shall make payment to the said Miss Barbara Robertson and her curators, through their factor and manager, of whatever sum shall ultimately be found due by him, and decreed for in the said process of sequestration—all in terms of, and conform to the said interlocutor."

Ultimately the Sheriff decerned against the tenant for the whole sum of rents demanded, with expenses of process. The chargers, Messrs Duncan, had been Miss Robertson's agents in the cause; and when they lodged their account of expenses, they craved that decree therefor should be allowed to go out in their names. The Sheriff accordingly pronounced this interlocutor:—"Having considered the account of expenses given in by the pursuer, modifies the same to £17, 3s. 2d., and decerns against the defender accordingly; allows decree to go out and be extracted in name of the pursuer's agents, Messrs Gilbert and Andrew Duncan, junior, as craved."

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Duncans having charged the tenant without success, obtained letters of horning in their own names against Clark on the account against the tenant, and the registered bond of caution, and thereon charged him for payment. Clark thereupon presented a bill of suspension on the grounds, (besides certain trivial objections to the regularity of the diligence)—

1. That the bond of caution applied merely to the rent claimed, and did not cover the expenses of process.

2. That being granted to Miss Robertson nominatim, it could afford no ground for a charge at the instance of other parties. And,

3. That the decree for expenses being directed against the tenant alone, could not be enforced by summary diligence against his cautioner, who had never appeared in the process, and against whom no decerniture had passed.

To this it was answered—

1. The bond of caution undoubtedly covers every thing for which under the petition Miss Robertson was entitled to decree against the tenant.

2. Agents obtaining a decree for expenses in their own names, have an implied assignation from the principal party to the decree, and to any bond of caution for implement thereof, and they are accordingly entitled to operate on it as if they had taken an express assignation thereto, so far as regarded the expenses; and,

3. Decree is never pronounced against a cautioner nominatim, but the decree against the principal party, alongst with the cautioner's registered bond of caution, afford valid warrants for charging him for payment thereof.

The Lord (Moncreiff) Ordinary passed the bill, adding the subjoined note.* Thereafter, the expedite letters having come before Lord Med-

* "The chargers may very probably establish their right to recover the expenses of the process referred to from the complainer. The Lord Ordinary, by passing the bill, does not mean to express any opinion on this point, but he is by no means satisfied that, under the terms of the complainer's bond and the decret obtained, there is any warrant for a charge of horning against the complainer, the cautioner, in the name of the respondents, the agents in the cause. His obligation is to pay to the party, Miss Robertson, and her curators; the words added, though much spoken

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wyn, Ordinary, his Lordship repelled the reasons of suspension, and found the letters orderly proceeded, with expenses, adding the subjoined note.*

of in the answers, are of no manner of importance. But that being his obligation by the bond, and there being no decree against him in favour of the agents, it is difficult to see how they can be warranted to charge him any more than they could have charged the party if they had not got their decree against him in their own names. They may, in virtue of the decree and the bond together, have a very good right of action against the cautioner for the expenses (if the bond will sustain it otherwise); but the point on which the Lord Ordinary entertains doubt, is the competency of a charge upon such warrants. Perhaps it may be true, that they could not have got decree in their own names against the cautioner; but this only strengthens the objection, and brings the matter to this, that, if they found it necessary to separate themselves from the party, they could only have a right of action against the cautioner for the expenses on the failure of the defender to pay them."

* "The reasons of suspension founded on, are, 1st, The alleged erasure in the letters of horning. This seems to be ill founded, as, on inspection, there is no erasure except in that part which grants warrant to arrest, which has not been used as the foundation of diligence; and the only grounds of objection to the other parts of said letters is, that the name Clark has been originally written Clerk, and changed rather clumsily to the proper spelling. 2d, It is said that the proper documents were not exhibited in the Bill-Chamber. But the narrative bears, that the precept, letters of poinding and horning, and the extract of the bond, were shown; and although the clause only states that the Lords have seen the precepts and registered horning above mentioned, it does not appear that there are any other documents than those above mentioned (which are the proper warrants for such letters issuing), as otherwise it is not stated what the term precepts (in the plural) can mean, if the extract of the bond, having included in it a warrant for diligence, does not pass under that name. 3d, It is alleged that the bond of caution does not cover the expenses. As the sequestration was recalled, on caution being found for whatever sum should ultimately be found due and decerned for in the process of sequestration, and as the petition for sequestration, in the usual style, concludes for payment of the rent and expenses of the petition, and procedure to follow thereon, the bond of caution covered the expenses as well as the rent; and it does not appear, on examining the taxed account, that any expense has been allowed except what was incurred in the due exercise of the right to sequester, and obtain decree for the amount,—the counter claims of the tenant being repelled, and the full claim sustained. 4th, It is argued that the cautioner was bound only to the landlady, and that the chargers could not proceed with diligence against him, having obtained no decree against him. As the Lord Ordinary who passed the bill has expressed such strong doubts upon this point, it does not become the Lord Ordinary to be confident in his opinion; but it appears to him that the letters of horning have been duly obtained by the chargers. If the bond covers the expenses, although the landlady could only get decree against the original defender, the cautioner not being a party in the process, still, on production of the decree, with an extract of the bond of caution, at the Bill-Chamber, warrant would be obtained for letters of horning against the cautioner. If she had assigned to a third party the decree in her favour, production of the decree, assignation, and bond of caution, would in like manner have warranted the issuing of a horning against the cautioner in favour of the assignee. Now, the chargers have obtained decree for the expenses in their own names as the disburers of them, founded upon their right to obtain an assignation from

Clark reclaimed.

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Trotter v.
Dorea.

LORD CRINGLETIE.—The doctrine maintained in this suspension surprised me. I always understood that a sequestration covered expenses, and that the crop was liable for that as well as for the rent, and when caution is found, it must do so too. Then it is said the bond of caution was only granted to Miss Robertson, and that the decree was not against the cautioner. It could not be given against the cautioner, but decree having gone out against the principal, in the name of the agents, that, with the bond of caution, is a sufficient warrant for summary diligence against the cautioner. There never is such a thing as an extract of decree against the cautioner; and decree in the agent's name is a judicial assignment of the decree and of the bond for implementing it. I have no doubt the interlocutor is right, and the diligence regular.

LORDS GLENLEE and MEADOWBANK concurring,*

THE COURT adhered.

HENRY CHEYNE, W.S.—DICKSON and STUART, W.S.—Agents.

T. TROTTER and J. GRANT, Suspender.—*Munro*.
THOMAS DORES, Changer.—*Penney*.

No. 57.

Title to Pursue—Diligence—Corporation—Bill of Exchange.—A charge having been given on a bill, granted to a party as deacon of an alleged corporation, in satisfaction of expenses in an action for breach of corporation privileges, decreed for in absence against a third party, a bill of suspension, upon the allegation that the body was not a legal corporation, passed on caution.

THE FLESHERS and CANDLEMAKERS of Canongate, alleging themselves to be a corporation, raised action before the Bailie Court of Canongate, against one Robert Wight, for payment of penalties for exercising his craft without being admitted a member of their body, and having obtained decree in absence against him for £10, with expenses, they incarcerated him thereon. After he had been some time in jail, the suspenders,

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their client, and to recover payment in their own name. The assignation which is now implied must have the usual effect of an assignation, to carry to the assignee any collateral security in the person of the cedent; and, in truth, the cautioner has no interest to object, unless he had counter claims against the party, which is not alleged here. It is not questioned that the chargers might claim these expenses from the cautioner, by raising an action founding on the decree and the bond; but such does not appear to be necessary for the ends of justice, and the multiplication of unnecessary actions is to be avoided."

* Lord Justice-Clerk absent.

Trotter and Grant, granted to the charger, Dores, as deacon of the corporation, a promissory-note in these terms :—

(Signed) "THOMAS TROTTER."
"JOHN GRANT."

To this it was answered, inter alia, that the suspenders having granted the promissory-note charged on to Dores, expressly as deacon of the incorporation, were barred from suspending on the allegation that there was no such corporation.

JAS. BURNES, S.S.C.—R. ANDERSON, S.S.C.—Agents.

Bankruptcy—Composition-Contract—Condition.—A creditor acceded to a composition-contract under the condition that, as part of his debt was secured by a cautioner, the consent of the cautioner should be obtained, and the claim against him reserved entire: held that as this stipulation was not implemented, the creditor was not bound by the contract, but might proceed with a poinding which he had used previously to the offer of composition.

Dec. 5, 1833. JAMES INGLIS and Co., bankers, were creditors of John Neil, by three bills for £49, 18s. 6d., £88, 15s. 6d., and £26, 15s. 6d. A charge was given for payment of these bills, and a poiding executed in virtue of the diligence on the bill for £88, 15s. 6d. Neil presented a bill of suspension of charges on the other two bills, which was refused as to the bill for £49, 18s. 6d., but passed on caution as to the bill for £26, 15s. 6d. Neil then called a meeting of his creditors, which was held on 17th April, 1832, and attended by Mr Rymer, W.S., the agent of Inglis and Co. Neil offered a composition of 3s. per pound, which the creditors entertained, "it being always understood that Messrs Inglis and Company were to abandon the poiding which they had executed of the said John Neil's household furniture."

niture, and that all the other creditors were to abstain from using any diligence," and the meeting was adjourned. Next day, Rymer wrote to Cullen, W.S., Neil's agent, that Inglis and Co. were disposed to "agree to the composition of 3s. per pound, on condition of receiving sufficient security by bill or bills at a reasonable date, and getting payment of the expenses incurred on the bills and in the suspensions, reserving their claim against the cautioners in the suspension as to the bill for £26, 18s. 6d., and against the other obligants." Cullen having proposed less favourable terms, Rymer answered, that Inglis and Co. "are resolved to accept of the composition offered, only on the conditions specified in my last; and if these are not agreed to, they will rather take their chance. They would rather lose the debt altogether as agree to other terms. In these circumstances, I do not see what good could result from my presence at the meeting to-morrow. If the terms stated are agreed to, you can intimate my clients' acceptance of the composition; if not, then I must just proceed to recover as I best can." A second meeting of creditors was held on 21st April, when satisfactory caution being tendered, the offer of composition was accepted, "it being expressly understood that this agreement shall only be binding provided the whole creditors agree to it, and not otherwise." Rymer did not attend this meeting, but on 23d April he signed the minute of acceptance, and at the same time received this letter from Neil. "Notwithstanding your having subscribed the minute of my creditors on behalf of Messrs Inglis and Company, agreeing to accept of my offer of composition of 3s. per pound, I hereby engage to pay your clients the expenses incurred by them on my bills, and in the suspensions, within three months from this date, on the accounts being taxed, if thought necessary,—reserving your clients' claim against the cautioners and attestors in the suspension, which is noways to be affected by this arrangement." Rymer wrote to Neil on 25th April, that if the cautioners in the suspension made any objection to the composition being accepted of, Inglis and Co. would look to him for full payment of the bill of £26, 15s. 6d.; and on that understanding they would recommend to an insurance company, of which they and others were directors, to accede to the composition-contract.

Thereafter, Rymer having written to Neil, expressing dissatisfaction that the composition-bills had never been sent, Neil answered, that "With regard to the bill under litigation, you may depend upon the parties giving no farther trouble about it—nothing of the kind being contemplated, were my other unfortunate arrangements completed."

And again he wrote, "As all the parties have now subscribed my minute of composition, I will thank Messrs Inglis to send me a note of their claim against me, in order that the composition-bills may be got signed by the cautioner along with myself. Likewise a separate note of the £26 bill, with the expenses incurred, that it may be arranged as soon as possible."

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No. 58. Rymer made a claim for £29, 5s. 10½d., being the composition two bills of £49, 18s. 6d., and £88, 15s. 6d., with the relative c
 Dec. 5, 1833. for the expenses of the poinding, charged in full; and for th
 Neil v. Inglis and Co. £26, 15s. 6d. under suspension, and the expenses of that process, ing together to upwards of £35, which was stated as a claim on tioners in the suspension. Neil, on 4th August, sent a bill fo 5s. 10½d., being composition at the rate of 3s. per pound on the t due by the said John Neil," signed by himself and his cautio asking, at the same time, some farther explanation as to the b suspension, "as its settlement rested chiefly with the first ca Rymer replied, that Inglis and Co. accepted the composition-bi on condition of the bill under suspension, and expenses as rendere immediately settled:" and he afterwards wrote, that as Neil h to arrange the claim, he must now proceed with the poinding offered farther indulgence in point of time, if Neil would pay under suspension, and the expenses of that process. Neil refu and, along with Glover, the cautioner for the composition, presen of suspension and interdict, which was passed on caution.

Pleaded by the Suspenders—

1. As Inglis and Co. obtained a bill for £29, 5s. 10½d., which composition on their "total debt," reserving their claim against tioners in the suspension, they were not entitled to proceed with tl ing. Besides, it was part of the contract that the poinding sh abandoned.

2. The proposal to Neil to pay the bill under suspension in fu demand for an illegal preference, and a fraud against the other c and as the composition-bill included the expenses of the poinding, this was an illegal preference.

Pleaded by the Chargers—

1. When the composition was proposed, the bill for £26 and were secured by caution; and Inglis and Co. could never mean to s that security. It was on the remaining two bills which were un that the composition had been claimed. Accordingly, they stipul they would only accede to the composition-contract, and discharge tl on the footing, that their claim against the cautioners and the obl the bill in the suspension was reserved entire, which could not unless Neil got their consent, which he had not done; and, conse Inglis and Co. were at liberty to recur to their diligence.

2. Neil neither made, nor agreed to make, any illegal payme the alleged proposal (which was not admitted) could not affect t tion. The expenses of the poinding would have been a preferab even had the creditors rendered Neil bankrupt. It was a conc accession, that these should be paid in full; and it did not therefo an illegal preference: but, even if it had, it could only have been : of reducing the composition-contract.

surers and attestors in the suspension, which is noways to be affected arrangement." These words certainly had a meaning, and a very fair and one: for Inglis and Co. had their bill, which was under suspension, security caution, and it was not to be expected that they should take a mere view upon it. Accordingly, their object was to have their full claims the cautioners in the suspension reserved entire, and they never proposed, any party a right to expect, that they should accede to the composition upon such terms. This was a perfectly lawful object: Inglis and Co. were under no sort of obligation to part with their security; and the words in Neil's bill which was *pars ejusdem negotii* with the signature of the minute by Inglis distinctly reserve the full claim against the cautioners. But if these mean any thing, it must be that the consent of the cautioners should be

12.—The respondents were creditors of the suspender Neil in three bills, which diligence was raised, and a poinding commenced, and another for seven brought under suspension, and caution found. In these circumstances the suspender offered a composition of three shillings in the pound, and the respondents agreed to accept it, on the condition that caution should be found for the composition-bills, that the expenses incurred on the three bills, and suspension, should be paid, and that their claim against the co-obligants in the first bill, and against the cautioners in the suspension of that bill, should be

It was obviously implied in these conditions that the consent of the respondents in the suspension should be obtained to the arrangement, otherwise the respondents' claim against them would have been nugatory; but these conditions were not implemented by the suspenders. A long delay took place in raising the composition-bills, and the consent of the cautioners in the suspension to the reservation of the claim against them on the third bill was never obtained. Consequently the respondents were not bound by their offer. It is true that in the subsequent correspondence between the agents for the parties, the agent for the respondents proposed as an alternative that the suspender Neil himself

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obtained: for, without that, the claim against them was lost. This being the case, I hold that as such consent was never obtained, the condition of accession was never implemented; and Inglis and Co. were not bound by the composition-contract.

LORD CRAIGIE intimated his doubts of the judgment, and his disapprobation of the proceeding of Inglis and Co., as an attempt to gain an unfair preference over the other creditors. Had it been known from the first that Inglis and Co. were not to accede, the other creditors might long ago have taken steps to equalize the distribution of the pointed goods, leaving to them only such preference as they might be able to make good if they succeeded in the process of suspension as to the bill for £26, 15s. 6d. By the steps which had been adopted, an undue preference would accrue to Inglis and Co. if the interlocutor was adhered to.

LORD GILLIES.—I take the same view of the case with the Lord Ordinary and Lord Balgray. Inglis and Co. had already obtained caution for the bill of £26, 15s. 6d., before the offer of composition was talked of. When it was proposed, they intimated their willingness to accede to any reasonable offer as to the other bills, but only on condition of their claim against the cautioners in the suspension being reserved entire. So far from there being any thing unfair in this, it is what any man possessing prudence as well as honour, would naturally do, and no men of common sense had a right to expect them to act otherwise. Inglis and Co. were not bound to give up any unchallengeable security which they previously held. They therefore stipulated for the consent of the cautioners in the suspension as a condition of their acceding to the composition; and as such consent was never procured for them, I hold them not bound by the composition-contract.

LORD PRESIDENT.—I am entirely of the same opinion. Suppose that a debtor owes his landlord £500, one half of which consists of rent, and is secured by the hypothec. The tenant calls a meeting of his creditors, and offers a composition of 5s. per pound. The landlord agrees to accede, on condition that his preference under the hypothec is reserved entire. In making this proposal, I think he acts only with fairness and prudence, and that it would be in the highest degree unreasonable to expect him to act otherwise. So also, if one of several creditors has part of his debt secured by heritable bond and infeftment. He accedes to a composition, reserving the preference of his heritable security entire. This is perfectly just, and, in principle, it is analogous to what was done by Inglis and Co. They considered that part of their debt was effectually secured to them by caution. They accordingly agreed to the composition, but only under the condition that their security should not be impaired. As the consent of the cautioners was never procured by Neil, the condition was never implemented, upon which alone Inglis and Co. had agreed to accede.

THE COURT adhered, and allowed expenses since the date of the Lord Ordinary's interlocutor.

J. CULLEN, W.S.—J. RYMER, W.S.—Agents.

JAMES GRANT, Pursuer and Advocate.—*Robertson—Maidment.*
JAMES GORDON and Others, Defenders and Respondents.—*Pyper.*

No. 59.

Dec. 5, 1833
Grant v.
Gordon.

Road—Acquiescence—Jurisdiction.—1. Where road trustees act beyond the powers of a statute, they are not within its protection. 2. Circumstances in which a party was not held to have acquiesced in a judgment of the Sheriff, to the effect of cutting off his right to seek redress at common law.

By a road act for the county of Banff, passed in 1804, it was enacted, Dec. 5, 1833
“that it shall be in the power of any trustee, by a writing under his hand, to delegate to his agent or factor, all the power with which he is
by this act invested in the respective district or parish meetings.” Three
members were to form a quorum at a district meeting. The statute also
enacts, “that in taking the necessary ground for making, altering, or
widening the roads, if the trustees shall not come to an agreement with
the owner or occupier of the lands where the roads are to be altered or
widened, or where fences are to be altered or removed, application shall
be made to the Sheriff of the county to summon a jury, in order to value
the ground necessary to be taken and used, and the loss or damage ensu-
ing from the altering or removing of fences.” The Sheriff is required
to give notice of the application to the owner or occupier, and to summon
a jury, who shall examine the damage sustained, and return a verdict
accordingly—the said proceedings being “final, and not questionable by
advocation or suspension.”

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It is also provided, “that in case any person interested shall apply for, and obtain from any judge competent, a warrant for stopping the execution of any of the roads to be made under the authority of this act, the said judge is hereby directed and empowered to recall such warrant, and remove any sist obtained as aforesaid, provided sufficient caution is found by the respective trustees, for the amount of such damages as may be ultimately awarded to the person suing for the same.”

The statute farther enacts, “that all actions and complaints, for the penalties and forfeitures imposed by this act, or for any wrongs done, or injuries suffered in any matter hereto relative, or in consequence of any of the powers by this act given and granted, shall be commenced within the space of six calendar months after the penalty or forfeiture is incurred, or wrong done, or injuries suffered, and not afterwards.”

On 21st June, 1828, a district meeting of trustees was held at Charleston of Aberlour, which was attended by James Gordon of Aberlour, James Skinner, factor for the Duke of Gordon, James M'Innes, factor for Mr Grant of Ballindalloch, Peter Cameron, factor for Mr Grant of Elchies, and James Findlater, factor for the Earl of Fife. Mr Gordon was qualified as a trustee, in virtue of his property. Mr Skinner's com-

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mission of factory empowered him, "in general, to do every thing necessary respecting the premises which to the office of factor is known to pertain." Mr Findlater's commission from Lord Fife was in similar terms. Mr M'Innes held a special authority from his constituent "to attend and vote for him at all district road meetings with which his property was connected." Mr Cameron held a factory with special power to exercise all the rights belonging to Mr Grant, his constituent, as a proprietor and road trustee; but Mr Grant died in May, before the meeting, and his heir was in the East Indies.

The meeting authorized the alteration of a line of road to be made, and the new line ran through part of the farm of Tomachlaggan, under lease to James Grant. Workmen were employed to make the new line of road, and on 11th July, Grant presented a petition to the Sheriff to interdict the operation, as injurious to his farm, unauthorized by any arrangement with him, and not required by the public, and also praying for damages. Answers were lodged by the parties who had sanctioned the proceeding; and after a record was made up, the Sheriff, "before farther answer, appointed the respondents, qua trustees, in terms of the act of Parliament, to find sufficient caution to the petitioner (Grant) for the amount of such damages as may be ultimately awarded to him, on account of the operations complained of."

Grant reclaimed against this judgment, but his reclaiming petition was refused. Caution was thereafter found, and the Sheriff, in respect thereof, refused the interdict, and dismissed the petition, on 15th November. The new line of road was then carried through.

Grant then raised an action of ejection and intrusion against the members of the meeting of 21st June, 1828, and against Messrs Grant and Ross, (two parties whom the other defenders had employed to superintend or to execute the operation,) concluding, inter alia, for damages, on account of the injury done to his farm by the new line of road. During the dependence of this action, the pursuer brought an advocacy of the process of interdict and damages, ob contingentiam. The Lord Ordinary "found the advocacy incompetent in so far as regards the question of interdict; and, quoad ultra, advocated the cause, and conjoined the same" with the previous process.

Pleaded by the Pursuer and Advocate—

1. Where parties act beyond the powers of a statute, they are no longer within its protection. If they commit any wrong, redress is open at common law. The meeting of 21st June, 1828, was not attended by three qualified persons. Five were present; four of these appeared as factors, but they had not an express written delegation of the power of acting at district road meetings, and the act required that as essential. The commissions in favour of Skinner and Findlater gave nothing but general factorial powers. Cameron's constituent was dead, and he held no power from the heir. Farther, the defenders seized the ground without pro-

ted by the Defenders and Respondents—

he pursuer had acquiesced in the Sheriff's judgment dismissing
tion, on caution found in terms of the statute, and he had allowed
rations to be completed without farther complaint. Besides, the
off the present proceedings as not having been commenced within
the after the operation complained of. The proceedings had been
ma fide, in furtherance of the act; and if the act protected no
lings save those which were strictly regular, it afforded no pecu-
tection at all. There was no deviation from the statute; and the
rs averred that Skinner and Findlater had been, for a course of
n the habit of attending road meetings, and binding their consti-
ty so doing; and that the heir of Mr Grant of Elchies had ratified
ceedings of the factor, who held the express power required.

was not imperative to agree as to the damages, or to have them
l by a jury, before entering upon the ground. As the pursuer had
an interdict and damages from the Sheriff, and the defenders had
aution in terms of the act, "for the amount of such damages as
ultimately awarded to the person suing for the same," they were
de to an action in this Court, but only to have a jury summoned,
damages assessed by the Sheriff.

Lord Ordinary found, "that on the pursuer's application for an
t, the Sheriff ultimately, on 15th November, 1828, recalled the
t, in respect of the defenders, 'qua trustees, in terms of the act of
ent, having found sufficient caution to the pursuer for the amount of
mages as might be ultimately awarded, on account of the operations
ined of:' that this judgment was acquiesced in, and that the opera-

No. 59. The pursuer reclaimed.

Dec. 5, 1833.
Grant v.
Gordon.

LORD PRESIDENT.—Where parties do not act within the provisions of the statute, but go out of it, their actings are not covered by any peculiar privileges which the statute confers. Unless this rule were applied, there would be no intelligible limit to the application of these privileges. In this case, I think the parties have acted out of the statute; and the prescription of six months does not cut off the pursuer's right of action. But the question of acquiescence is one of more difficulty. Caution was found under the application to the Sheriff; and there is no appearance of acquiescing in the Sheriff's judgment, by delaying so long before an application is made to this Court. On the other hand, it is stated that the pursuer's circumstances are such as to have rendered it difficult for him to seek redress here; and I scarcely think the acts of acquiescence are strong enough to cut him off from seeking a remedy in this Court.

His Lordship was understood to hold, that the commissions to Skinner and Findlater, and to Mr M'Innes, were enough to make them duly qualified members of the meeting of 21st June; and, therefore, to consider that the irregularity which had been committed consisted in the seizure of the ground, without previously arranging with the tenant as to damages, or having them assessed by jury.

LORD BALGRAY was understood to observe, that the commissions of factory to Skinner and Findlater, who appeared at the meeting as the known factors of the constituents, was enough. His Lordship farther observed as follows:—

I think the grounds of acquiescence are too narrow to bar the party's right of applying to this Court. It was the duty of the trustees to have attempted a amicable arrangement with the tenant in the first place, instead of which they entered on the ground at once, without any adjustment of his claims. It might happen, where there was a previous road, in full use, but requiring to be widened or repaired, that the public interest would not admit of delay, and the road trustees might be entitled instantly to proceed, on merely finding caution for damages. But there was no such reason for urgency here. The operation was the making of a new line of road; and yet the tenant avers, that there was no previous arrangement and not even an attempt at a previous arrangement, before seizing his ground.

LORD CRAIGIE.—When unusual powers are conferred by a statute, parties should exercise the most scrupulous caution in the exercise of them. If they go beyond the statute, they must answer as at common law. As for the plea of acquiescence, I do not think it duly instructed. A poor man, and a rustic, may have been unable instantly to follow out an application to this Court; and I think his acquiescence in the proceedings is not lightly to be presumed against him, to the effect of cutting off his remedy.

THE COURT “altered the interlocutor, and, in respect that the terms of the act of Parliament were not duly observed and complied with, found that the defenders were not entitled to encroach on the farm of the pursuer: and remitted to the Lord Ordinary to proceed farther,” &c.

J. J. FRASER, W.S.—D. GRANT, W.S.—Agents.

as to the correct stage of the case, but that it is discretionary with the court to withhold it, every such application being a question of circumstances.

Dec. 6, 1833.

1st Division.
Ld. Corehouse.

On the 6th of December, 1833, Mrs Kennedy, or Currie, wife of James Currie, of the Post-Office, Edinburgh, raised an action of separation, a mensa et concludendo for an aliment of £50 a-year. She stated that and was "a tyrant and tormentor, who maltreated her person, and on her the greatest contumely and indignities, both by words and in a variety of instances, so that her comfort and peace of mind were totally destroyed, her character and respectability degraded, life thereby rendered miserable;" that he had falsely charged adultery; and that he had "often, in his fits of passion, threatened violence, and at other times actually beat her with his fists;" he had been obliged to leave his house.

He stated in defence, that his wife had behaved with distress and impropriety, though not with actual criminality; that she hated him with dislike and contempt, publicly and privately; that she always behaved with kindness and indulgence towards her; and was ready to take her home again, and maintain her in his house. The defences were lodged, the pursuer made a claim for interim and the Lord Ordinary ordered minutes of debate.

Ordered by the Pursuer—

Though, in virtue of the *jus mariti*, the husband is, in the ordinary course, administrator of the goods in communion, yet the wife possesses a right to her separate property, and the husband is not entitled to abuse his power of administration as to deprive her of the means of vindicating her rights, and of protecting herself against maltreatment. It must be assumed, *hoc statu*, that she

No. 60. aliment had been allowed, without delaying till an advanced stage of the cause.¹
 Dec. 6, 1833. *Currie v. Currie.* *Pleaded by the defender—*

As the defender was willing to take back his wife and alime she was bound to make out a prima facie case before the Court award aliment. The practice of the Commissaries had always required a *semplena probatio*;² and this was sanctioned by the express judgment of this Court.³

The hardship on a husband would be very great, if any wife merely libelling a relevant summons, and leaving his house, could compel an interim aliment, and continue to extort it during the whole of a process. On the other hand, there was no real hardship in requiring a wife to make out a prima facie case, as there would be little difficulty in procuring the means of doing this wherever she had a good cause to prosecute.

The motion for interim aliment came before the Lord Ordinary disposed of on the last day of the summer session 1833. His Lordship then intimated to the defender, that it appeared proper to make an award of £20 of interim aliment, and also to prevent this award from being interrupted by a reclaiming note; and that he was therefore prepared to report the cause to the Inner-House instantly, and obtain an Inner-House judgment, unless the defender consented to the interim award. The defender's counsel stated that he was not instructed to consent, but would offer no opposition. The Lord Ordinary, "in respect no objection is made by the defender, decreed against him for the sum of £20 sterling of interim aliment to the pursuer, together with the expenses, if necessary, and allowed an interim decret to go out as extracted accordingly."*

The defender presented a reclaiming note, signed by a new counsel.

¹ Lady Lennox, March 23, 1579 (5877); Lady Invernytie, Feb. 27, 1711, Supp. 880; Crammond, Jan. 25, 1756 (5886); Fraser, March 11, 1774, 1 Hail. 577; Grahame, June 3, 1826 (ante, IV. 670); Anderson, March 3, 1819 (F. 4).

² Lothian on Consist. Law, p. 127—197 (Irving, Oct. 1820; Lockhart, April 1819; Commissary Records.) See also MSS. Collection in Commissary Court.

³ Maxwell, March 5, 1808 (Mor. v. Husb. and Wife, App. 7); Sassen, 2 1 327.

* "NOTE.—By the practice of the Commissary Court, as proved by a number of decisions, a wife pursuing a divorce on the ground of adultery, or of separation on the ground of indignity and ill-treatment, was not entitled to demand that the libel should be modified to her in *initio litis*, or until she has brought a *semplena probatio* of her libel. Though in some circumstances this may be proper, the Lord Ordinary entertains great doubts whether it should be laid down as a general rule, particularly as it seems to have been under the consideration of this Court on one occasion, and in a case full of specialties. If the wife has no means of supporting herself, or carrying on her action, but what she derives from her husband

ura of alimient; and his Lordship reported the case on the former of debate.

Lordships waived the determination of the general point, but it, on the one hand, there was no incompetency in applying for an award of alimient at the earliest stage of the cause, and, on the other, there was no indefeasible right to obtain it; but every such case, as it occurred, was one of circumstances, and depended on the opinion of the Court. Their Lordships remitted to the Lord Ordinary to enquire whether, in the circumstances of this case, any, and if any, further sum of interim alimient ought to be allowed to the pursuer; to proceed further," &c.

A. ROBERTSON, W.S.—W. HUNT, W.S.—Agents.

RATES AND TOWN COUNCIL OF DUNDEE, Advocators.—*Skene—* No. 61.
Baxter.

CHRISTOPHER KERR, Respondent.—*Rutherford—Ivory.*

Removing—Public Officer.—Magistrates of a burgh having proceeded as in removing within burgh, for the purpose of taking from one of two convicts part of the accommodation in the town-house which he had been in custody, chalking the door, and bringing a summons of removing before the action dismissed as incompetent.

consequence would be, that she must return to his house till part of her sentence, which, in the case of adultery, would be a total bar to her action, and, it might expose her to such treatment as no woman is bound to submit to, and endanger her life. But, whatever might have been the rule of the Com-

No. 61. THE respondent, Kerr, and Mr Barrie, were, in 1822, appointed joint town-clerks of Dundee, with "the whole fees, salaries, profits, emoluments annexed, or justly belonging" to the office. For many years prior to this there had been four apartments in the town-house, in which were occupied by the town-clerks, and it had also been the practice of persons appointed to the office to carry on their private business as well in the premises so occupied by them. Of two of these apartments Mr Barrie was put in possession, and of the other two Mr Kerr got possession. He and his brother, who carried on business in partnership as writers, moved their private establishment to these apartments. In 1829, in consequence of some projected alteration as to the arrangements in the town-house, the ground-floor, which had previously been occupied as shops, was fitted up, and formed into writing apartments, to which were removed, while Mr Barrie occupied those previously held by him, and those possessed by Mr Barrie were applied to another purpose. In 1833, the Magistrates and Council resolved that the accommodation afforded to Mr Kerr was beyond what was necessary for the office, and intimated to him that he must give up a portion of the premises, and confine himself to the apartments formed out of what had been the westmost shop; and further, in October of that year, caused warning to be given to him and his brother, to remove at the ensuing Martinmas, chalking the door according to the forms used by landlords in removing tenants within ten days. Mr Kerr having refused to yield the apartments sought to be taken from him, the Magistrates and Council raised an action before the Sheriff of the county of Dundee, setting forth the circumstances, and that in order to avoid a forcible ejection at their own hand, they had resorted to this action, concluding that Kerr and his brother should be ordained to remove, at Martinmas, from the premises. Besides his pleas on the merits, which were generally to the effect, that he held these apartments by legal title for life, as pertinents of his office, Kerr pleaded, that the action was incompetent before the Sheriff as being an extraordinary removing, raising questions of right which could only be settled under a declaration in the Supreme Court.

The Sheriff having dismissed the action, "reserving to the pursuers to bring a competent action in a competent court," and adding the usual note,* the Magistrates and Council brought an advocacy

* "The Sheriff is of opinion that the pursuers have mistaken their remedy in bringing an action of removing in this court. The defender, Christopher Kerr, was years ago appointed joint town-clerk, and his appointment is one *ad vitam* culpam. It has been immemorially the practice, and held to be the duty of the magistrates, to provide chambers for the town-clerks in the public building of the burgh, to enable them to execute their public duties. Admittedly, it is admitted that Mr Kerr, on being admitted a joint town-clerk in 1822, was put in possession of certain apartments, which he retained till 1829, when, of his own consent, those he now possesses were provided for him, instead of those

which they contended—that the matter in question regarded the internal distribution by them of the occupation of their own town-house by the officers of the burgh; that the action was not of the nature of a proper

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Magistrates of
Dundee v.
Kerr.

he had formerly occupied, and to which he entered, and has used and possessed them ever since. The pursuers seem to maintain that the arrangement under which he holds his present chambers became void and null, because, at a subsequent period, the magistracy were disfranchised, and because the disfranchisement was carried back to the magistracy which made the new arrangement with Mr Kerr. But it rather appears to the Sheriff that the arrangement, being within the ordinary power of the magistrates, must remain good, notwithstanding the subsequent disfranchisement; or, if this shall be thought otherwise, it will follow that Mr Kerr must be reinstated in the apartments previously provided for and occupied by him, and this last he offered to accept of, but the proposal appears to have been rejected by the pursuers. The pursuers, in support of the conclusion for removing, state that the premises given to Mr Kerr in 1829 are more extensive than were requisite for the purpose, and they therefore proposed to deprive him of part of them; and in order to attain that object, a summons of removing has been brought before the Sheriff. The question is, Whether such an action, under such circumstances, be competent? Mr Kerr holds a life-appointment from the pursuers, which was not even affected by the disfranchisement of the burgh. As a part and pertinent of the office of town-clerk, he, like his predecessor, claimed a right to certain apartments or chambers, wherein he was to do the public business, and also, as was customary, any private business intrusted to him by individuals; and such apartments, formerly occupied by his predecessor, were accordingly assigned to him when he entered on office in 1822, and which, down to 1829, were used and possessed by him as part and pertinent of his appointment. It seems to be of no importance that he subsequently gave up one set of apartments and accepted of a different set, because, having done so voluntarily, that circumstance does not vary the present question. The point now at issue (the magistrates having resolved to take back part of the chambers so assigned to him in 1829) is, whether the Sheriff be competent to set aside a concluded agreement between the parties, which, in ordinary circumstances, and supposing the chambers not more extensive than was requisite, confessedly remained binding for the lifetime of the defender, and which therefore could only be altered by the consent of both of the contracting parties. It does not seem to be maintained by the pursuers that the Sheriff has power to annul the agreement of parties, so far as regards the defender's appointment of clerk, so as to remove him from office as unfit for the duty, supposing such an allegation were to be made, or that he can deprive him of any of his customary fees and emoluments which he draws daily, or even take from him all of the chambers or apartments set aside, now and formerly, for the use of the town-clerks, as part and parcel of their office; on the contrary, the pursuers seem to admit that the defender is entitled to certain apartments, though they wish to restrict and limit the extent of the accommodation which they formerly gave him, on the footing that, in their opinion, it is more extensive than is requisite. But is it competent for an inferior court to alter the concluded arrangement of parties upon which possession has followed, upon a mere ground of expediency favourable to the views of one of the contracting parties? The Sheriff entertains the greatest doubts upon that point, and thinks, that if the arrangement can now be set aside, that object can only competently be sought for under the form of a declarator and reduction of the defender's rights, to the extent that may be insisted for. But such an action is not competent before the Sheriff, and it would therefore seem that the object in view cannot be attained indirectly, viz., by an action of removing, a

No. 61. removing, but of mere summary ejection of an alleged intruder, and whether they would succeed or not on the merits, there could be no doubt of the power of the Sheriff to entertain and determine such a process.
 Dec. 6, 1833. *Brown v. Cheyne.*

The Lord Ordinary pronounced this interlocutor:—"Finds that the present action may be taken as an action for an immediate order of removal and ejection of the respondent; and in that view, remits to the Sheriff to recal his interlocutor dismissing the action, to sustain the same and thereafter to proceed as to him shall appear just, and decerns accordingly: Finds no expenses in this Court due to either party."

Kerr having reclaimed, the Court altered the interlocutor of the Lord Ordinary, and returned to that of the Sheriff.

BROWN and MILLER, W.S.—MACLACHLAN and IVORY, W.S.—Agents.

No. 62. MISS ISABELLA BROWN and MANDATARY, Pursuers.—*Monteith.*
 J. A. CHEYNE and J. M'KEAN, Defenders.—*D. F. Hope—Robertson-Moir.*

Sale—Agent and Client.—1. A purchaser not bound to accept a title attended with doubt, and unnecessary in such case to determine whether the objections to it are truly fatal or not. 2. Objections which held sufficient to entitle the purchaser to reject it.

Dec. 6, 1833. **THE** pursuer, Miss Brown, in 1824, employed the defenders, Messrs Cheyne and M'Kean, writers in Edinburgh, as her agents, to purchase a house. They accordingly bought from the trustee of Baynes, one of a number of houses in Malta Terrace, belonging to Baynes. Miss Brown lodged with the defenders the money for the price, which they paid to the trustee, who executed a disposition in Miss Brown's favour, but died before

proceeding which implies, either that the defender never had a title to possess, that the possession was at the pleasure of the magistrates, or that the title to possess was limited in point of time, and that the period for which the possession was given was now expired; none of which assumptions are in accordance with the true state of the fact. In truth, what the pursuers ask, is a reduction and voidance of certain of the rights which seem to have been vested in the defender for life, by regular appointment flowing from the pursuers and their predecessors in office. But such a question, it is thought, cannot competently be tried by the Sheriff under the form of a removing. Ex facie of the grant of the office, as explained by what took place on occasions of former appointments, the clerk was entitled to the use of certain apartments or chambers, to be held by him during life, as part and parcel of his appointment. Is it competent for the Sheriff to sanction the magistrates in recalling, at their own pleasure, on a ground of expediency or economy, what was unqualifiedly bestowed on another for life? Or, can he competently decide between them to what extent the defender shall have accommodation, supposing the magistrates may now enquire into the extent of the accommodation which ought to be afforded him? The form at least of the present action will not warrant him doing so."

fore it was delivered, or the testing clause filled up. In 1829, a ranking and sale of all Baynes's property was brought by the trustees of one Cameron, who held a catholic security over it; and Miss Brown thereafter raised the present action against the defenders, concluding for repayment of the £500, in respect of their having failed to obtain for her titles to the house she had employed them to purchase. On this the defenders presented an application to the Court, in the process of ranking and sale, to have the sale of the house in question suspended till they should complete the title in favour of Miss Brown. The common agent in the ranking resisted their application, on the grounds that their right was merely personal, like that of the personal creditors; that both parties should be left free to complete their respective rights according to law; and that it was unfair to stay the only mode of proceeding left open to the general creditors for making their rights real, while their opponent was allowed to follow forth the steps necessary to enable him to cut them out. The Court, however, (ante, IX. 302,) ordered the sale to be suspended in *hoo statu*. Thereafter the defenders put in a claim in the ranking and sale, to have the house struck out of the sale altogether, and they produced therewith the disposition by Baynes's trustee, the testing clause being still incomplete. An objection was taken to the claim on this head by Cameron's trustee, but after some procedure, a minute was lodged by the defenders, offering certain terms in favour of the other claimants, on condition of this house being struck out of the sale. Answers were lodged for Cameron's trustees, the raisers, and for the common agent, the former consenting to the offer, and the latter bearing as follows: "And Mr John Marshall, advocate, procurator for the common agent, stated, that he had obtained the express consent of all the claimants in the ranking to the arrangement proposed in Mr Cheyne's minute, with one exception, viz. the trust-dispousee of the heir of the late John Hutchison, wood-merchant in Leith; and in respect of the want of the express concurrence of that individual, he could not expressly consent to the proposed arrangement; but as Mr Cheyne's proposal seemed advantageous to the interest of the estate, and the other claimants approved of it, he did not in these circumstances feel himself called on to make objections thereto."

The Court, "in respect and in terms of the foregoing minute and answers," ordained the house to be struck out of the sale. In the meantime the present action had been going on, and so soon as the defenders obtained the judgment, striking the house out of the sale, they lodged in this process the disposition by Baynes's trustee, having first had the testing clause filled up. The Lord Ordinary found that Miss Brown was not now bound to take the house, and decerned for repetition of the £500, as libelled; but the Court (see ante, XI. 497) altered and remitted "to his Lordship to hear parties on the sufficiency of the title offered to the pursuer, and if his Lordship shall be of opinion that the title so offered is good and

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sufficient, to find that the pursuer is still bound to accept the same, but without prejudice to her claims of damages, in terms of her summons."

Before his Lordship, Miss Brown contended that the title was not on which she was bound to accept, seeing it was liable to objections, which whether fatal or not, threw such doubt on the validity of the title, as to entitle her to reject it. These objections mainly were:—

1. That Hutchison, one of the creditors in the ranking, had not consented to the judgment ordering the house to be struck out of the sale which, not being pronounced *causa cognita*, but in respect of the consent given, could not bind him; and,

2. That the disposition by Baynes's trustee, who had previously died had not the testing clause filled up when produced in the ranking and sale; and consequently, as to all questions arising in that process, it was invalid, and incapable of being remedied, and Hutchison not having consented to the judgment of the Court striking the house out of the sale, he or his representatives were still entitled to challenge that judgment, and any title made up on the disposition.

To this it was answered—

1. The absence of consent on the part of Hutchison to the interlocutor striking the house out of the sale, cannot invalidate it, seeing it was *in foro*, and so is *res judicata* against him; and, at any rate, his having it in his power to challenge would be of no consequence, unless on the merit the interlocutor might be impugned, and besides, he has no substantial interest to challenge; and,

2. The disposition having been completed before being produced in this process, it must be held, as in a question with Miss Brown, to be perfectly valid and effectual, while Hutchison has no substantial interest to challenge it.

The Lord Ordinary found "that the title offered by the defenders to the pursuer, is not such a title as she is bound to accept of," adding the subjoined note.*

The defenders reclaimed.

* "In considering the sufficiency of the title, for which purpose the case has been remitted, the point is not so much whether there is much probability of eviction, or of any party challenging the title, as whether it be such a title as would be taken by a purchaser from Miss Brown without objection, or without some farther guarantee, or at least a diminished price? The objections stated to it are—1st. That the disposition by the trustee, the testing clause was filled up after it was produced in Court, and after the death of the trustee. 2d. That the price is stated in it £622, instead of £560, although with a corresponding diminution of feu-duty. 3d. That the subject was struck out of the ranking and sale by an arrangement with the creditor who raised it, not objected to, but not assented to, by the common agent because he could not obtain the consent of one of the creditors.

"With regard to the 2d, the defenders offer to settle with the pursuer in the original terms, and to take an obligation for payment of the portion of the feu-duty

LORD CRINGLETIE.—There never was a person worse used than this poor lady has been. Her money was employed to buy this house in 1824, and she has not got a title yet. We are not bound to decide if the objections taken to the title are fatal or not. If there is any risk at all, it should fall on the defenders; and as there is risk, I am for adhering. No. 62.
Dec. 6, 1833.
Stewart v. Menzies.

LORD MEADOWBANK.—I am entirely of the same opinion. The pursuer is not bound to take a title, as to which any rational doubt exists. I think there is such doubt here, and I am therefore for adhering.

LORD GLENLEE.—I agree.

LORD JUSTICE-CLERK.—I also concur. The objections would require much consideration, but it is enough that there is doubt.

THE COURT accordingly adhered.

J. S. DARLING, W.S.—JAS. ARNOTT, W.S.—Agents.

CHRISTIAN STEWART and Others, Pursuers.—*Shene—Patton.*

No. 63.

JOHN MENZIES, Defender.—*D. F. Hope—Smythe.*

Husband and Wife—Marriage—Proof—Fraud.—1. A party gave to a woman, with whom he had previously lived in concubinage, a letter in these terms: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connexion betwixt us," and the intercourse having continued thereafter, and a child born—held not to constitute marriage. 2. In a declarator of marriage and legitimacy, it is competent for the defender to prove that a letter given by him to the pursuer, was, on the understanding of both, intended not to constitute marriage, but to deceive others. Observed, however, that a proof of the one party's intention thereby to deceive the other, would not be admissible.

purchased up to themselves, and this seems sufficient, provided the deed be executed at their expense.

"As to the 1st, the Lord Ordinary views it as a serious objection, and the best answer to it is, that there is probably no person who is in title to urge it. Yet a purchaser would probably scruple to take such a title.

"Again, as to the 3d, the subjects have not been struck out of the process by a decree of the Court, finding that they ought never to have been included in it; but by an arrangement, to which the assent of one creditor has not been obtained, and which on that account is only not objected to by the common agent. The decree of certification which had been pronounced before the claim for Miss Brown was produced was recalled, and subsequently the subjects struck out, 'in respect and in terms of the foregoing minute and answers.' It is said that the creditor who did not agree, has no interest to challenge this proceeding, although it lets in a claim excluded by the decree of certification, the effect of which is to strike out a valuable subject from the sale. That the creditor who will not be paid from the other subjects has not an interest to challenge, is not so clear—at least, as to preclude all risk of challenge; and an intending purchaser might estimate this risk so high as to preclude a purchase, and make him prefer another subject with an unimpeachable title. In short, the Lord Ordinary is not satisfied that the pursuer is bound to accept of this title, considering what the correct rules of business entitle her to, and how differently she would have been situated if these had been observed as to her purchase, as they were in another purchase by the same agent about the same time."

No. 63.

Dec. 6, 1833.
2d Division.
Consistorial.
Ld. Medwyn.
T.

Stewart v.
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THE pursuer, Christian Stewart, and two children, borne by her to the defender, John Menzies of Chesthill, raised against him an action of declarator of marriage and legitimacy, in which it was averred, that after an illicit intercourse had commenced between the principal parties, while the former was a servant with the latter, and had continued for some time, he had on diverse occasions declared her to be his wife, and, in particular, in the beginning of the year 1828, had given her a holograph letter, which was produced, and was in these terms:—"Duneaves, 25th March, 1826.—Christy, you and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife, in the event of a child being born in consequence of the present connexion betwixt us, and I am yours truly." (Signed) "JOHN MENZIES of Chesthill." A child was born about two years after the date of this letter.

Menzies admitted the intercourse both before and after the delivery of the letter, but he denied ever having declared Stewart to be his wife, and as to the delivery of that letter, (while, in one afterwards written to his agent, he had said that he had been "imposed upon to give" it,) he on the record averred as follows:—"In the course of the year 1827, the defender became acquainted with a young lady of the name of Macdougall, and engaged to marry her. He afterwards, however, became desirous of breaking off that engagement, and being unwilling to assign any reasons for doing so, which could prove offensive to the feelings either of that lady or of her relations, he falsely pretended that he was under a previous engagement to marry the pursuer. He accordingly instructed the pursuer to make a similar statement in case any questions should be put to her by the friends of Miss Macdougall, and with the view of supporting her statement, he wrote the letter which is quoted in the fourth article of the condescendence, and delivered it to her. At the time when he did so, he explained to her that he had no intention of thereby making her his wife, and the letter was received by her upon that understanding. Although it bears date the 25th March, 1826, it was only written and delivered to the pursuer in the course of the summer 1828. No change took place in the nature of the intercourse between the defender and the pursuer, after the latter obtained possession of the letter. She continued to reside with her uncle in the same manner as formerly, and never ventured to assume the character or privileges of the defender's wife. On the contrary, she at that time acknowledged to various persons the true purpose for which the letter was given to her, and it is believed she would have had no hesitation in restoring it to the defender, had he then asked for it. Unfortunately, the document fell afterwards into the hands of her brother, Donald Stewart, who at first endeavoured to make use of it as a means of extorting money from the defender; but having failed in that, he has stimulated the pursuer to raise the present action."

The Lord Ordinary having pronounced an interlocutor, remitting to the commissaries "to take the proof of the parties," the pursuers presented a reclaiming note, praying the Court "to find, 1st, That the holograph

letter by the defender, dated 25th March, 1826, together with the admitted cohabitation of the parties subsequent to the letter, constitute a legal marriage. 2dly, That the allegations made by the defender, in order to evade the consequences of his own legal admissions, that the said letter libelled on was false, and prepared by himself or his agents, under instructions from him, for purposes of fraud, cannot be admitted to probation. And, 3dly, That the pursuers, John and Catharine Menzies have acquired right, and are entitled in the circumstances to the privileges and status of legitimate children, and that these rights are not subject to be defeated by proof of the facts alleged by the defender."

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The Court, on advising this note, ordered Cases "on the points of law involved in the second prayer."

Pleaded for the pursuers—

The object of the defender's proposed proof, with reference to the letter in question, is to redargue his own written statement therein contained. This, however, is incompetent, because, First, written deeds cannot be redargued or modified by parole proof;¹ and, Second, a party cannot be allowed to prove his own fraud, in order to benefit thereby.² These are general principles in the law of Scotland, applicable to contracts generally; and there is nothing in regard to the contract of marriage, which should take it from under the general rule. On the contrary, when the interests of third parties, as children, and the public, are concerned that full effect and faith should be given to such contracts, according to the fair import of the acts constituting them, there are peculiarly strong grounds for strictly enforcing these rules, and not permitting the one party to allege that such acts were done by him, not with the intention of marriage, but for a different and immoral purpose, or allowing both parties desirous to get free, to do so collusively, by pretending different motives from those which the acts done truly bear and import.³

Pleaded for the defender—

Marriage can only be constituted by true and actual mutual consent, and the status cannot be created by acts done to deceive others, when such mutual consent and true intention is absent. More especially irregular marriages are open to construction, and by a series of decisions in this Court and the House of Lords,⁴ it has been decided, that whether the alleged marriage have been constituted by words, by a course of

¹ Tait, 335; Ersk. 4. 2. 21.

² M'Ghie, June 26, 1829 (ante, VII. 797).

³ Lord Meadowbank in Cuninghame of Balbougie; Fergusson's Consist. Law, App. 128.

⁴ Cameron v. Malcolm, June 29, 1756 (12680); Allan v. Young, Dec. 9, 1773 (Fergusson, 37); Cochran v. Campbell, Dec. 21, 1781 (12683, and Fergusson, 84, 154); M'Innes v. More, in House of Lords, June 25, 1782 (12683); Taylor v. Kello, Feb. 16, 1786 (12687); M'Lachlan v. Dobson, Dec. 6, 1792 (12693); Grant v. Menzies, June 12, 1812 (Fergusson, App. 110); M'Gregor v. Campbell, Nov. 28,

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conduct, by writing, or by a ceremony performed, it is competent to lead proof by parole of the whole facts and circumstances, to show that there was no real and true consent, but that all that passed was really intended as a blind or cover, and not to constitute the status of marriage. Then as to the allegations here being to establish fraud on the part of the defender, it is not fraud practised against the pursuer, deceiving her and leading her to believe that a real and true contract had passed, but fraud, in which she was participant, so as to exclude, if established, the idea of any understanding or belief, on her part, of marriage, even if the document, supposing it not to be a mere cover, were capable in law of establishing a marriage, which it is not.

LORD CRINGLETIE.—In the first place, I must say, that I do not think the letter a constitution of marriage; and, secondly, though it could be held apparently so, it would be competent to determine, whether under all the circumstances there was a real intention on the part of the defender to make the pursuer his wife. As to the first point, there is no room for construction that cohabitation complete consent, where a promise has been given. Here, however, according to the terms of the letter, the parties had been living, I do not say as man and wife—but under a condition that they were to be so in the event of a son being born. Parties must either be married or perfectly free, as there cannot be a conditional marriage, and she could not consider herself his wife in consequence, for it was two years before a son was born. This case is quite different from any hitherto determined, so far as regards the declaration de presenti. Then, even if this could be held such declaration, it is clear, by the judgments of the House of Lords and this Court, that such writings may be used to impose on people, if they have been so used, it does not make marriage, as not being the requisite consent, and therefore I think proper to explain it. I think the Lord Ordinary's interlocutor right, and I am for adhering.

LORD GLENLEE.—The first thing is to consider the propriety of the first prayer as it would supersede the necessity of adverting to the second. It is to find the letter constitutes marriage. Now, we must hold, particularly after the case of Kennedy v. M'Dowall,¹ that it does no such thing. Mr Fergusson, as the heading to that case, puts the very question here raised—"An promissio futurarum nuptiarum, sub conditione 'si concipiat', post primam copulam data, sed secunda etiam copula tum subsequente necnon pluribus deinceps copulis ex intervallo, cum conceptu, matrimonium faciat?" This question was there resolved in the negative and it was decided that it was no marriage at all. Under that judgment we must hold, that the promise being sub conditione, there was no marriage; and, after that they just lived as before, in a state of prostitution. Therefore, as to the first prayer, I am of opinion, that there is no constitution of marriage by the letter. Then, as to the second prayer, it is a different matter, and requires a distinction. There can not be much doubt on general principles, that facts and circumstances in particular

1801 (12697); M'Gregor v. M'Neill or Jolly, in the House of Lords, June 20, 1801 (3 W. & S. 85).

¹ 1796, Fergusson, 163.

cases may be admitted, to show that a writing does not mean what it says it means. But then the allegation that he himself did not intend it as a marriage, would be quite irrelevant, unless coupled with this, that the woman did not understand that he was his wife, and I would hesitate as to allowing a proof of what he thought himself, or said to other people.

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LORD MEADOWBANK.—I take the same view of the import of the letter. I do not think it can be considered a document which by effect of it alone, followed by cohabitation, could create a marriage; and on the other point I concur with Lord Glenlee.

LORD JUSTICE-CLERK.—I think we should not alter this interlocutor merely allowing a proof, which will not preclude any objection to the proof offered as incompetent or irrelevant. On the record this woman gives a history of the letter. She states she got it at the end of 1827, and it is dated 1826, and we cannot exclude his opposite account of it. This is not alleged to be a deception practised on the party, and we would not allow that to be averred or proved; but the allegation is, that it was to deceive not her, but third parties. Considering all the cases, I have not been able to arrive at the conclusion that the defender is not to be allowed this proof, though it will be limited according to the rules of law, and certainly he will not be allowed to prove his own views and intentions, and she will not be foreclosed from objecting to any thing incompetent.

LORD MEADOWBANK.—I think it would be proper to insert the limitation, as I do not think, that under the interlocutor as it stands, the Commissaries could reject proof of any averment set forth in the condescendence.

LORD JUSTICE-CLERK.—Let it be before answer then.

THE COURT accordingly adhered, with the variation that the proof should be before answer.

GRIGG AND MORTON, W.S.—J. FERCUSSON, W.S.—Agents.

JAMES POTT AND JANE RANKINE, Pursuers.—*Robertson—Shaw.*

No. 64.

JAMES POTT, Defender.—*D. F. Hope—Whigham.*

Parent and Child—Aliment—Interest.—1. So long as a natural child is unable to maintain itself, either from ill health, or from having been prevented by previous ill health from learning a trade, the father is liable to maintain it. 2. He is also liable in interest on arrears of aliment. 3. Interim aliment awarded pending the discussion as to the father's liability. 4. An agreement being made between the father and mother of a natural child, by which the father bound himself to aliment it till the age of twelve, and the mother bound herself to free him of all claim thereafter—held that this did not bar the child from claiming aliment against the father, after it reached the age of twelve. 5. The father having paid a sum to the Edinburgh kirk-treasurer, before the child was born, and having received an obligation from the kirk-treasurer, to maintain, clothe, and bring up the child—held that the father was nevertheless directly liable, at the instance of the child and the mother, to pay her a reasonable rate of aliment, so long as she had the custody of the child, deducting all sums received from the kirk-treasurer, and reserving the father's claim of relief against him. 6. Where a boy had reached his sixteenth year, held that the father, if called on to provide for him, was entitled to the custody of him, with a view to teaching him a trade.

No. 64. **JANE RANKINE**, in 1817, was delivered of a natural son, of which James Pott, W.S., who was alleged to possess at least £30,000, was the father. **Dec. 7, 1833.** During her pregnancy, he made an agreement with the kirk-treasurer of **1st DIVISION.** Edinburgh, on behalf of the Charity Workhouse, by which, in consideration of £52, 10s., he undertook to maintain, clothe, and up-bring the child. When the child, (who received the name of James Pott,) was born, its mother refused to give up the custody of it to the kirk-treasurer. In an action before the Justices of Peace, they awarded aliment against the father at the rate of £5, and he afterwards agreed to pay at the rate of £8 per annum, till it reached the age of twelve. To the extent of £5 per annum these payments were made by the kirk-treasurer, the father paying the difference. The boy attained the age of twelve on 7th February, 1829; prior to which time, his father intimated to the mother that she must now devolve the custody of the child on the kirk-treasurer, or keep it at her own cost. The child had been for many years afflicted with disease, which unfitted him for learning any trade; and in June, 1829, Dr Thatcher granted a certificate, to the effect, that, from the delicate state of his health, he was not a fit subject for the Charity Workhouse, and "any person placing him there must be responsible for all consequences." The mother refused to give up the boy to the kirk-treasurer, who, at the father's desire, offered to take him into the Charity Workhouse. Subsequently to this, the boy was employed as a message-boy by a shoemaker, and earned about 2s. a-week. Some aid was also obtained from the kirk-treasurer, who paid, in all, the sum of £17, 15s., between February, 1829, and September, 1832, at which time he discontinued his allowance. As the father granted no farther aliment from his own funds after February, 1829, the mother raised an action against him, in the Small-Debt Court, for a continuation of the aliment; but the Sheriff, in July, 1829, assoilzied. The boy was no party to the action.

In January, 1833, the mother and the boy (who was now sixteen years old) raised an action of aliment against the father, stating, that the boy was unable, from want of health, to earn a livelihood for himself; that his mother was in utter destitution; that they had latterly been denied all aid from the Charity Workhouse, because the father was possessed of affluence, and was bound to maintain his son so long as the boy was unfit to maintain himself. They concluded for payment of £36, as three years' arrears of aliment, at the rate of £12, past due since the aliment was stopped in 1829, with interest from the date of citation; and for decree, ordaining the father to pay aliment at the same rate, so long as his son should be unable to aliment himself.

The father stated that the boy was now in perfect health, and able to maintain himself; and he pleaded—

1. That the boy had now no legal claim to aliment. But if he had a legal claim, it could lie only against the kirk-treasurer, who was liable to

maintain him in consequence of the above agreement, by which the kirk-treasurer received £52, 10s. in 1816, and became expressly bound to maintain, clothe, and bring up the boy.

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2. At all events, the three years of by-past aliment could only be awarded under deduction of the amount of earnings made by the boy, and sums paid by the kirk-treasurer under the agreement.

3. The decision of the Sheriff in July, 1829, was *res judicata* as to the aliment then claimed, and applied *a fortiori* to subsequent aliment.

To this it was answered—

1. When a child is in infancy, its father is bound to maintain it, because it cannot maintain itself. So long as its inability continues, whether from ill health or otherwise, so long the obligation continues against the father. If he make an agreement with another, who undertakes to support the child, this cannot affect the rights of the child, as its claim lies primarily and properly against the father, and enables the latter only to obtain relief.

2. The pursuers did not object to deduction of the sums received from the Charity Work-house, but the defender was liable in the arrears, subject to that deduction, and interest thereon.

3. The Sheriff's judgment formed no *res judicata* against the boy, who was no party to the process.

The cause was first advised on 8th March, 1833, when the Court ordered condescendence and answers, "and in the meantime, decerned against the defender for payment to Henry Tod, W.S., for behoof of the pursuers, of the sum of £5 sterling, and if not paid within ten days from this date, allowed an interim extract to go out therefor, and for the dues of extract: Farther, appointed Mr John Waugh, treasurer of the Charity Work-house of Edinburgh, to be called as a party to this action."

Mr Waugh was called, and declined to appear. On a second advising, the defender, *inter alia*, insisted that Jane Rankine should surrender the custody of the child, which she did not oppose, provided he were properly taken care of or provided for.

LORD PRESIDENT.—Even if it were instructed that the present health of the boy is good, yet his delicate health in past years renders his situation peculiar. He may have been prevented from learning a trade as other boys could have done, and may still be unable to do any thing effectual for his maintenance. This circumstance would require the special consideration of the Court.

LORD GILLIES.—I should like to hear the father state more specifically what he means to do with the child. If he provides for him, I think him entitled to the custody and management of the child.

THE COURT found "that the mother of James Pott, the pursuer, has now no right to the custody of the pursuer; and, in respect the defender offers to take charge of the said pursuer, they, in the meantime, supersede farther advising."

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When the case was finally advised, it was stated that the boy had now been bound by his father apprentice to a trade.

LORD PRESIDENT.—I think it is clear from the medical certificates produced, that the boy has been in very poor health during a great part of the time in which he might otherwise have been learning some trade.

LORD BALGRAY.—I think aliment should be allowed from February, 1829, to the period when the custody of the child was given up to the father.

LORD GILLIES.—The merits of this case may be brought to a short issue by perusing the following letter from the father. The agent for the boy wrote to his father, asking him for aliment, before the action was raised: the father gave this answer—"I received yours of the 24th instant, wishing me to pay to Jean Rankine, alias Paterson, alias Miller, a sum of money for alimentering and maintaining her bastard, or one of her bastards, since it attained the age of twelve, and to provide in future for its education, clothing, &c. The principle of law you lay down is, that the 'father's obligation of support does not end at twelve, unless the child be able to maintain itself.' Supposing this principle of law to be correct, there must be exceptions, arising out of the agreement of parties. By agreement with said Jane Rankine, dated 28th April, 1818, she binds and obliges herself to free and relieve me of all claim for aliment, and every other claim whatsoever, after the child has attained the age of twelve complete." Then he goes on to say that the Justices of the Peace and the Sheriff gave unqualified effect to this agreement, and found him free of all farther claim. So that the view which this gentleman takes of an obligation to support his destitute child, an obligation equally incumbent on him by the law of nature and morality, and by the civil law of this country, is, that in virtue of an agreement which he has made with a woman whom he describes to be abandoned and profligate, he shall shake himself loose of all claim at the instance of his son. But he seems to have some misgiving whether this was the surest ground to take, and so he proceeds to say that he had "also purchased up the claim of relief competent to the parish against me, in the event of the bastard falling into destitution, so that neither the mother nor the parish can found any claim against me. So standing matters, it follows, if the bastard is not able to maintain itself, application can be made to Mr Waugh, for support as a pauper; and on proving poverty, or inability to work, it will receive, I have no doubt, that consideration of the claim due to it." And thus the defender imagines he can interpose the poor's house between his son and himself, when the son comes to him with a claim for subsistence. These are the grounds on which he refuses that claim. There can be no hesitation about repelling them.

LORD CRAIGIE concurred.

THE COURT found "the defender liable to the pursuer, Jane Rankine, at the rate of £12 yearly of aliment for the other pursuer, James Pott, from the 7th day of February, 1829, until the day when the defender took charge of his son, deducting £17, 15s. paid by the Charity Work-house, and £5 paid to Henry Tod; with interest since the date of citation till paid; and found, after deducting said sums, that the balance of principal due is £29 and 4d.: decerned therefor, and for the interest thereof from the date of citation: and found the defender liable in the pursuer's expenses, reserving

claim of relief at the defender's instance, against the managers of the Charity Work-house, and to them their defences, as accords." No. 64.

Dec. 7, 1833.
Bell v. Murray.

TOD and ANDERSON, W.S.—W. MARTIN, S.S.C.—Agents.

Laird v. Miln.

ALEXANDER BELL, Pursuer.—*Mylne*.
— MURRAY, Defender.—*Jameson*.

No. 65.

Poor's Roll—Counsel.—Senior counsel entitled, on application to them by the counsel for the poor, to act in a poor's cause without the special authority of the Court.

APPLICATION by Bell, a party on the poor's roll, for the sanction of the Court to the Dean of Faculty acting as his senior counsel on the trial of his cause before a jury. The Court having granted their sanction, Dec. 7, 1833.
2D DIVISION.

Jameson requested, for the satisfaction of the bar, to know whether senior counsel were not entitled, without special authority of the Court, to give their services to parties on the poor's roll.

Court.—On the application of the counsel for the poor, senior counsel are perfectly entitled to give their assistance without any special authority.

DAVID LAIRD, Petitioner.—*Robertson*.
J. MILN and DR F. NICHOLL, Respondents.—*D. F. Hope—More*.

No. 66.

Trust—Sequestration—Judicial Factor.—The Court refused to sequester a trustee and appoint a judicial factor, on the allegation that there were only two trustees capable of acting, and that they differed as to the management.

THE late Admiral Laird of Strathmartine, disposed his estates to trustees, the majority residing in Scotland being declared to be a quorum, to be held by them till the petitioner, his grandson, should attain the age of twenty-five, and then to be conveyed over to him. The only accepting trustees resident in Scotland, were the respondents Miln and Dr Nicholl, and the petitioner's mother, Mrs Alison. These three parties had attended all the meetings of trustees hitherto held, but some differences having arisen, (as to which, see ante, p. 54,) the petitioner presented this application, setting forth that Dr Nicholl had become incapable of acting, and that Miln and Mrs Alison differed so entirely as to prevent any proper management of the estate, and therefore praying for sequestration, and the appointment of a judicial factor. This was opposed by Miln and Dr Nicholl, who denied the allegation of the incapacity of the latter, and contended that there were no grounds for superseding the trustee. Dec. 7, 1833.
2D DIVISION.
F.

- No. 66.** **LORD JUSTICE-CLERK.**—If a meeting of trustees were called, and only appeared, and they differed, there might arise a case for our interference, but such case has yet arisen.
- Dec. 7, 1833.** **Laird v. Miln.** **LORD GLENLEE.**—I agree; and at any rate the proper application would be for sequestration, but for appointment of a factor to execute the trust.
- Fraser v. Gordon.** The other Judges concurring,

THE COURT refused the petition.

J. J. FRASER, W.S.—A. STORIE, W.S.—Agents.

- No. 67.** **J. J. FRASER, W.S., Reclaimer.**—*Maidment.*
COLONEL GORDON, Respondent.—*Cuninghame.*

Process—Multiplepoinding.—Question, whether in a multiplepoinding an interlocutor pronounced on the compearance of a new party, is to be held in absence of claimants who had entered appearance in the process, but for whom there had been no attendance as against this new party.

- Dec. 7, 1833.** **IN** a multiplepoinding in name of Lord Fife, Fraser, W.S., had entered appearance. Thereafter at a calling, when there was no attendance on his part, Colonel Gordon was sisted in his place as his assignee and interlocutor which was allowed to become final. A subsequent interlocutor having been pronounced, preferring Colonel Gordon to the interdict in medio, Fraser put in a reclaiming note against both interlocutors contending that he was entitled to be reponed against the first, as properly in absence, as in a question between him and Colonel Gordon then for the first time appearing in the cause.

LORD MEADOWBANK.—In regard to the motion made by Colonel Gordon to be sisted, Fraser was defender, and quoad that it was equivalent to a new application and the interlocutor must be held as a decree in absence, unless Gordon can show special intimation to him.

LORD JUSTICE-CLERK.—I would wish to have minutes on the competency of *Cuninghame, for Colonel Gordon.*—We will rather consent to go to the Ordinary at once.

THE COURT accordingly, of consent and before answer, remitted to his ship to hear parties.

J. J. FRASER, W.S.—JAS. BURNET, W.S.—Agents.

OGILVIE'S LEGATEES, Claimants.—*D. F. Hope—Anderson.*
 JOHN HAMILTON, W.S., Common Agent.—*Keay—Marshall.*

No. 68.

Dec. 10, 1833
 Ogilvie's Legatees v. Hamilton.

Testament—Legacy—Trust—Interest.—A party conveyed his lands to trustees, discretionary powers as to the times of sale, for payment of legacies which he declared not to be payable till after such sale, and the trustees allowed several years to elapse without selling—held, in a question between the special legatees and the residuary legatee, that interest should run on the legacies of the former, from the first term after the lapse of three years from the testator's death, which was allowed as a reasonable period within which to have sold the lands.

THE late Mr Ogilvie of Gairdoch, by trust-deed of settlement, conveyed all his estates heritable and moveable to trustees, for the purpose, *inter alia*, of paying such legacies as he might leave by any writing under his hand, with power to them "to sell, either by public roup or private sale, in their option, and in such lots as they shall judge proper, and at such time or times as they shall think most advantageous for the interests of the subjects, and after proper advertisements in the newspapers," certain lands of Carron House and others specially mentioned, and with directions to entail the residue upon his cousin, John Walker, whom he appointed a trustee, and a certain series of heirs. By various subsequent letters of instructions, Mr Ogilvie directed diverse legacies to be paid "as soon as may be convenient after my decease," but with a declaration, that "it is not my intention that any of these legacies be paid until the sale of Carron House and lands, &c., to procure the money, unless the sums ordered for the poor of the four parishes, and mournings to the sisters there at my decease." Mr Ogilvie died in 1818. Eight years passed without the trustees having effected a sale, when, in 1826, Mr Ogilvie's creditors brought a ranking and sale, under which the whole estate was sold and made the subject of division. The value of the lands specially directed to be sold for payment of the legacies being exhausted towards the debts, a question arose betwixt the legatees and Walker, (carried over for behoof of the latter, in name of the common agent in the ranking,) whether the legatees were entitled to their legacies out of the residue, or whether his claim to have it entailed on him was exclusive of theirs. The Court having (ante, X. 330) found the legatees entitled to their legacies, a further question arose before the Lord Ordinary, from what date they were to be allowed interest thereon. The legatees demanded interest from the first term after Mr Ogilvie's death, while the common agent, on behalf of Walker, pleaded that they were only entitled thereto from the date of the institution of the process of ranking and sale, the time being the period of payment in terms of the testator's letters of instructions. The Lord Ordinary having found the legatees entitled to interest from the second term after Mr Ogilvie's death, the common agent reclaimed.

Dec. 10, 1833.
 2d Division.
 Ld. Medwyn.
 T.

No. 68.

Dec. 10, 1833.
Thomson v.
Reid.

LORD JUSTICE-CLERK.—The question is, if the trustees did or did not exercise a sound discretion in regard to their powers of sale. It appears to me that neither party is right in regard to the period from which they wish interest to run, and that justice will be done by fixing a reasonable period within which the lands should have been disposed of, and allowing interest from that date.

LORD MEADOWBANK.—I thought three years would have been a proper time to allow the trustees for selling. They were not entitled to retain the lands on speculation for the benefit of the residuary legatee.

LORD GLENLEE.—There must certainly be some term between the two extremes, and I do not object to that proposed by Lord Meadowbank.

LORD CRINGLETIE also concurring—

The Lords having considered this note, with the other proceedings, and heard counsel thereon, "In respect of the discretionary powers of management given by the late Mr Ogilvie to his trustees, and that in the due exercise of such discretion a considerable time must have been considered as requisite for the prudent and advantageous disposal of his heritable property, and its conversion into a fund for the payment of legacies, alter the interlocutor of the Lord Ordinary, in so far as complained of, and find that interest on the several legacies here in question shall be payable from and after the lapse of three years from the first term after the death of Mr Ogilvie, and grant warrant to and authorize the judicial factor to make payment of such legacies, with the interest thereof accordingly, and find as expenses due to either party."

ANDREW SCOTT, W.S.—J. HAMILTON, W.S.—Agents.

No. 69.

JOHN THOMSON, Suspender.—*J. Wilson.*
J. REID and J. GRANT, Chargers.—*Skene—Patton.*

Bill of Exchange—Oath.—Circumstances as appearing from the oath on reference of the drawer of a bill of exchange, which held to establish that the bill was without value.

Dec. 10, 1833.

2D DIVISION.
Ld. Mackenzie.
K.

SUSPENSION by Thomson of a charge at the instance of Reid and Grant, his mandatary, on a bill of exchange drawn by Reid upon, and accepted by him, on the allegation of no value. This he referred to the oath of Reid, from whose deposition it appeared that the bill in question, with two others, had been drawn for Thomson's accommodation; that at this time Reid was not a creditor of Thomson's, and had made no advance on his behalf; that Reid was to discount the bills, and hand the proceeds over to Thomson; that he discounted the bill charged on, but did not transmit to Thomson the proceeds, which, along with the two other bills discounted, he handed over to one Waring, a party for whom Reid acted as a traveller, though he also carried on business on his own account, to whom Thomson was indebted in a sum less than the amount in

they belonging to him, thus handed over by Reid to Waring; that done without authority from Thomson; that he had received none from Waring of Thomson's debt to him, but that Waring was to impute the proceeds in payment thereof; and that Thomson of other value than this payment to Waring, for the bill charged on. Considering this deposition, the Lord Ordinary suspended the let-soliciter, adding the subjoined note.*

No. 69.
Dec. 11, 1833.
Murray v.
Presbytery of
Glasgow.

THE COURT adhered.

JOHN RONALD, S.S.C.—MACKENZIE and MACFARLANE, W.S.—Agents.

TRICK MURRAY and Others, Suspenders.—*Greenshields—Skene.* No. 70.
PRESBYTERY OF GLASGOW and Others, Chargers.—*Cuninghame—Pyper.*

—*Process—Judicial Remit.*—1. Condition of a church in regard to decay, and not to warrant decree for a new church. 2. A remit having been made in pursuance of the presbytery's decree to an architect to report—held to super-verify reports of tradesmen on which the presbytery had proceeded; and, when refused in Inner House to allow additional queries to be put to the architect as to measurements, after the cause had come to the Inner House.

The present parish church of Kirkintulloch was built so far back as 1756. It is only capable of containing about 700 persons. The population of the parish is 5518, and the rental £13,362, the land being divided into a large body of heritors. The church was originally built without galleries, and the side walls were, in height, according to the one party, 12 feet 2 inches, and, according to the other, except where earth had accumulated, 15 feet. In 1756, and subsequent years, galleries were from time to time erected by individual heritors, for access to which openings were made in the walls for each new gallery, making in all four openings in the building, and injuring the fabric of the walls. The churchyard had been so much raised in the course of two centuries by the interment of bodies, that it considerably exceeded the level of the floor of the church—in some parts to the extent of four feet. In these few years it had fallen into a state of disrepair, and several

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F.

It appears to the Lord Ordinary to be proven by the oath, that the bill charged was accepted without value; that the charger Reid discounted it, and re-ceived the proceeds; that he had no authority to pay over any part of it, or any sum in discharge of any debt of the suspender, (having no vouchers of such extinction,) and that he sent to Waring the suspender's money and bills, which were used by him for his own accommodation, to an extent far greater than the debt owing to the suspender, and without obtaining in return any legal discharge of that debt, and that Waring is willing to allow him to state himself as the payer of that

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meetings of heritors were held to consider what steps should be taken in consequence. While these meetings were going on, a petition was presented to the heritors, signed by 662 parishioners, setting forth their attachment to the established church—the great want of accommodation, and earnestly praying them to erect a new church instead of attempting to repair the old building, and at the same time stating that they did “not crave a magnificent and costly structure, but only a plain roomy house, suitable for the purposes intended,” which they said “would meet with the grateful acknowledgments of the whole congregation.” This seemed to be the general sentiment of the heritors, and, accordingly, after some surveys, &c., they applied to the presbytery of Glasgow for a visitation. In consequence of this application from the heritors, the presbytery held a visitation at Kirkintilloch on the 20th August, 1829. A large body of heritors appeared, and among them the factor of Mr Murray Gartshore, the principal heritor; and after the presbytery had appointed three tradesmen to inspect the building, the heritors were asked if they wished any other tradesmen added, but they declared that they were satisfied with those named by the presbytery. The tradesmen thus appointed with the concurrence of the heritors, after inspecting the church, returned the following report:—“We, the undersigned, declare, first, that the walls seem to have undergone considerable alteration since their original erection; particularly, a window has been broken out very injudiciously, without attending to the bearings above. This part of the wall is dangerous in its present state. There are also other parts of the walls in a bad state of repair. There is a considerable portion of them so damp that they will not hold the plaster. This is in consequence of the church being considerably sunk below the surrounding ground, and which can never be removed. Secondly, The roof is not in a good state, except the sarking and slates, which are good. But the ceiling joists are very rotten and worm-eaten. We think there is not above one-third of the wood of these joists fresh, so that two-thirds of the strength is gone, and the main tie beams are very insufficient. Third, The seating is very bad; the greater part of it is quite worn out, and the whole of it is by much too narrow and confined. The passes are likewise too narrow, being only two feet in width, when they ought to be at least four feet. And further, if the whole seats and passages were renewed and made to the proper width, there would be a considerable reduction in the number of sittings. After mature consideration, we have no hesitation in giving it as our opinion, that the church is altogether unworthy of repair. It is true that any house may be repaired, however bad its condition, and we think it quite possible to repair this church so as to stand for a considerable number of years free of danger; but we are decidedly of opinion, that it cannot be repaired so as to be at all a healthy, comfortable, or appropriate church for such a parish.” (Signed) “R. SCOTT, ALEX. GRIEVE, ALEX. BROOM.”

This report having been read, the presbytery asked the heritors if they had any remarks to make on it; and they answering that they had none, the presbytery unanimously found, that “the church cannot be repaired, so as to be a healthy, safe, and comfortable place of worship,” and therefore ordained a new church to be built, capable of containing 1500 sitters. The great body of the heritors acquiesced in this judgment, and appointed a committee to carry it into effect; but Sir Patrick Murray, on behalf of his son, Mr Murray Gartshore, the principal heritor, along with Mr Green-shields, and a few small proprietors, (said to be dissenters,) possessed in all of a rental of £3069, out of £13,362, the total rental of the parish, brought a suspension, on the ground that the church was not in such a state as to warrant a new building, and that they were only liable to put it in repair, of which they alleged it was quite capable. In support of the decree for a new church, appearance was made by the presbytery of Glasgow and the committee of the heritors, and, after some procedure, the Lord Ordinary appointed Mr Hamilton, architect, Edinburgh, to inspect and report on the state of the church. Mr Hamilton accordingly returned a report in these terms:—

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“In obedience to the remit of the Honourable the Lord Ordinary, of 11th July, 1832, I carefully inspected the parish church of Kirkintilloch, in presence of the Rev. Mr Forman, and several of the heritors, and others, on the 22d November last; and, in compliance with the desire of several of the heritors, &c., I again inspected the building on the 24th November, and found,

“That the seating, generally, was in very bad repair, uncomfortably narrow, and irregular in width, some of the pews in the body of the church being only 21 inches, others 22, 23, 24, 25, and 26 inches in width, the space allowed in ordinary cases being 28, or at least 27 inches. In the galleries, the pews were 28 inches, some 29, and in the fronts about 30 inches wide.

“The passages, in general, are unusually narrow. Those in the galleries are about 25½ inches wide; but the inconvenience from this cause may not, perhaps, be so great as might be expected, each passage having exclusively an external door of its own.

“The surrounding ground is, in some parts, considerably above the level of the interior of the body of the church, which is not floored with either wood or stone.

“The roof is constructed with rather substantial common rafters, but without tie-beams, each having what is termed a collar-beam or balk, at a considerable height above the base of the roof; and the church being of the form of a cross, the intersection of the roof is strengthened by diagonal rafters, of greater scantling than that of the common rafters. These diagonals are much decayed at their bases or heels, where they rest upon the walls. This defect, however, does not seem to have been occasioned by any natural decay of the timbers, but neglect in repairing the roof at

No. 70. some preceding period, whereby the rain-water has been allowed to lodge in the internal angles or flanks, so as seriously to injure the timbers of those parts of the roof.

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“ The rafters, generally, are worm-eaten externally, but sound at the core, and, upon the whole, may even yet be considered sufficient; the balks and smaller timbers are, however, greatly decayed, and, under any circumstances, ought to be renewed.

“ By a date on the south front, the church appears to have been erected about the year 1664. As before stated, it is a cruciform building, and, although in a rough style of masonry, appears to have been well and substantially built.

“ The walls have been somewhat injured by the breaking out of various doors, not originally contemplated; this seems to be more especially the case in regard to the doors entering to the galleries, which have evidently been added subsequently to the original erection of the building.

“ By the introduction of these galleries, some of the original windows have been built up, and the walls otherwise injured.

“ Notwithstanding the injudicious nature of these alterations, the walls, in general, appear to be still substantial, with the exception, perhaps, of the east front, where a slight settlement has taken place, a door-lintel broken, &c.; but these injuries are not of such extent as to cause any serious apprehension for the safety of that part of the building.

“ On mature consideration, I am therefore of opinion—

“ 1st, That the church is capable of repair, and that the expense of replacing the decayed parts of the roof, new plastering the interior, and reseating the whole with new galleries, floor, windows, doors, &c., would amount to £660 sterling.

“ 2d, It is extremely difficult to state any decided opinion as to what time the building would last if repaired, as, even with the most careful repair, the duration of the old timbers cannot be calculated upon with certainty. In hazarding an opinion, therefore, which I do with some hesitation, I would calculate upon from twenty-five to thirty-five years as the period which the church would last, provided proper attention be paid to upholding it, and keeping it water tight.

“ 3d, Having carefully estimated the expense of a new church, capable of accommodating an equal number of people equally well, I am of opinion that building the same would cost £1280 sterling.

“ 4th, Having also calculated the expense of a new church, capable of accommodating 1500 people, I am of opinion that the same might be built for £3250 sterling.

“ 5th, In answer to the question, Whether, abstracting from the circumstance that the people of the parish have increased in number beyond what the old church can accommodate, it appears expedient to repair the old, or build a new church in the parish of Kirkintilloch? I submit, that, supposing the old church to be repaired, it would be subject to the following disadvantages:—

st, In reseating the church, so as to accommodate the same number present, it will be almost impossible to avoid placing 70 or 80 sitters d the pulpit, unless by allowing a considerable proportion of sitters transept, to be altogether cut off from a view of the preacher, which be a still more objectionable arrangement.

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d, Independently of the inconvenient form of the building, its situation in several respects ineligible. There are houses on the north side, five or six feet of the church, and the burying-ground being small, its obstacles to any enlargement or addition whatever.

d, Lobbies or porches at the several entrances would be of essential tance to the comfort of the congregation, as, without some sort of lient for moderating the temperature, currents of cold air must rush he church at every opening of a door; but the limited space around ilding renders any improvement of this nature almost impracticable. The burying-ground being close upon the church, there may be some lty in levelling it to such a degree as to ensure the church against . At the south-west angle of the building, the present surface is rds of four feet above the floor of the interior.

so far as the question of expense is involved in that of expediency, already been spoken to. The difference of expense betwixt repair- ie old, and building a new church of the same capacity, though con- ble, is, to a material extent, compensated by the difference of per- ncy. How far the remaining difference of expense may be counter- ced by the increase of comfort, is very much matter of opinion. ny own part, I am humbly of opinion, on the footing of the question, it is more expedient to build a new church than to repair the old

objections were stated to this report by the chargers; but, in con- nce of objections by the suspenders, the Lord Ordinary required a ementary report, which Mr Hamilton returned in these terms:—

In obedience to the remit to me contained in the Honourable Lord enzie's interlocutor of 7th June, 1833, I beg humbly to report:—

1st, That if the repairs contemplated in article 1st of my former re- shall be made upon the church of Kirkintilloch, I am of opinion, he persons of the congregation will be equally safe as if a new church built; and, in particular, that no such danger will result from the s being partially worm-eaten. The worm-eating is almost entirely ned to the sap-wood or soft external fibres of the timber, as I ascer- d by chipping the rafters in a variety of places.

2d, The sum reported by me as the expense of a new church was dered sufficient for building it wholly of new materials; it is not, fore, intended to be taken as over and above the use of the materials e old church.

It is somewhat difficult to state precisely what price might be obtain- r these materials, but I should consider them worth about £80 to a

No. 70. contractor, for a building near the spot; consequently, by using the old materials, the new church might be built for £80 less than the sum stated in my former report."

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On considering these reports, the Lord Ordinary pronounced this interlocutor, and added the subjoined note:—"Having heard parties' procurators, and again considered the report, and additional report of Mr Hamilton, objections to the report, and whole process, sustains the reasons of suspension, suspends the letters simpliciter, declares the interdict perpetual, and decerns: Finds no expenses due to either party."

The presbytery and committee of heritors reclaimed, and contended, that, even on the rule laid down by the Lord Ordinary, a new church ought to be built, as it was evident, that, if its capacity were not to be increased, no heritors would ever hesitate as to erecting a new church, instead of repairing such a building as this: and they further stated, that, even if repaired as proposed, the sitters in the gallery would, in many parts, be unable to stand, while below there would only be seven feet between the gallery and the floor; and craved that additional queries might be put to Mr Hamilton, the architect, on this point, he not having specified the height of the walls in his report.

LORD JUSTICE-CLERK.—We are to decide the question according to the principles of law, and not on views of expediency. In determining if a new church is to be built, we must first enquire if the old one is capable of repair. The early reports are to be considered as matter of averment; and the Lord Ordinary took the proper course, of appointing an architect to inspect the building. Then, what have we in his report? That it is capable of repair, at an expense of £660. By that report the Lord Ordinary was bound to judge. The additional report makes no difference, but as to the value of the old materials; and, even in going back to the earlier reports, it is impossible to extract an opinion that the church is not

* "The Lord Ordinary considers, that the heritors are not bound to rebuild, where a church is repairable, and that it is repairable, excepting, (1,) where it cannot be made a safe and serviceable church, by any thing that could be truly and fairly called repairing at all; (2,) where it cannot be made a safe and serviceable church, by any repair that could be used reasonably, or would be used, except for the purpose of evading the legal duty of enlarging the church, when rebuilt, in order to suit it to the population, or, in other words, that would be reasonable, or would be used, if the capacity of the church were not to be increased in rebuilding; in this case, the Lord Ordinary thinks it appears clearly that the church is repairable; and he does not think it appears that the repairing it is unreasonable, or would not be used, except for the purpose of the evasion above mentioned. Supposing there was no demand for additional church-room, he thinks it could not be said that a repair, which was to cost only about half the expense of rebuilding, and which gave fair expectation of affording a safe and serviceable church, for a time of from twenty-five to thirty-five years, was in itself anywise absurd. The Lord Ordinary decides this case, as he has decided other cases of the kind, on such grounds of law as he can find, since a decision must be given, though he heartily wishes the Legislature, or custom, had afforded a more certain, plain, and definite rule."

capable of repair. In these circumstances, can we sanction a decree for a new church? Looking to all the decisions, (and the case of Lerwick is not contrary,) I am satisfied we cannot, however expedient it may be to build rather than repair. I certainly feel myself compelled by the rules of law to adhere to this interlocutor, and I have no right to advise the heritors in this or any other case, to do what I consider most expedient or beneficial for their interests, or the wants of the parish.

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LORD GLENLEE.—I am also for adhering. The charger's counsel justly says, he does not object to the law of the interlocutor, but he fixes on one point of it, and says it is clear the heritors would not resist a new church, except from the consequence, that, if a new church is to be built, it must be made of a larger size than the present. I cannot view it in that light; for I think it would be very reasonable to prefer repairing the present building, though at a distance of twenty-five or thirty years they would have to build a new one; and I agree with the Lord Ordinary.

LORD MEADOWBANK.—We are bound to take Mr Hamilton's report, to which the chargers lodged no objections; and if they meant to maintain the statements now made, they should have stated them to the Lord Ordinary, and have obtained the plans or an additional report; and therefore I feel bound to take it pro veritate; and, holding it so, we must adhere to the interlocutor of the Lord Ordinary.

THE COURT accordingly refused to allow additional queries to be put to the architect, and adhered.

JAMES HOPE, W.S.—JAMES LANG, W.S.—Agents

A. B., Petitioner.—

No. 71.

C. D., Respondent.—*Smythe.*

Poor's Roll—Competent and Omitted.—An objection that an applicant for the poor's roll was a married woman, and had not her husband's concurrence, stated after the lawyers had reported a *probabilis causa*—Held to be competent and omitted quoad hoc, but that it would be open to the objector to plead it in *causa*.

A WOMAN having applied for the benefit of the poor's roll, a remit was made to the lawyers for the poor, who reported a *probabilis causa*. At moving the report, it was objected that the applicant was a married woman, and had not the concurrence of her husband: she had thus no title to pursue, and it was competent to take this objection at any stage of the proceedings.

Dec. 12, 1833.
1st Division.

LORD GILLIES.—The only question before the Court at present, is, whether the applicant shall have the benefit of the poor's roll. There is a *probabilis causa* reported, and until this time the objection has not been taken that she is a married woman, and has not her husband's concurrence. Such objection now falls under the rule of competent and omitted, so far as regards the right of the applicant to

No. 71. be placed on the roll; but, of course, it will remain open to the respondent to plead it in causa.

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Macalister.

The other Judges concurred.

THE COURT found the applicant entitled to the benefit of the poor's roll.

No. 72.

GENERAL MACALISTER'S TRUSTEES.—*More.*

Trustees of the late ALEXANDER MACALISTER.—*M'Neill.*

Trustees of ALEXANDER MACALISTER, and the late MRS A. MACALISTER.

—*Greenshields.*

Competing.

Proof—Process.—1. In a proof, relative to the local usage and law of the island of Penang—held that a question put to a witness as to the law or usage of Bombay or Madras was inadmissible, there being no averment on the record relative to that law or usage. 2. Question, whether the holograph statement of a party, regarding the usage and law of Penang, be admissible evidence, though not taken on oath, or under cross-examination,—the party being now dead, and being alleged to have possessed accurate information on the subject.

Dec. 12, 1833.

1st DIVISION.
D.

IN a process relative to the succession to a portion of the late Governor Macalister's property, situated in the Island of Penang, a question arose as to "the local customs, and usage, and law of the settlement of Penang." The trustees of General Macalister were allowed to put in a condescendence of what they averred on this subject, which, being followed with answers, was sent to proof under commission. In examining Sir Edmund Stanley, he was asked "whether in the territories generally of the East India Company, and particularly in Bombay and Madras, there is or is not a distinction taken between real and personal property in respect to its descent and transmission." To this it was objected by the trustees of the late Alexander Macalister of Strathaird, that there was no averment in the condescendence regarding the law of descent and transmission of real or personal property at Bombay or Madras. The commissioner ordered the question and answer to be sealed up, and the Court refused to allow the seal to be broken.

LORD GILLIES.—If the parties wished to lead a proof on this subject, they should have framed a different condescendence.

The other Judges concurred.

There were also tendered to the commissioner the holograph answers to a set of queries which had been proposed by General Macalister's trustees to the late Mr John James Erskine. That gentleman had been for some time a member of the council at Penang, and he was said to be peculiarly versant in the usages of the island. The queries were "whether landed property in Prince of Wales' Island (Penang) was

round upon which a statement, not made on oath, and not made there was an opportunity of cross-examining, could be admitted as evidence in any shape.

General Macalister's trustees answered, that, as it was the law and of a remote island which formed the facts in issue, there really were few accessible witnesses who could speak to them. As the statement was in a photograph, it ought to be admitted, *valeat quantum*, the objection of want of an oath, and of the power to cross-examine, going merely to the admissibility, and not the admissibility of the testimony.

The commissioner sealed up the document, and reported the point to the court, intimating that he "was inclined to repel the objection to the admissibility of the answers, reserving consideration of the effect to be given to them."

THE PRESIDENT.—As the statement of Mr Erskine only forms part of a body of evidence which has been led on this subject, it seems to me to be premature to pronounce on its admissibility until it appears how far the party tendering it may be able to rely on it before disposing of the cause. Perhaps it may prove superfluous when the rest of the case is examined. In the meantime, I think the objection raised should be superseded.

MR GILLIES.—I have no objection to that; but it appears to me that the admission of such evidence would require to be gravely considered by the Court, and not, at present, feel inclined to receive it. If the fact in issue were a simple insulated fact, which the late Mr Erskine had peculiar access to know, then the mere circumstance of his death might not prevent his holographic statement from being admissible, however much the weight due to it might be affected by the circumstances under which it was made. But that is not the

No. 73.

ROBERT ROSS, Suspender.—*Cunninghame*.JAMES WEBSTER, Charger.—*D. F. Hope*.

Dec. 12, 1833.

Ross v.
Webster.

Process—Lease—Removing.—In an action of removing, the defender having failed to find caution for violent profits, the Sheriff “decerned against the defender in the removing, in terms of the conclusions of the summons,”—held competent to present a bill of suspension, without caution or consignment, though the reclaiming days against the Sheriff’s judgment were not expired.

Dec. 12, 1833.

1st Division.

Bill-Chamber.

Jd. Moncreiff.

B.



WEBSTER having let a spinning-mill and houses at Battiesden to Ross, brought an action of removing, as at Martinmas, 1833, founding on a missive of lease, but of which only a copy was produced, the original being lodged in a process of sequestration depending between the parties. The summons being called before the Sheriff of Forfarshire on 29th October, 1832, he appointed Ross “to lodge defences, and find caution in terms of the Act of Sederunt for violent profits, against the 4th of November next.” Ross lodged defences, alleging that the missive was improbable and unstamped, and that the original was not produced; and also a reclaiming petition against that part of the interlocutor which ordered caution. The Sheriff, on 7th November, refused the reclaiming petition, and, on 12th November, refused to allow an appeal against this judgment, and “of new appointed the defender to find caution in terms of the Act of Sederunt for violent profits, and that against the 16th instant, with certification.” No caution was found, and, on 19th November, the Sheriff, “in respect the defender has failed to obtemper the order in the interlocutor of the 12th November, decerns against him in the removing, in terms of the conclusions of the summons: finds him liable in expenses.” A bill of suspension of this decree, without caution or consignment, was presented on 21st November, which the Lord Ordinary ordered to be answered, “reserving consideration of the competency of suspension before extract.”

The respondent lodged answers both on the competency and on the merits, and he produced a certified copy of the missive of lease, in terms of which the removing had been brought, the original being still in the process of sequestration. The Lord Ordinary “having considered this bill, with the answers and productions, refused the bill as incompetent, and found expenses due.”*

* “NOTE.—The Lord Ordinary has little doubt that the proceeding of the Sheriff-Substitute, on what may be called the merits of the case, in refusing to receive defences without caution, was perfectly right; and that, in refusing to allow an appeal (under the discretion expressly given to him) on such a matter, he acted justly and wisely. But the bill of suspension is so clearly incompetent, now that the nature of the case is seen, that the Lord Ordinary cannot allow it to remain in Court a moment longer than the strictest forms render necessary. If, therefore, the complainer wishes to reclaim to the Court, the Lord Ordinary must warn him

Ross reclaimed, and pleaded—

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He could not bring under review, by advocacy, a judgment ordain-
ing him to remove, as the 41st section of 6 Geo. IV. c. 120, enacted
“that when any judgment shall be pronounced by an inferior court,
ordaining a tenant to remove from the possession of lands or houses, the
tenant shall not be entitled to apply as above by bill of advocacy to be
passed at once, but only by means of suspension as after regulated.”
There were no “after regulations,” although contemplated, as to the con-
ditions under which suspension should be competent. But the judgment
is final, in the sense in which an advocacy would have been competent
in any other case; and as advocacy is barred, he must either have a
right to offer a bill of suspension, or he must be bound to wait until the
reclaiming days expired, in which latter case, the decree might be extract-
ed within forty-eight hours (section 1. c. 18, A.S. of Sheriff-court). As
he could not procure a sist on a bill of suspension within that time, he
might be absolutely ruined unless the remedy of a bill of suspension was
competent at the stage at which he had tendered it; and, in general,
wherever the remedy of advocacy was cut off, and still some remedy
was necessary, a suspension was admissible.

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Pleaded by Webster—

The purpose of the 44th section of the judicature act was to limit the
means of bringing a decree of removing under review. It therefore cut
off the power of advocacy, and limited the remedy to suspension. If
the effect of this was to allow a bill of suspension to be presented at an
earlier stage than would otherwise have been competent, it was an abor-
tive enactment. But the statute clearly meant not only to limit the
remedy to suspension alone, but to leave the remedy of suspension pre-
cisely on its former basis. No suspension was therefore competent unless
where there was a charge, or at least a threatened charge as on an ex-
tracted decree. In this case there was neither of these; the suspender,
after the interlocutor of 19th November, had six days to reclaim to the
Sheriff-substitute, after which he might have offered an appeal to the
Sheriff-depute. Until these remedies were exhausted, and decree ex-
tracted, it was incompetent to resort to suspension.

LORD PRESIDENT.—My chief difficulty in acceding to the argument of the
suspender arises from an apprehension that its practical result will be to defeat the
provision of the 44th section of the judicature act, as to removings. It would seem
that the act had intended to specify some “after-regulations” as to the suspension
of a decree of removing. But no such regulations are enacted. Even if the Court
should hold that suspension is competent, it remains open to the Lord Ordinary to
require full caution before passing the bill, so as to secure the interests of parties
as far as possible.

to lose no time in his preparation; because, according to his best judgment, he can,
in justice, allow very little indulgence in time.”

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Cuninghame, for suspender.—If the Lord Ordinary will only hear us on the merits, we hope to satisfy his Lordship that the bill should be passed without caution at all.

LORD GILLIES.—That would raise a very serious question indeed ; but its discussion belongs to the merits, and is not *hujus loci*.

LORD BALGRAY.—The question raised is one of a very general nature. The judgment of the Sheriff explicitly “decerns against the defender in the removing in terms of the conclusions of the summons.” The act of Parliament prohibits any review save by suspension “when any judgment shall be pronounced by an inferior court, ordaining a tenant to remove.” The remedy of suspension is the only competent one, and I rather apprehend, from the peculiar words of the act, that as a judgment has been pronounced, ordaining to remove, it is competent to resort to that remedy.

LORD GILLIES.—The case is attended with some difficulty. In disposing of it, the Court must be careful not to mix up the merits with the competency, and, therefore, let me put such a case as brings out the point of competency in no unfavourable point of view. Suppose that a tenant, at the same time with lodging defences, found caution for the violent profits : that he was possessed of an extensive and well-stocked farm : that his defences were repelled, and a judgment was pronounced, ordaining him to remove. Is he bound to wait until the decree be extracted, before he presents his bill of suspension ? Is he bound to wait until no farther remedy by reclaiming petition or appeal is competent to him in the Sheriff-court ? If so, the decree is extractable in forty-eight hours, and, in many of the counties of Scotland a tenant might be exposed to the summary measures which follow an extracted decree of removing, and might perhaps be ruined before a sist on a bill of suspension could be obtained. In such a case as that, it would be difficult for this Court to find that a bill of suspension was not competent when offered at the same stage of the cause with this one. But, in the pure question of competency, which is the only one before the Court, it is necessary to determine this bill of suspension in the same way in which the Court would determine as to the competency of a similar bill in the case I have now put. I am not prepared to find the bill of suspension incompetent. I think the interlocutor of the Lord Ordinary on that point should be recalled, and that a remit ought to be made to his Lordship to hear parties on the merits.

The LORD PRESIDENT and LORD CRAIGIE were understood to concur.

THE COURT “recalled the interlocutor, found the bill of suspension competent, and remitted to the Lord Ordinary to dispose of the bill and answers as shall be just, and also to determine as to the expenses occasioned by the necessity of reclaiming against the interlocutor reclaimed against.”

Graig and Morton, W.S.—W. Douglas, W.S.—Agents.

a decree of maills and duties, and had exposed the subjects to sale, and no creditor being infert—held entitled to have them struck out of a sequestrated in relation to a ranking and sale of the debtor's estate.

February, 1830, the late John Hutchinson, of Leith, and his son, Dec. 12, 1833.

1 a loan of £500 from Captain John Robertson, for which they 1st Division.

an heritable bond and disposition in security over subjects in place, Edinburgh, containing a power of sale, and also an assignation of the rents, "with full power to enter into possession, intromit with, lift them at any time he shall please." Captain Robertson took effect; and, in the course of the same year, Hutchinson died, leaving considerable heritage, chiefly houses, over which he had granted securities, but there was no security affecting the subjects contained in Captain Robertson's bond. Hutchinson's eldest son served heir to the estate, and having raised a process of ranking and sale against his creditors, he presented a petition for sequestration of the estate. The petition was opposed by Major Gordon, as to part of the subjects in which he was infert under an heritable bond, with powers of sale as to which he was in possession under a decree of maills and duties against the tenants. The Court, on 14th February, 1833, refused the petition for sequestration, so far as it included the property contained in Gordon's bond and disposition, but granted it *quoad ultra*, and appointed Mr Charles Ferrier judicial factor.

In November, 1832, Captain Robertson gave notice of his intention to exercise the power of sale, and in August and November, 1833, part of the estate was exposed, but unsuccessfully. He then raised an action of ranking and duties against the tenants in the houses contained in his bond, but Mr Ferrier having opposed as an interference with the judicial

No. 74. Mr Charles Ferrier, judicial factor thereon, to pay over to the petitioner the whole rents and profits of the said subjects, both those that became due at March last, and those which shall become due in all time coming, until the debt due by the petitioner shall be discharged.”

Dec. 12, 1833.
Robertson v.
Ferrier.

Mr Ferrier opposed this petition on the ground—

1. That a petition for recal of the interlocutor awarding sequestration, was incompetent.

2. That as Captain Robertson had accepted payment of a half year's interest on his bond, out of the rents, he had thereby homologated the sequestration, at least to the effect of allowing the factor to draw all the rents, while the subjects remained unsold, provided that he paid the interest of Captain Robertson's bond; and that, though he could not prevent the exercise of the power of sale, yet so long as the subjects remained unsold, he was not entitled to pay more out of the rents than the interest on the heritable bond.

To this Captain Robertson answered—

1. That as the subjects were improperly included in the sequestration in his absence, he was entitled to have them struck out of the sequestration.

2. That the acceptance of interest, for one term, on his bond, could not imply the renunciation or waiving of any part of his legal rights; especially as notice of sale under the powers in the bond was then current, and had been followed up by exposing them to sale; and that as the power of sale of an heritable creditor infest remained entire, notwithstanding the existence of a process of ranking and sale,¹ the smaller power to enter into possession and uplift the rents must exist; and besides, he was entitled to enforce it against all the world. There were no other creditors having any real right in the subjects in question. But he was ready to refrain from drawing the rents himself, provided that the judicial factor should account to him for the whole rents of the subjects which he had right to draw under his bond, so that he might impute them in extinction first of the interest and next of the principal of his debt.

LORD BALGRAY.—I do not think the Court have power to maintain the sequestration of this part of the estate to the prejudice of the real right of a creditor infest in it before the sequestration was craved. There is no other creditor having a real right in that part of the sequestrated estate to which Captain Robertson's security applies.

LORD GILLIES.—Captain Robertson lent his money on the faith of the bond and heritable security which were given to him. He took infestment under his disposition, and the Court have no right to impair his real security to the extent of one iota. He cannot be deprived of it, or of any part of it, without his own act.

¹ Simpson, &c., Nov. 25, 1831 (ante, X. 66).

and consent. The disposition in his favour conferred full power on him "to enter into possession, intromit with, and uplift the rents at any time he shall please." No. 74.
 Upon the faith of this he lent his money; and the Court have no power to touch Dec. 12, 1833.
 is right to enter and possess the subjects, and to draw the rents when he sees Lord Duffus v.
 cause. If any party means to oppose this, there is indeed one effectual way of Petrie.
 doing so, and there is but one—by paying up the debt.

LORD CRAIGIE.—I concur in the opinions which have been expressed, and I think the petitioner entitled to his expenses.

LORD PRESIDENT concurred, and observed that the acceptance of a term's interest on the debt from a party who had drawn the rents of the subjects, did not imply the waiver of any part of the full legal rights of Captain Robertson.

THE COURT "recalled the sequestration of the subjects in the petitioner's heritable bond, and decerned; and found the petitioner entitled to expenses."

J. ROBERTSON—W. HUNT, W.S.—Agents.

LORD DUFFUS, Suspender.—*Buchanan.*
 WILLIAM PETRIE, Charger.—*Skene—Handyside.*

No. 75.

Arbitration.—An arbiter made up accounts between a landlord and tenant, on the assumption of the rent of a farm being £70, and decerned for a balance thus brought out against the landlord, subject to deduction should the landlord be able to instruct an averment that the rent was £100; and the landlord having established this, held that the amount of surplus rent and interest was not to be deducted from the sum of balance, but that the balance payable was the amount brought out by setting the £100 in place of the £70 in the arbiter's state, as at the terms when the rent periodically fell due.

THE suspender, Lord Duffus, and the charger, Petrie, as trustee of John Dalrymple, who had been a tenant of his Lordship, entered into a submission, as to the accounts between them, to Mr Brown, accountant, Edinburgh. Mr Brown made up a state of accounts, giving Lord Duffus credit for £70, as the rent of the farm possessed by Dalrymple, periodically as it fell due, down to 1820, and thereafter pronounced a decret-arbitral, in which he reserved to Lord Duffus "to get credit" for an additional rent of £30, by which sum his Lordship alleged it had been increased in 1811, should he be able to establish this; and he decerned for the balance brought out by him as due by Lord Duffus to Dalrymple, "subject, however, to deduction of such additional rent" as Lord Duffus should make out to have been due. Being charged for payment of this balance, Lord Duffus brought a suspension, in which it was admitted, that an additional rent of £30 was payable by Dalrymple, for nine years, from 1811 to 1820. The amount of this additional rent Lord Duffus insisted should simply be deducted from the sum decerned for by Mr Brown as the balance due; while Dalrymple's trustee maintained, that credit should
 Dec. 12, 1833.
 2d DIVISION.
 Ld. Mackenzie,
 F.

No. 75. be given for it as it had fallen due, so that the accounts would stand :
 Dec. 13, 1833. £100 had been credited as rent, instead of £70, as in the state prepar-
 Hamilton v. by Mr Brown on the assumption that the rent was £70 only, which
 Queensberry's ferent modes of stating the account made some difference on the inter-
 Executors. and consequently on the ultimate balance payable.

The Lord Ordinary repelled Lord Duffus's pleas, and found the let-
 orderly proceeded, to the extent brought out by the mode of stating
 account proposed by Dalrymple's trustee.

Lord Duffus reclaimed, but the Court adhered.

H. M'QUEEN, W.S.—A. D. FRASER, W.S.—Agents.

JAMES HAMILTON, Pursuer.—*Whigham—Moir.*
 No. 76. DUKE OF QUEENSBERRY'S EXECUTORS, Defenders—*Murray.*

Lease.—A tenant, holding a 14-years' lease, and entering into possession in ten-
 of it—held not entitled to found on an alleged new lease for 19 years, granted
 ring its currency, which, though signed by the landlord, was never delivered,
 for which a stipulated grassum had never been paid.

Dec. 13, 1833. IN 1802, a lease of the farm of Kirtlehead for 14 years, from Whitsun-
 1st Division. day 1807, was granted by the Commissioners of the Duke of Queens-
 Ld. Moncreiff. berry to James M'Queen, on payment of a grassum of £383, 10s., and
 B. rent of £42, and containing a clause of absolute warrandice "to the
 tent only of the grassum." M'Queen assigned the lease to James Han-
 ton, W.S., who entered to possession in 1807, and thereafter he sublet
 farm at a rent of £152. He fell into arrears of rent, and in 1814,
 executors of the Duke of Queensberry obtained decree in absence against
 him for a sum of £153. In the same year, the Duke of Buccleuch &
 Queensberry, heir of entail in the lands, raised an action of removal
 against Hamilton, and obtained decree in absence. He presented
 bills of suspension, the last of which was passed, in which he stated, that
 "the lands under discussion were granted by tack by the late Duke
 Queensberry for the complainer's behoof, for fourteen years from Whitsun-
 day 1807, which, of course, completely excludes his Grace the present
 Duke, even independent of any claim the complainer has from a proro-
 gation or extension of that lease; and the complainer has accordingly been
 in the possession of the farm, unmolested, since Whitsunday 1807."

In 1821 a process of multiplepoinding was raised in name of the sub-
 tenant, as to the surplus rents between 1814 and 1821, (which was the
 natural term of expiry of the lease,) which Hamilton claimed, founded
 on a duplicate of the lease, and of M'Queen's assignation, together with
 the missive of subset by him to the subtenant; and he was preferred.

An adjudication having been raised on the decree obtained in 181

£153, by the Queensberry executors against Hamilton, he brought No. 76.
 duction, founding upon the following circumstances. In 1806, 1807, Dec. 13, 1833.
 1808, some correspondence had taken place between the commis- Hamilton v.
 sioner for the Duke of Queensberry and Hamilton, as to granting him Queensberry's
 a new lease for 19 years, from 1807, 1808, or 1809. The terms on Executors.
 which it was to be granted, repeatedly varied in the course of the dis-
 cussion. But it appeared to have been finally a condition of granting the
 lease, that a new grassum of £137 should be paid, (which confessedly
 had never been done,) and the new lease, though signed by the Duke's
 commissioner, had never been delivered to Hamilton, or signed by him,
 nor did it appear that the old one was ever renounced. On the con-
 trary, the old lease was founded upon by Hamilton as a title of posses-
 sion, long after the new lease, if duly granted, must have superseded it.
 The Duke of Buccleuch did not raise any action of reduction of the
 alleged new lease, when he raised other reductions in cases parallel to
 the new lease, if it had been granted as alleged by Hamilton. Neither
 did Hamilton allege that the new lease was framed so as to contain an
 unqualified obligation of absolute warrandice; and it was contended by
 the Queensberry executors that it could only have contained an obliga-
 tion in the same terms as the old lease, which was "to the extent of the
 grassum."

In support of his reduction of the decree in 1814, Hamilton maintained,
 1. That the negotiation for the new lease had been fully completed: that
 he was entitled to impute the chief period of his possession to the new lease,
 and, as it would have endured till 1828, (being seven years longer than
 the period of expiry of the old lease,) he was entitled to claim a sum
 equal to seven years of the surplus rent (£110) which he was drawing
 as the subtenant prior to 1821; that if allowed this sum, it not only
 extinguished the amount of rent for which the decree in absence had
 been taken, but made him a creditor of the executors. And,

2 That in taking decree for the arrears in 1814, no deduction had
 been made on account of property-tax.

On the other hand, the executors pleaded,

1. That Hamilton never had obtained right to the new lease, as he
 never paid the grassum, and accordingly the new lease was never deliv-
 ered, nor was the old lease renounced: that he himself, both in the bill
 of suspension and in the multiplepoinding, had expressly ascribed his pos-
 session to the old lease, which was, in truth, the only good title of pos-
 session he ever had; that the warrandice in all the leases was only to the
 extent of the grassum paid; and had he obtained a new or prolonged
 lease, it would have engrossed this condition. And,

2 That the whole of the landlord's share of the property-tax was paid
 directly by the Duke to the collector; and that Hamilton neither produ-
 ced evidence of having paid it, nor even averred this.

No. 76.
Dec. 13, 1833.
Hamilton v.
Queensberry's
Executors.

The Lord Ordinary, "in respect that the decree was obtained in absence, reduced the same to the effect of the party being heard on his defences: but, on the merits, in respect that the pursuer held possession, as principal tenant of the farm of Kirtlehead in question, by virtue of the lease assigned to him from 1807 to 1821, which lease is No. 19 of process; and that though negotiations for a prorogation, or renewal of that lease, on payment of a certain grassum, were carried on, which negotiations were repeatedly varied; and though it appears that a new lease was extended and signed by the Duke's commissioner, no such lease was ever signed by the pursuer, or delivered to him, and no grassum was ever paid: in respect that no reduction of any such lease was brought by the Duke of Buccleuch, and no action of damages was raised by the pursuer founded on such a reduction, or on his removal from the farm; and, further, specially in respect that it is not averred in the record, and does not appear from any of the writings produced, that under any of the successive offers founded on, the pursuer asked or expected to receive absolute warrandice of any new lease to be granted; and that the lease produced, No. 19 of process, bears an obligation to warrant the same, 'at all hands and against all mortals, as law will, to the extent only of the grassum aftermentioned, and interest thereof,' &c.; and it must be presumed that any prorogation or renewal of that lease would have been in the same terms: and whereas it is admitted, that no grassum was ever paid on any such prorogation or renewal; found that no relevant case has been stated by the pursuer in support of his plea of compensation against the claim for rents due for which the decree under reduction was obtained; and repelled the said plea accordingly. Further, in respect that by the statutes imposing the property-tax, it is only tenants 'paying the said assessments,' who are entitled to insist for deduction thereof from the rents due to their landlords; and that it is not averred by the pursuer, either in the closed record, or the minute given in by order of the Lord Ordinary, that the sums of landlords' property-tax for which deduction is claimed, were paid by him, and no receipts for the same are produced; and, on the other hand, it is expressly averred by the defenders, and not denied by the pursuer, that the late Duke of Queensberry paid all his property-tax 'directly to the collector:' repelled the claim to any deduction on that account; but, in respect of the express admission by the defenders in the answers to the minute, and of the circumstances stated, sustained the claim for deduction from the sum in the decree to the amount of £6, 3s. 9½d.; and so far reduced, decerned, and declared in terms of the libel: but, quoad ultra, sustained the defences, assoilzied the defenders, and decerned: found no expenses due to either party."*

* "NOTE.—The plea of compensation on a supposed claim of damages up to the Lord Ordinary to be evidently untenable, for the reason last stated in

gas could arise where these appear to be limited to the extent of repeating
passum which may have been paid.

AD BALGRAY.—Possession was held by drawing the surplus rents till 1821,
period of the natural termination of the lease granted to M^cQueen, and assign-
the pursuer. I do not think he instructs any other good contract of lease to
ever been completed.

AD CRAIGIE concurred.

THE COURT adhered, and awarded expenses, since the Lord Ordinary's in-
terlocutor, against the pursuer.

J. HAMILTON, W.S.—Tait and Young, W.S.—Agents.

ALEXANDER FRASER and OTHERS, Pursuers.—*M^cNeill*.

No. 77.

JOHNSTONE'S TRUSTEES, Defenders.—*Maidment*.

DAVID PATERSON, Compeerer.—*Forsyth*.

~~cases~~—*Judicial Remit*.—A claim by an accountant for £596, 9s., as the ex-
of a report, modified to £393, 15s.

this action a remit had been made to David Paterson, accountant Dec. 13, 1833.
dinburgh, to make a report, for which he rendered an account of 2^D DIVISION.
1, 9s. This being objected to as exorbitant, the Lord Ordinary re- Ld. Mackenzie.
d to Mr Robertson, accountant, to report on it. Mr Robertson T.
ted that £393, 15s. was a proper charge. The pursuers still think-
his too much, put in objections. This, however, the Lord Ordinary
led, and decerned for payment of the above sum, reserving all ques-
of relief between the parties in the cause.
he pursuers reclaimed, but the Court adhered.

No. 78.

JAMES ROBERTS and OTHERS, Pursuers.—*Maidment.*THOMAS ROBERTS, Defender.—*Smythe.*

Dec. 13, 1833.

Roberts v.
Roberts.

Arbitration—Judicial Reference.—In an action containing conclusions of declarator and accounting, a record was made up without any objection by the defender to the conclusion of accounting, and a judicial reference was entered into of the whole cause; and the referee having given an award, to which the Lord Ordinary interposed his authority, the Court refused to open it up, that the defender might be heard against the competency of the conclusion for accounting.

Dec. 13, 1833.

2D DIVISION.
Ld. Mackenzie.
T.

THE pursuers, James Roberts and others, nearest of kin of the deceased John Roberts, raised action against the defender, Thomas Roberts, (who was in the same degree of kin, but was also heir of conquest, and as such, entitled to certain real property which had belonged to the deceased,) setting forth, that he had entered into an agreement with them, binding himself to collate, and that he had of common consent been allowed to make up titles, both as heir and executor, and had intromitted with the whole effects of the deceased, but had now refused to collate or account for his intromissions, and concluding to have it declared that he was bound to collate, and to have him ordained to hold count and reckoning for his intromissions. A record was made up; and in the pleas Thomas confined himself to the question of the obligation to collate, without stating any objection to the conclusion for an accounting. After some procedure, the parties made a judicial reference of the "process, with the whole claims and disputes thence arising," to Mr Buchanan, advocate who, after hearing parties, &c., made the following report to the Lord Ordinary: "The referee having considered the minute of reference, with the whole process, and the deposition of Alexander Simson, and heard the counsel for the parties thereon, and on their several claims and pleas; and having also considered the joint minute of the agents, of date the 20th instant, humbly reports his opinion to the Lord Ordinary as follows:

"1. That it is sufficiently instructed that there was an agreement between the pursuers and defender, to collate their respective shares of the succession of the late John Roberts, which is effectual and binding on the defender; and that he is not now entitled to resile therefrom.

"2. That the fund divisible among the parties is the free proceeds of one half of the heritable and moveable estate of the deceased John Roberts' deductis debitis, and that the same is divisible among the pursuers and defender, in equal proportions.

"3. That the defender ought to be subjected in expenses of process."

Thereupon the Lord Ordinary interposed his authority to the award, and decerned in terminis. Thomas Roberts however reclaimed, and contended, that it was incompetent for his Lordship *hoc statu* to interpose

s authority to the award, inasmuch as the reference was not exhausted No. 78.
 the award not having determined any thing as to the conclusions for
 counting, from which he contended he was entitled to have been assoilzied. Dec. 14, 1833
 How v. Bank
 of England.

LORD GLENLEE.—The reference must be held to be of the cause as it stood,
 cluding the defender's pleas in law, in which there is no objection to the compe-
 nency of the accounting, and I think therefore the interlocutor is right.
 The other Judges concurring—

THE COURT adhered.

BROWN and SMITH, W.S.—HOBBS and ROSE, W.S.—Agents.

JAMES HOW, Petitioner.—G. G. Bell.
 BANK OF ENGLAND and OTHERS, Respondents.

No. 79.

Bankruptcy—Discharge—Process—Mandate.—1. Circumstances in which a dis-
 charge was granted to a bankrupt residing abroad, against whom a sequestration
 had been awarded as a partner and an individual, separately from the estates of a
 company, although the latter estates were still under sequestration, and the bank-
 rupt had no individual estate. 2. Held competent (in the absence of opposition) for
 a trustee to act as mandatary for the bankrupt, who was abroad, in presenting
 petition for discharge. 3. Opinion by the Lord Ordinary that, if a petition for
 discharge under § 61 of the bankrupt statute has been presented with the requisite
 concurrence, creditors who subsequently rank can only oppose on cause shown.

JAMES HOW was a partner of the firm of John and James How, mer- Dec. 14, 1833
 chants in Glasgow, and along with John and Robert How, of the firm 1ST DIVISION.
 James How and Company, merchants in Bahia, where James resided. Ld. Moncreiff
 B.
 August 1827, the estates of the Glasgow company of John and James
 How were sequestrated, and also the estate of John How as an indivi-
 dual, on both of which Mr Cuthbertson was appointed trustee. In con-
 sequence of the bankruptcy of the Glasgow firm, the firm of James How
 and Company became insolvent, and conveyed their estates to a Mr
 Reid, as trustee for their creditors. Pending the sequestration of the
 Glasgow firm, James How came to Scotland, and in March, 1829, a
 sequestration was awarded, on his petition, of his estate, both as a part-
 ner of the Glasgow firm, and as an individual. The concurring creditor
 then attended the meeting for choosing an interim factor, and appointed
 John Lamb. The same creditor, along with another, elected Mr Lamb
 trustee; and at the meeting for this purpose, a state of affairs was exhib-
 ited by the factor, from which it appeared that James had no individual
 estate at the time when the estates of the two firms were conveyed to
 their respective trustees; that, in the interval, prior to his own sequestra-
 tion, he had only acquired £17, 17s. 6d.; and that there were no indivi-
 dual debts; but the debts of the two firms amounted to £38,973: and,
 concluding, the factor stated, "that as he had had no intromissions

No. 79. with the estate and funds—and that there was no estate in this country—
 he had therefore merely to hand the prefixed statement of the affairs,
 Dec. 14, 1833. *How v. Bank of England.* made up at his sight by the bankrupt, Mr James How.”

At the two statutory diets of examination, James declared that the state of affairs, as engrossed in the sederunt-book, was a full and true state. He remained for a considerable time in Glasgow, and was in communication with the trustee under the sequestration of John and James How; but he was not examined in that sequestration, and afterwards went abroad.

A third creditor claimed under his sequestration,—the debts of the three creditors ranked being £304. They appointed themselves commissioners, and, after observing all the forms prescribed by the statute, a petition was presented in the name of James How and Lamb, his trustee, acting as his mandatary, under a mandate to that effect, craving a discharge in terms of the 61st section of the Bankrupt Act. Lamb gave his concurrence as trustee, and the three creditors gave theirs. At this time, the sequestration of the Glasgow firm of John and James How, was still in dependence. Appearance was made for the Bank of England, and other banks, who had been previously ranked as creditors of the Glasgow firm to the amount of £9493; but until this period, they had not claimed in James's sequestration.

Pleaded by the respondents—

1. The petition is incompetent, James being abroad, so that he could not take the oath, in terms of the statute, “before the Court, or upon commission before the Sheriff.” No regular mandate is produced; the trustee cannot act as mandatary of the bankrupt, because he represents the creditors, and their interests might be conflicting.

2. There is not the requisite concurrence. The statute requires four-fifths of the creditors, and the respondents formed a large majority. The respondents were entitled to be computed, both in number and value, as they had ranked and refused concurrence, before the discharge was granted.

3. The whole proceedings were merely colourable, and got up by the bankrupt's friends, to procure a discharge, although there was no individual estate to be the subject of sequestration, and the interests of the general creditors did not form a primary object, or any substantive object of the sequestration.

Pleaded by the petitioner—

1. There is no incompetency in the petition, for if there should ultimately prove to be any difficulty in taking the oath because he remained abroad, that could only postpone the extract of the decree till he should return and take the oath. Neither is there any objection to the trustee appearing as mandatary. Where all the requisites of the statute have been complied with, it was the duty of the trustee to certify this, and he could have been compelled by the bankrupt to do so. But, in that case, the bank-

upt was entitled (with the requisite concurrence) to his discharge, and he trustee was at liberty to act as his mandatary in applying for it. In doing so, he violated no duty which he owed to the creditors.

2. As at the date of presenting the petition, there was the requisite concurrence, the statute (§ 61) admitted no ground of opposition by new creditors, except on just cause shown.

3. The sequestration was obtained fairly and honestly. If James How had been in the country at the date of sequestrating the estates of the Glasgow firm, his estate would have been sequestrated as a partner and as an individual; and it was equally competent for him, after he came to Scotland, to obtain the sequestration of his estates. None of his creditors could object to the deficiency of his estate, as that arose from his whole effects having been previously conveyed under the sequestration of the company to the creditors. The requisites of the statute having been complied with, he had a right to a discharge.

The Lord Ordinary "made avizandum with the cause to the Court." *

No. 79.

Dec. 14, 1833
How v. Bank
of England.

* "NOTE.—This cause is reported of course, the Lord Ordinary having no power to decide. The parties are not agreed as to all the matters of fact comprehended in the record; but it will probably be thought, that the points essential for enabling the Court to dispose of the application are sufficiently ascertained.

"The short state of the matter is this. The company of John and James How, established in Glasgow, consisted of John How, and the petitioner James How. The petitioner did not reside at Glasgow, but at Bahia, where he managed a separate company of James How and Company, of which a Robert How was also a partner. Though the respondents do not admit that the petitioner was unacquainted with the transactions of John and James How, it is not alleged that he ever took any active concern in their affairs.

"In November, 1827, (James How being of course abroad,) a sequestration was awarded of the estates of John and James How as a company, and of the estate of John How as an individual partner. But the estate of James How as an individual was not included. There are some particular circumstances as to the manner in which the application for the sequestration was made and conducted, which require attention; but they need not be adverted to in this abstract.

"The bankruptcy of John and James How produced a bankruptcy of James How and Company; and that estate was, with the concurrence of all parties, surrendered to a trustee, Mr Reid.

"After the bankruptcies, James How came to Glasgow. It is stated without contradiction, that he communicated with the trustee on the estate of John and James How, and was openly in Glasgow for a considerable time. He was not examined at that sequestration, probably because it was not supposed that he could give any information as to the affairs of the company.

"Having been left out of the sequestration as an individual, whereby it was impossible that he could ever be discharged, James How resolved to apply for a sequestration of his individual estate. It does indeed appear to be sufficiently ascertained, that all his funds having been embarked in the two companies, he had no individual estate or property left. The respondents do not exactly admit this, and they say, that, when he applied for the discharge, there are indications in some others that he had got into a valuable situation, and had the command of funds at least sufficient to pay the expense of any litigation which might take place. But,

No. 79. with the estate and funds—and that there was no estate in this country—
 he had therefore merely to hand the prefixed statement of the affairs,
 Dec. 14, 1833. *How v. Bank of England.* made up at his sight by the bankrupt, Mr James How.”

At the two statutory diets of examination, James declared that the state of affairs, as engrossed in the sederunt-book, was a full and true state. He remained for a considerable time in Glasgow, and was in communication with the trustee under the sequestration of John and James How; but he was not examined in that sequestration, and afterwards went abroad.

A third creditor claimed under his sequestration,—the debts of the three creditors ranked being £304. They appointed themselves commissioners, and, after observing all the forms prescribed by the statute, a petition was presented in the name of James How and Lamb, his trustee, acting as his mandatary, under a mandate to that effect, craving a discharge in terms of the 61st section of the Bankrupt Act. Lamb gave his concurrence as trustee, and the three creditors gave theirs. At this time, the sequestration of the Glasgow firm of John and James How, was still in dependence. Appearance was made for the Bank of England, and other banks, who had been previously ranked as creditors of the Glasgow firm to the amount of £9493; but until this period, they had not claimed in James's sequestration.

Pleaded by the respondents—

1. The petition is incompetent, James being abroad, so that he could not take the oath, in terms of the statute, “before the Court, or upon commission before the Sheriff.” No regular mandate is produced; the trustee cannot act as mandatary of the bankrupt, because he represents the creditors, and their interests might be conflicting.

2. There is not the requisite concurrence. The statute requires four-fifths of the creditors, and the respondents formed a large majority. The respondents were entitled to be computed, both in number and value, as they had ranked and refused concurrence, before the discharge was granted.

3. The whole proceedings were merely colourable, and got up by the bankrupt's friends, to procure a discharge, although there was no individual estate to be the subject of sequestration, and the interests of the general creditors did not form a primary object, or any substantive object of the sequestration.

Pleaded by the petitioner—

1. There is no incompetency in the petition, for if there should ultimately prove to be any difficulty in taking the oath because he remained abroad, that could only postpone the extract of the decree till he should return and take the oath. Neither is there any objection to the trustee appearing as mandatary. Where all the requisites of the statute have been complied with, it was the duty of the trustee to certify this, and he could have been compelled by the bankrupt to do so. But, in that case, the bank-

rupt was entitled (with the requisite concurrence) to his discharge, and the trustee was at liberty to act as his mandatary in applying for it. In doing so, he violated no duty which he owed to the creditors.

No. 79.
Dec. 14, 1833
How v. Bank
of England.

2. As at the date of presenting the petition, there was the requisite concurrence, the statute (§ 61) admitted no ground of opposition by new creditors, except on just cause shown.

3. The sequestration was obtained fairly and honestly. If James How had been in the country at the date of sequestrating the estates of the Glasgow firm, his estate would have been sequestrated as a partner and as an individual; and it was equally competent for him, after he came to Scotland, to obtain the sequestration of his estates. None of his creditors could object to the deficiency of his estate, as that arose from his whole effects having been previously conveyed under the sequestration of the company to the creditors. The requisites of the statute having been complied with, he had a right to a discharge.

The Lord Ordinary "made avizandum with the cause to the Court." *

* "NOTE.—This cause is reported of course, the Lord Ordinary having no power to decide. The parties are not agreed as to all the matters of fact comprehended in the record; but it will probably be thought, that the points essential for enabling the Court to dispose of the application are sufficiently ascertained.

"The short state of the matter is this. The company of John and James How, established in Glasgow, consisted of John How, and the petitioner James How. The petitioner did not reside at Glasgow, but at Bahia, where he managed a separate company of James How and Company, of which a Robert How was also a partner. Though the respondents do not admit that the petitioner was unacquainted with the transactions of John and James How, it is not alleged that he ever took any active concern in their affairs.

"In November, 1827, (James How being of course abroad,) a sequestration was awarded of the estates of John and James How as a company, and of the estate of John How as an individual partner. But the estate of James How as an individual was not included. There are some particular circumstances as to the manner in which the application for the sequestration was made and conducted, which require attention; but they need not be adverted to in this abstract.

"The bankruptcy of John and James How produced a bankruptcy of James How and Company; and that estate was, with the concurrence of all parties, surrendered to a trustee, Mr Reid.

"After the bankruptcies, James How came to Glasgow. It is stated without contradiction, that he communicated with the trustee on the estate of John and James How, and was openly in Glasgow for a considerable time. He was not examined in that sequestration, probably because it was not supposed that he could give any information as to the affairs of the company.

"Having been left out of the sequestration as an individual, whereby it was impossible that he could ever be discharged, James How resolved to apply for a sequestration of his individual estate. It does indeed appear to be sufficiently ascertained, that all his funds having been embarked in the two companies, he had no individual estate or property left. The respondents do not exactly admit this, and they say, that, when he applied for the discharge, there are indications in some letters that he had got into a valuable situation, and had the command of funds at least sufficient to pay the expense of any litigation which might take place. But,

No. 79. As the Lord Ordinary concluded his note by stating that he thought the application was "in its substance fair and just," the respondents entered a minute, withdrawing their opposition.

Dec. 14, 1833.
How v. Bank
of England.

as it is part of the case of the respondents, that the single object of the sequestration was to enable him to obtain a discharge, and the petitioner states that he had no individual property, which is confirmed by the trustee, the Lord Ordinary thinks that it may be assumed, that he really had none available to these creditors at the time of the bankruptcy, or when his petition for sequestration was presented.

"He obtained the concurrence of a creditor of the proper value. The sequestration was awarded regularly in all respects; and it does appear, that the proceedings under it have been regularly conducted, so far as the observance of the statutory provisions is concerned.

"He now applies for his discharge: he has the concurrence of the trustee, and of all the creditors who at the date of the application had produced grounds of debt and oaths of verity; and it is certified by the trustee that he has complied with all the requisites of the statute.

"This application is resisted by the Bank of England, the Royal Bank, and the British Linen Company. The grounds of opposition seem to be, 1st, That the petitioner has not the statutory concurrence of his creditors, because the respondents being creditors of the company, and who might have claimed in his sequestration, are still entitled to be counted in determining whether he has the concurrence or not; and, 2d, That the whole proceedings of James How in applying for his sequestration, and of the trustee under it, were collusive; intended, not for the benefit of creditors, but solely for the purpose of obtaining a discharge to the bankrupt, and were therefore illegal.

"1. The Lord Ordinary is of opinion that the first ground is untenable. The statute, indeed, (section 42,) speaks in general of 'four-fifths of the creditors;' but, in the matter of discharge, it is evident that this must mean four-fifths of the creditors who have claimed at the date of the application; for, otherwise, no man situated like the petitioner would know when he could make the application, and the trustee could never certify the fact. Mr Bell, accordingly, so explains it, (Bell, 2. 441): 'After the concurrence is once obtained, and the petition duly presented, the appearance of new claimants, who might by their dissent at first have stopped the application, will not operate as a bar to the Court proceeding to give judgment.' There is no doubt, that any person who is a creditor may afterwards appear and oppose the discharge; but he must oppose it on other grounds than that by his interposition the concurrence is insufficient; such as, that the bankrupt has not made a fair discovery or surrender; that he has refused to grant a disposition; or that he has been wilfully absent from examinations—all which are specified in the statute; and there may be other grounds of fraud, irregularity, &c., competent to be stated.

"2. When a man is made bankrupt, by having the misfortune to be a partner of a company which has become bankrupt, it may often happen that he has no individual estate left. But the respondents seem desirous of calling for judgment on this point—Whether a sequestration, which is obtained where there is no property to divide, and the sole object is to obtain a discharge for the bankrupt, must necessarily be considered as collusive and illegal? They do indeed state some particular circumstances in the case—that the concurring creditor was a friend; that the trustee and his cautioner were also friends of the bankrupt; that the trustee has been aiding to the bankrupt in his preparations for obtaining a discharge; and that there are grounds to suspect that the bankrupt has acquired funds since the sequestration.

are all circumstances which might be expected to occur in such a case, if the conduct of the bankrupt has been fair and honest; and the creditor did not choose to appear have themselves to blame, if they think that the proceedings should have been different, though not irregular or illegal as they stand. These, indeed, seem to be an irregularity in the circumstance of the trustee being a mandatary of the bankrupt in the application for discharge, and the Court is, how far this, which is not liable to any objection on the statute, is sufficient to annul the application on general principles. With regard to the bankrupt's funds now, his statement is, that he has been assisted by his friends in the past, and that he has no funds but the produce of his daily labour. It appears to the Lord Ordinary, therefore, that, with the exception of the point as to the trustee, which may admit of doubt, the case is reduced to the question, Whether the process of sequestration is simply incompetent, because the bankrupt, without any allegation of fraud against him, is reduced to the condition of having no individual estate, and therefore can only apply for sequestration on the object of ultimately obtaining a discharge? The Lord Ordinary cannot say that the case would have been exactly the same, if the petitioner as an individual had been included in the original application for sequestration of the company. How as an individual. John How may obtain a discharge; and it would be a peculiar hardship, if the petitioner, who had no active management of the company's business, must be held to be bound for ever, personally, and in all his future dealings, merely because he was left out of the first sequestration, and all his funds absorbed by the bankrupt companies.

The Lord Ordinary had at one time some doubt as to the demand of discharge on behalf of the company, while the company itself is not discharged. But he is now satisfied that there is nothing incompetent in this, and he rather believes that it is common in practice.

On the whole, though the case is of a peculiar nature, and may present some difficulties, the Lord Ordinary thinks that the application is in its substance fair.

No. 80. JOHN DUFF DINGWALL and CURATOR, Complainers.—*Rutherford—Moir.*

Dec. 14, 1833.
Dingwall v.
Duff.

MRS CHARLOTTE DUFF, Respondent.—*Shene—Neaves.*

Fee and Liferent—Faculty—Interdict.—A liferentrix by constitution, with power to cut such wood as in the opinion of the grantor's executors could be done without injury to the estate, having avowed an intention to cut wood which the fiar considered would be injurious to the estate, the Court passed a bill of suspension presented by him, and granted interdict prohibiting the cutting of all wood as to which a month's previous intimation of the intention to cut should not be specially given to the fiar, whose right to apply de novo for an interdict was reserved.

Dec. 14, 1833.

2D DIVISION.
Bill Chamber.
Ld. Moncreiff.
T.

THE late Mr Duff, of date 28th October, 1826, executed an entail of his lands of Corsindae and others, in favour of the late John Dingwall of Brucklay, and the heirs of his body, "with and under the burden of any trust-deed, executed, or to be executed by me, and also, with the burden of any deed of locality, liferent disposition, or any other deed, executed or to be executed by me, in favour of my spouse." Of the same date, he executed a liferent disposition of the lands in favour of Mrs Charlotte Duff, his wife, "with full power to her, in case she survive me, to call for exhibition and production of the said writs on all necessary occasions for defending her right, and immediately upon my death to possess the said lands, set tacks thereof to tenants for nineteen years from the commencement of said tacks, with the approbation of the executors named in my last will and testament, at a fair and adequate rent, but without taking any grassum or entry money; and also with liberty to her to cut, sell, or use for fire or otherwise, such wood growing on said lands, as in the opinion of my executors can be done without injury to my estate; and to do every thing which any liferentrix by law may do in like cases." By a latter will, executed in November, 1831, Mr Duff named as his executors Mrs Duff, Mr Alexander Black, wine-merchant in London, her nephew-in-law, and Mr William Stratton of Aberdeen,—the latter of whom declined to accept. Mr Duff died shortly afterwards; and Mr Dingwall having also deceased, his son, the complainer, John Duff Dingwall, made up titles to Corsindae under the entail, and alleging that Mrs Duff had cut down a considerable quantity of wood, greatly to the injury of the estate, and had threatened to cut plantations necessary to the amenity of the estate, he and his curator presented a bill of suspension and interdict, praying to have Mrs Duff interdicted "from cutting down any of the green or unripe wood on the said lands of Corsindae and others; as also any of the grown timber which is of an ornamental nature, or necessary for the comfort, shelter, or amenity of the mansion-house, or any of the trees of the garden or shrubberies, or from suffering the young plantings to be injured by sheep or other

hich she was bound to be guided in regard to what might be cut, out injury to the estate, and that the Court had no right to interfere; at all events, ought not to interfere on such vague and general statements as those contained in the bill.

ie Lord Ordinary reported the bill and answers, granting interim dict, and adding the subjoined note.*

RD MEADOWBANK.—It is impossible to hold that this lady is entitled to cut a wood, even with consent of the executor. The testator makes the executor judge in the first instance, and I looked to see if he had come to Scotland to try himself. If he was stone-blind, the Court might interfere; and the executor being in England, is it not incumbent on the Court also to interfere, or at least to require the executor to state his opinion, and the grounds of it? And in the meantime, I doubt exceedingly if we should withdraw the interdict, without a statement as to what is proper to be cut without injury.

It is probably clear enough that a sufficient case has not been laid, in any thing fully done, to warrant the interference of the Court. But the respondent does show an intention of cutting entire woods of forty and sixty years old; and when such anxiety is expressed about the possible effect of any delay in her operations in the event of her dying, it is impossible not to see that the power is thought very extensive, and the apprehension of its being extensively used not altogether groundless. There is no doubt that the will of the testator must regulate, as it is expressed. But the question is, whether, according to the fair meaning of the power or faculty given, the respondent has an absolute discretion as to cutting wood, restrained only by herself and her near relative residing in London. The substance of the power, conferred specially beyond the ordinary powers of a father, and therefore not so favourable in construction as the powers of a father

No. 80.

Dec. 14, 1833.
Gibb v. Magistrates of
Hamilton.

LORD GLENLEE.—As to the propriety of passing the bill to try the question, I have no doubt. It is a fundamental condition of the power to cut contained in the deed, that it is not to be done to the injury of the estate. No doubt the executor is to be the judge, but notice should be given to the heir, that he may state to the executor his objections, and have an opportunity, if dissatisfied with his judgment, of trying whether the intended cutting be not beyond the intention of the testator; and I have considerable doubt as to the extent of the power given. In these circumstances, though unwilling to interfere as to interim possession, in cases where indemnification cannot be made to one party, I would be inclined to interdict here, because caution would indemnify the lady; while, if the wood is once cut, the heir cannot be put in the same situation as before. I would incline to direct, that she should give notice to the heir always before cutting.

LORD JUSTICE-CLERK.—I think we might control the judgment of the executor; but as it is a delicate matter, I think the view of Lord Glenlee very good, to give the heir an opportunity of applying for an interdict.

After hearing these opinions, the parties concerted an interlocutor in conformity thereto, which was pronounced by the Court in these terms:—"Pass the bill to the effect of trying the question, recal the interdict, on condition always that the respondent, before cutting down, except for the immediate use of the estate, or selling any part of the timber on the lands stated in the bill, shall give intimation to the complainer, or his known factor or agent, specifying precisely the timber which she proposes to cut or sell, such intimation being made one calendar month at least before she proceeds to cut or sell; and reserving also to the complainer his right to apply if he shall be so advised for interdict de novo, and to the respondent her answers, as accords; but continue the said interdict to the effect of prohibiting and discharging the respondent from cutting or selling any timber as to which such intimation shall not have been made."

A. G. SUTHERLAND, W.S.—W. DUTHIE, W.S.—Agents.

No. 81.

ELIAS GIBB, Pursuer.—*Maitland*.MAGISTRATES OF HAMILTON, Defenders.—*Patterson*.

Expenses—Auditor.—Fee to counsel for revising summons, and advising whether the action should be raised, sustained as a proper charge.

Dec. 14, 1833.

2d DIVISION.
T.

AT auditing the pursuer's account of expenses in the case mentioned ante, p. 28, the auditor struck off a fee to counsel for revising the summons, and giving his opinion whether it should be raised, and relative charges. On his report being brought up, objections were taken by the pursuer, in so far as these charges were disallowed.

LORD JUSTICE-CLERK.—This point has been decided over and over again. The charges must be allowed.

LORD MEADOWBANK.—It is strange that the auditor will not be taught.

THE COURT sustained the objection, and allowed the charges.

M'KENZIE and M'FARLANE, W.S.—F. HAMILTON, W.S.—Agents.

a judgment disallowing the bill of exceptions in this cause, men- Dec. 14, 1833.
ante, XL 451, having been reversed on appeal, without any thing 2D DIVISION.
said as to expenses, Mrs Allison presented a petition, praying to R.
he judgment applied, and to be allowed the expenses of the former
and of discussing the bill of exceptions. The Court applied the
ent, and reserved the claim for the expenses of the former trial;
to those attending the discussion of the bill of exceptions, without
nining whether there might not be cases where they would allow
xpenses, they refused Mrs Allison's claim, which, in regard to a
on of such difficulty, they considered quite preposterous.

JAMES BURNSIDE, W.S.—JAMES WEMYSS, W.S.—Agents.

FORBES'S TRUSTEES, Suspenders.—*Robertson*.
GORDON'S ASSIGNEES, Respondents.—*Cowan*.

No. 83.

ional or Real—Sale—Expenses.—1. A disposition and deed of settlement was
d under the burden of certain provisions which were declared to be real
as and liens on the lands, and under a clause imposing an obligation on the
ee to pay a certain additional provision, in the event of his selling the lands
, that that additional provision did not constitute a real burden. 2. A pur-
found liable in the expense of a suspension to obtain a judgment on the vali-
his title.

late John Gordon of Lochdougan, by his deed of settlement exe- Dec. 14, 1833.

No. 83. He then declared these provisions to be in full of the legal rights of his wife and children, and of all claims and demands, "except the additional provision hereinafter specified, in the event of the sale of the said lands and others." This provision was constituted by the following words:—"Declaring always, as it is hereby expressly provided and declared, that in case my said son Samuel shall sell the lands and others hereinbefore disposed, in his own lifetime, then he shall be bound and obliged, as I hereby bind and oblige him, and his heirs, executors, and successors, to make payment to each of the said John, William, and Alexander Gordon, my said sons, and to each of the said Nicholas and Margaret Gordon, my daughters, of the sum of £250 sterling; and which additional provisions shall be payable at the time of the purchaser's entry to the said lands and others, and shall bear interest thereafter till the same be paid."

Dec. 14, 1833.
Forbes's Trustees v. Gordon's Assignees.

This declaration was followed by an obligation to infest, "under the burdens and provisions before specified;" and the procuratory of resignation, and the precept of seisin, authorized resignation and infestment, "under the burdens and provisions before written."

Samuel Gordon was infest on this disposition; and all the burdens and provisions, including the additional provision, were engrossed in the instrument of sasine in the terms above recited. He thereafter sold the lands to the trustees of the late Forbes of Callender; and having subsequently become insolvent, a commission of bankruptcy was issued against him in England, and his estate vested in the chargers, as assignees. They having claimed payment of the price from Forbes's trustees, the latter, for the purpose of obtaining the judgment of the Court on the point, whether the additional provisions were real burdens affecting the lands, presented a bill of suspension, (but without caution,) contending that, by the conception of the deed of settlement, these did constitute real burdens.

To this it was answered, that, to constitute real burdens, it was necessary that they should be stated in the dispositive clause as affecting the lands themselves, while here the additional provision clearly formed only a personal obligation against the disponent.

The Lord Ordinary (Glenlee) having refused the bill, Forbes's trustees presented a second, offering caution, which came before Lord Moncreiff, Ordinary. His Lordship having passed the bill, adding the subjoined note,* Gordon's assignees reclaimed.

The Lord Ordinary (Glenlee) having refused the bill, Forbes's trustees presented a second, offering caution, which came before Lord Moncreiff, Ordinary. His Lordship having passed the bill, adding the subjoined note,* Gordon's assignees reclaimed.

* "The Lord Ordinary does not mean to intimate any opinion that the additional provisions were made real burdens on the land. If he were to decide this point, he rather thinks that they were not. But the complainers are entitled to be secure in paying the money; and as there may be a doubt whether the sums of the price corresponding to the additional provisions do not belong to the parties to whom they are appointed to be paid, in the event of a sale, he thinks it right to pass the bill. The last point alluded to in the answers is very doubtful indeed, and makes the Lord Ordinary still more hesitate to refuse the bill. If the respondents wish to take the opinion of the Court, they may reclaim at the box-day."

The Court ordered minutes of debate.

No. 83.

LORD JUSTICE-CLERK.—I am of opinion that the title is perfectly good, and that the bill should be refused. The law is correctly laid down by Mr Bell (l. 686,) and supported by the cases referred to, and by the case of Martin,¹ and, subsequently, that of M'Intyre in 1824,² and that of Hume v. Stewart in 1799, in which all the authorities founded on by the suspenders were before the Court; and I cannot think there is the least doubt that it was not the intention of this man to make the additional provisions real burdens. The gentlemen are right to see that the titles are valid; but I have no doubt about it, and that the bill must be refused.

Dec. 14, 1833.
Cowan v.
Campbell.

The other Judges concurred.

Cowan.—They should pay the expenses for having a judgment on their title.

LORD MEADOWBANK.—It is for their advantage that expenses should be given, showing that the Court were clear.

THE COURT accordingly altered and refused the bill, with expenses.

WILLIAM FORBES, W.S.—CUNINGHAME AND WALKER, W.S.—Agents.

JOHN COWAN, Pursuer.—*Whigham.*

No. 84.

PETER CAMPBELL, Defender.—*Cuninghame.*

Expenses—Reparation.—In an action of damages, laid at £1000, for wrongous apprehension and imprisonment, the jury found for the pursuer, and assessed the damages at one shilling—held, that the pursuer was entitled to his expenses.

JOHN COWAN had been imprisoned for six weeks under a meditatione Dec. 17, 1833.
warrant, in which his name was written on an erasure, and which
was granted upon evidence of a rather loose description. In a process of
suspension and liberation, the letters were suspended,³ and he raised an
action concluding for £1000 damages, which was directed against several
parties, including the law-agent who had obtained the warrant. The jury
found a verdict in favour of the other defenders, but against the law-agent,
and assessed the damages at one shilling.⁴ Cowan now moved for ex-
penses, and the Court found him entitled to them.

1st Division.

W. MARTIN, S.S.C.—P. CAMPBELL, S.S.C.—Agents.

¹ Martin v. Paterson, June 22, 1808 (App. 5, Personal and Real.)

² (Ante, II. 664.)

³ March 6, 1829 (ante, VII. 558).

⁴ July 12, 1833 (ante, XI. 999).

No. 85. SIR JOHN HOPE and OTHERS (SCOTT'S TRUSTEES), Raisers and Claimants.—*Jameson—G. G. Bell.*

Dec. 17, 1833.
Hope v.
Dickson.

MRS DICKSON and HUSBAND, Claimants.—*D. F. Hope—R. Bell.*

Homologation—Husband and Wife.—A widow was entitled to above £1000, in name of *jus relictæ*, besides £20 of terce; her husband had executed a settlement, making very inferior provisions in her favour, and even these she was to forfeit in the event of a second marriage, which she made; after a lapse of ten years from the death of her first husband, during which time a series of actings by all parties had taken place, on the footing that the settlement was unchallengeable—held competent to her to recur to her legal claims, in respect that any acts of alleged homologation were done in ignorance of her legal rights, and therefore afforded no proof of a consent to surrender them.

Dec. 17, 1833.

1st Division.

Ld. Corehouse.

B.

THE late Thomas Scott died on 24th December, 1819, possessed of fully £3000 of moveables, besides heritage, which yielded at least £60 per annum. He left a widow, Mrs Agnes Scott, and four minor children. There was no contract of marriage. By a deed of settlement, he conveyed his whole heritable and moveable estate to Sir John Hope and others as trustees, and he stated, that "it is my earnest desire that my wife and children live together in the house I presently possess, at least as much as circumstances will admit of, until the period of division of the trust-funds after mentioned; and my said trustees are hereby directed to appropriate the rents of my heritable subjects, and the interest or yearly proceeds of my personal funds and effects, or what part thereof they may judge proper and reasonable for the aliment, clothing, and education of my wife and children, according to their stations, until my youngest child shall attain the age of twenty-one years complete, or if married, whichever of these events shall first happen; and at the first term of Whitsunday or Martinmas that shall happen three months after that period, I direct my said trustees to make a division of the trust-fund and estate under their management, in the following manner, viz.—I direct them to stock out at interest, and upon good and sufficient security, as much of the trust-funds as will produce an yearly free annuity to the said Mrs Agnes Scott, during all the days of her life, in case she continues my widow, of £50 sterling per annum, and to pay to her such a sum of money as they shall judge to be reasonable for her maintenance and support until her first half-year's annuity becomes due. And it is my will, that the household furniture, bed and table linen, china, plate, and others in my said dwelling-house, shall be kept up in good condition till the foresaid period of division, when the same shall be delivered over to the said Mrs Agnes Scott, for her sole and separate use, provided she then remains my widow. But it is hereby declared, that if she, the said Mrs Agnes Scott, enters into a second marriage, either previous or

d to be "in full satisfaction to her of all terce of lands, half or
moveables, or others of the law competent to her in and through
band's decease." The trustees were named tutors and curators
children.

meeting of the friends, held on the day of the funeral, the widow
ed a sealed packet, which contained the deed of settlement, which
id over, and a minute of acceptance was signed by all the trustees,
the widow, who never signed it.

4th January, 1820, the trustees held a meeting relative to the dis-
f the estate, and the appointment of a factor, the minutes of which
subsequent meetings of the trustees, on 14th and 28th January,
15th March, were signed by the widow along with the trustees.

last meeting, a resolution was passed "to fix Mrs Scott with an
y of £120 for one year, commencing at Whitsunday, 1820, and to be
ed at that rate till that date from this time. Cash drawn formerly
to this date not to be included." The cash formerly drawn was
m the factor at four several times, and amounted to £36, for which
anted receipts as "from the trustees for the management of my
estate, to account of annuity."

May and August, she received two quarterly payments of £30, pur-
to the resolution above quoted; and on 4th September, the trustees
nfeft, and the name of the widow was included in the infeftment
ustee. On the 14th, she entered into a second marriage with Mr
m. The inventories of Scott's executry, afterwards given up, did
ntain her name; and though she attended at several subsequent
gs of the trustees, to ask additional allowance, &c., she was no

No. 85. forfeited generally the provisions destined to her under the settlement, but that probably "the Court might hold she had still a claim to some reasonable allowance till the period of division, at least if the circumstances of her husband are not such as clearly to render this unnecessary;" 3. That the trustees might dispossess her of the house at the next term at farthest; 4. That they might remove the children from her superintendence; and, lastly, that if they did so, it was doubtful whether they would then be warranted in making any alimentary provision to her: "but as, at all events, the amount must be in their own discretion, they might be in safety to make some moderate allowance, if by that means all legal discussion might be avoided. It is not probable, however, that the widow or her husband will acquiesce in this; and if the subject comes before the Court at any rate, I think the memorialists should not pay any thing without a judgment. But as long as the children, or any of them, are allowed to remain in family with their mother, the memorialists will be bound to make a reasonable provision for their support and education."

Dec. 17, 1833.
Hope v.
Dickson.

This opinion having been obtained, the trustees held a meeting on 17th October, 1820, and the minutes bore as follows: "The trustees having considered the case and opinion, instruct Mr Marshall (their law agent) to send copies thereof, and of this sederunt, to Mrs Scott, or her husband; and at same time to intimate to them, that the trustees feel disposed to allow them to remain in possession of the house presently occupied by them, with the furniture, without rent, till Whitsunday next, and likewise to retain possession of the cows till that term, after which they would exact a fair rent and remuneration. It is also to be understood, that the furniture, &c. shall remain entire, the ordinary tear and wear excepted. The meeting next instructed Mr Marshall to intimate to Mrs Scott, not Mrs Dickson, and her husband, that the allowance given her by minute of sederunt of the 15th March last, of £120 per annum, would be continued for the year from Whitsunday last; but at that period it is to be understood, that in consequence of her marriage, a reduction of the above allowance will be made, the amount of which will very much depend upon her uniform conduct, and attention to the children."

On 21st October, Mr Marshall sent a copy of the Memorial and Opinion to the widow and her husband, along with the minute of the trustees; but the last part of the Opinion, indicating the expectation of counsel that Mr and Mrs Dickson would not acquiesce in accepting some moderate allowance, and waiving legal discussion, was not communicated. The accompanying letter of Marshall stated that he would be glad to hear from them, "accepting of the terms held out by the trustees." No answer was returned. The draft of a letter of acceptance, dated December, 1820, and holograph of one of the trustees, was prepared; but it was never signed; and parties were at issue whether it had been framed at the request of the widow, or spontaneously by the trustee. On 12th Fe-

education of the children. A meeting of the trustees was held on May, 1821, which was attended by the widow and her husband; and the minutes bore that the meeting "took into consideration the annual sum to be allowed to Mrs Dickson, which was fixed as follows:—£120 per annum, but that she and her husband should pay £20 sterling annum for the use of the house and furniture out of the said £120." Some small extra allowances were made on different accounts, which exceeded the sum of £20 to be deducted as house-rent; and the trustees set forth, that "Mrs Dickson agrees to all the arrangements the trustees have made;" and they were signed by her and her husband. Subsequently to this, she, her husband, and children continued to inhabit the same house. The quarterly receipts were granted sometimes "the allowance for board, clothing, and education of Mr Thome's children," and sometimes as for "the allowance to herself, for board, clothing, and education of Mr Thomas Scott's children." In 1822, the annual sum was raised to £150, and was not afterwards reduced. Her allowances to the amount of about £1900 had been drawn on the terms, from the trustees, she and her husband, in 1832, raised a writ of multiplepoinding, in the name of the trustees, in which she demanded the full legal provisions which she could have demanded at the death of her first husband, under deduction of so much of the allowances as might be imputable to her terce and her own proportion of the goods in communion. At this time the youngest of the children was a minor. A claim was lodged for the trustees, on behalf of the children, maintaining that the whole trust-estate belonged to the children,

No. 85. and a contingent right to £1000, in the event of all her four children predeceasing the period of division, which was highly improbable. Even these provisions were to be forfeited if she entered into a second marriage prior to the period of division; and also (except the liferent of the house and furniture) if she did so after that period. These rights were greatly inferior to those which she possessed at common law, and she was entitled to repudiate them.

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2. There were no circumstances relevant to infer homologation of the settlement, or to bar her from claiming her legal rights. To establish this, it was essential to show that she knew what her legal rights were, and what was the nature of the substitute for them in the deed of settlement. But she never knew what were her legal rights, until recently before the action of multipointing was raised, and her acts did not infer such knowledge. She did not accept as trustee; neither did she sign the minute of acceptance; and her attendance at the four meetings preceding her marriage, was on account of her children's interest; and, at all events, even if she had acted as trustee, this would be no proof that she knew what her legal rights were. She received the subsequent allowances, not only in ignorance of her right to repudiate the settlement, but after being erroneously told by the trustees, through the medium of the defective copy of the Opinion, that she had no such right. Her subsequent conduct in refusing to answer the two letters requesting her to submit to the terms offered by the trustees, and to sign the draft of the letter of December, 1820, showed that she would not have consented to give up her rights, had she known what they were. Besides, as the deed of settlement contemplated a temporary arrangement, allowing generally the produce of the estate, so far as deemed advisable by the trustees, to be applied in support of her and the family, until the period of final division should arrive when the youngest child reached the age of twenty-one, and that time had not yet come, it was not too late to recur to her legal rights. She was also ready to prove that the children could not have been maintained or educated at a cheaper rate, even had she claimed her legal rights from the first, so that things were still entire.

Pleaded by the Trustees—

1. It is not disputed that it was competent to Mrs Dickson to repudiate the settlement, and resort to her legal rights; but she could also adopt and homologate the provisions in the settlement, and exclude her legal rights.

2. Her conduct, both before and after her marriage, afforded distinct evidence that she had repudiated her legal rights, and homologated the deed. The omission to sign the minute of acceptance was a mere act of inadvertence; and, as she attended the next four meetings of trustees, and signed the minutes as a trustee, naming a factor, and awarding an allowance to herself and family, she must be held to have accepted and acted as a trustee, and this of itself was a ratification of the settlement. After

...and, having been induced to do so, she had on the footing of homologation, she had irrevocably homologated the settlement; and this was her own unbiassed act, as the trustees had no part in inducing her to homologate. Besides, by her conduct matters were almost inextricable, as a difficult accounting would arise if all were to be adjusted on a new footing, as far back as the date of Mr. Scott's death; and the children had been educated and maintained with other, in a style which would not have been allowed, if it had been known that their mother was to enforce her legal claims. Lord Ordinary found* "that the deceased Thomas Scott exe-

TE.—The widow, Mrs. Scott, before her second marriage with Dickson, attended five meetings of the trustees, at four of which she subscribes their minutes, and signed, in the character of trustee. She concurred in the nomination of a trustee, and further, she concurred when the annual allowance was fixed under the trust deed for the maintenance of herself and the board and education of her children. She received payments to account of which she received from time to time. After her second marriage, she was furnished with copies of the memorial and queries, and was counselled, as to its effect, and whether she was barred by her conduct from enforcing the settlement, and recurring to her legal rights, and of the opinion of the trustees on that memorial. Two letters were addressed to her and her husband by the trustees, requiring them to say if they acceded to the arrangement proposed by the trustees, on the footing that they had acquiesced in the settlement, and the letters they made no answer; but they received the allowances as fixed by the trustees, and under the authority of the trust, for a period of more than nine years, and granted receipts for them, which are produced. If they intended to rescind the settlement, they were bound to give notice to the trustees, that arrangement might have been made different from those which had been adopted on the footing of acquiescence, and more suitable to the state of the funds, and the

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cuted a trust-disposition and settlement, on the 31st of August, 1819, in which he appointed his wife, now the claimant, Agnes Dickson, if she should survive him, one of his trustees, and made certain provisions for her, in satisfaction of her terce, half or third of moveables, and other legal claims, and, in particular, gave her a life annuity of £50; but he declared, that the said annuity should cease if she entered into a second marriage: that Agnes Dickson survived the truster, and in 1820, seven months after his death, married the claimant, John Dickson: that Agnes Dickson, by her conduct, both before and after her second marriage, homologated the settlement of her husband Thomas Scott, acquiesced in for a period of about ten years, and took benefit under it: that she has in consequence barred herself from repudiating the said settlement, as recurring to her legal provisions of terce and third of the goods in communion: Therefore repelled the claim of the said Agnes Dickson and her husband; preferred the trustees of the late Thomas Scott to the fund in medio; and decreed in the preference accordingly; but, in the peculiar circumstances of the case, found no expenses due."

Mrs Dickson and her husband reclaimed.

LORD BALGRAY.—At first, my opinion inclined me to coincide with the Lord Ordinary, but, on farther consideration, I am obliged to differ from his Lordship. When any series of actings is founded upon, in order to prove that a party has homologated a deed which infers a surrender of that party's legal rights, it is certainly one important circumstance to consider whether these actings have gone on for a length of time together. But in every such case, and especially where the sacrifice of valuable rights is involved, the true question is, whether these actings afford clear, distinct, unequivocal evidence of consent to surrender these rights; or whether they do not admit of any reasonable explanation, except upon the footing of such surrender having been made. And it lies at the very foundation of such a question, to ascertain, in the first instance, that the party knew what these legal rights were. If the acts of Mrs Dickson are to afford evidence of consent to surrender her rights, it must first be proved that she knew what her rights were. At least, wherever this is not proved, the Court must look with the utmost jealousy at those acts which are to be interpreted against her, to the effect of implying that she has voluntarily given her rights away. When I look to all the circumstances

effect, founded upon by Mrs Scott, in all of which there was nothing done on the faith of the alleged homologation.

"It has been said that Mrs Dickson and her husband were ignorant of their rights and misled by the trustees, who showed them an opinion of counsel erroneous on a point of law. But it was their own fault if they were ignorant of their rights, as their attention had repeatedly been called to the question, by letters which they did not think fit to answer. If they were not disposed to acquiesce in that opinion, they should have consulted other counsel. The trustees were the parties misled by the silence of the Dicksons, till the period of division was at hand, and the allowance to the children were to cease.

"In a question between a mother and her children, where a point of consideration occurs, there seems to be no reason for awarding expenses of process."

of this case, and especially to the fact that the period of division of the property in terms of the settlement had not yet arrived, I think there are not sufficient grounds for homologation. It is true that I hold her to have accepted and acted as trustee prior to her second marriage, but that, in itself, did not cut off her right to recur to her legal claims.

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LORD PRESIDENT.—I am of the same opinion. I think Mrs Dickson acted as a trustee, but that did not necessarily infer the renunciation of her legal rights. I am not inclined to rest too much upon the terms of the receipts granted by her for the quarterly allowances; and, as I am not satisfied that she ever knew what were her legal rights, prior to the time when she claimed them in this process, I cannot hold her acts to amount to the voluntary and deliberate surrender of these rights.

LORD GILLIES.—I concur. I do not think Mrs Dickson's originally acting as a trustee did necessarily foreclose her from recurring to her legal rights. The amount of the moveable and heritable estate was then to be ascertained. When the moveable estate was found to amount to £3000, I apprehend it to have been the duty of the trustees, (who have acted honourably throughout, but erroneously as to this,) to state precisely to Mrs Dickson how much of this was her own, absolutely, if she chose to claim it. They should have distinctly explained to her what she would enjoy by repudiating the settlement, and what she would have by adopting and accepting it. After that, her actings would be good evidence of homologation if they unequivocally approbated the settlement, and implied her adoption of it for the sake of her children, or from regard to her husband's wishes, or from any other motive. But without this, the very circumstance is wanting which would render her subsequent actings good evidence of her deliberate renunciation of her legal rights and adoption of the settlement. I am also influenced by the consideration, that the amount of the goods in communion was not specified in the memorial which the law-agent of the trustees submitted to counsel, and that a part of the Opinion was not communicated to Mrs Dickson. It is not enough for the trustees to say they thought it immaterial. It showed that the counsel did not expect Mrs Dickson to acquiesce in the view, that homologation had already taken place; and its communication was material in the question, whether she should make up her mind to acquiesce or not. I conceive that, at the date of her second marriage, she could certainly have repudiated the settlement. As the terms of the settlement implied the forfeiture of all her provisions in the event of such second marriage, I am persuaded that nothing short of concussion, or the erroneous conviction that her legal rights were already gone, could have induced her for a moment to entertain the purpose of acquiescing in the provisions of the settlement. And as it is stated that the children could not have been more cheaply educated, had she claimed her legal rights from the first, I do not consider the actings, subsequent to the second marriage, to be sufficient to bar her from now vindicating these rights in this process.

LORD CRAIGIE.—I entertain the same opinion. The facts and circumstances founded on as evidence of homologation, cannot prove this, unless they instruct the consent of the party. But the very basis of consent is removed if the party has been all along ignorant of the nature and value of the rights which, it is alleged, she consented to give away. When I consider what Mrs Dickson could have legally claimed, and what was the substitute held out by the settlement, I conceive there is real and moral evidence, of the most convincing kind, that she never would have surrendered her legal rights had she known what they were. Undoubtedly

- No. 85. this might be overcome if a clear and unequivocal proof were adduced, that, in the full knowledge of the amount of her rights and property, she consented to part with them; but it would require very strong evidence to satisfy me of this, and I do not find such evidence in the facts of this case.
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THE COURT pronounced this judgment:—"Recal the interlocutor of the Lord Ordinary; find that Mrs Dickson is not barred from claiming her legal provisions; and remit to the Lord Ordinary to proceed farther," &c.

D. M. BLACK, W.S.—W. DUNCAN, jun.—Agents.

- No. 86. FRANCIS HOWDEN and OTHERS, Petitioners.—*Rutherford—Sandford—Bruce.*
CHARLES FERRIER, (White's Trustee,) Respondent.—*D. F. Hope—D. Dickson.*

Process—Appeal—Ranking and Sale.—Question, whether an appeal from an interlocutor in a ranking and sale, or an appeal from a warrant obtained by one creditor, in a relative sequestration of rents, prevents the Court from entertaining a petition in the process of sequestration by another creditor praying for a similar warrant.

- xc. 17, 1833. THE respondent, Ferrier, as trustee on the estate of White, a creditor of Graham of Gartmore, brought a ranking and sale of Graham's heritable estates, in which the Lord Ordinary pronounced the usual interlocutor, allowing a proof. Against this interlocutor the present petitioners, trustees of the Scottish Union Insurance Company, and other creditors of Graham's, under heritable bonds of annuity, reclaimed; and the Court (June 2, 1832) remitted to his Lordship "to sist further procedure under the interlocutor complained of, and to hear parties on any question that may be raised under the summons." Subsequently to the institution of the ranking and sale, Ferrier had petitioned the Court for sequestration of the rents of the estates comprehended in that process, and for the appointment of a judicial factor; and the Court accordingly granted sequestration, and appointed a factor. Thereafter, a petition was presented by the trustees of the deceased Peter Wood and Mrs Veitch for a warrant on the factor to pay them certain sums, fallen due to them under their bond of annuity. This petition was opposed by Ferrier, but the Court (July 6, 1832) granted warrant as craved. Ferrier thereupon entered appeals, both against this interlocutor and that pronounced by the Inner-House in the ranking and sale. Service of these appeals was duly made; but to the competency of that in the ranking and sale, objections were taken by the petitioners, which were not yet decided upon by the Committee of Appeals in the House of Lords. In this state of matters, the petitioners presented an application to the Court for a warrant on the factor for payment to them, out of the rents in his hands, of sums fallen due to them under their bond of annuity. To the competency of this petition, Ferrier objected—
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1. That the process of ranking and sale being in the House of Lords No. 86. by his appeal from the interlocutor sisting procedure, no step could be taken in it without leave of that House, according to the rule laid down Dec. 17, 183 in *M'Nab v. Martin* (Dec. 24, 1803, F. C.), and that the sequestration Howden v. Ferrier. was a part of the ranking and sale, so that all procedure in it was also stayed by that appeal; and,

2. That, at all events, procedure in the sequestration was stayed by the appeal from the order on the petition of Wood's trustees, which was a proceeding in the sequestration itself.

To this it was answered—

1. That the sequestration, though generally resorted to pending a ranking and sale, is no part of that process, but an independent process, not affected by appeal from a judgment in the ranking; and,

2. That, in like manner, each incidental petition for an interim warrant is a separate proceeding, and an appeal from an order on such petition cannot carry to the House of Lords the process of sequestration itself.

The Lord Ordinary, to whom the cause had been remitted for preparation, reported it on objections and answers.

LORD JUSTICE-CLERK.—Taking the facts to be, that Mr Ferrier raised the ranking and sale, and then made application for sequestration, it does not appear to me to be of any consequence whether he made such application as an individual creditor or as pursuer of the ranking and sale, because he brought before your Lordships the fact of the dependence of the ranking and sale. In the ranking and sale, the Lord Ordinary pronounced in the ordinary way the usual interlocutor, allowing a proof, &c. We, however, sisted till the questions arising under the summons should be discussed; and Ferrier has appealed from our judgment. Now, although objections to the competency of the appeal have been lodged, an order for service was made, and the petition of appeal has been served. Then an application is made for a warrant on our factor for payment of this sum, and the question is, whether, this sequestration taking place after the ranking and sale was brought, we can, till the appeal be disposed of, grant the warrant. Whether it is clear or not that the appeal will be dismissed by the House of Lords, we cannot take it for granted; and it is as clear as any point can be, that all questions in the action are placed in dependence on that appeal. I cannot distinguish between this and the case of *M'Nab v. Martin*, where the Court held they could not entertain a collateral question pending an appeal from an interlocutory judgment. The rule thus laid down in 1803 never has been deviated from, and there cannot be a clearer instance of it than that of the case of *Brodie*; and I cannot doubt, therefore, that all proceedings are stopped by the appeal.

LORD MEADOWBANK.—My opinion entirely coincides in regard to the result, but I did not think it necessary to consider whether the appeal from the interlocutor in the ranking and sale stopped the proceeding in the sequestration; because I hold that an appeal on any one application in the sequestration has that effect. Every order on the factor must be pronounced with reference to the original step applying for his appointment, and an appeal from any order carried that original step to the House of Lords; and therefore, though the two processes were held not to be one and the same, the sequestration has been carried up by the

No. 86. appeal from the order in favour of Wood's trustees. Had I been to rest my opinion on the other appeal, I would have wished to know whether, in extracting the decree in a ranking and sale, the process of sequestration is included; but to satisfy my own mind, it is not necessary to consider that, as the appointment of the factor being carried to the House of Lords by the appeal from the order in favour of Wood's trustees, that is enough to stop this proceeding.

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LORD GLENLEE.—I am not satisfied of the incompetency of this petition, as I do not see the least analogy between this case and that of *M'Nab v. Martin*. Every thing that could arise between the parties in that case fell under the petition and complaint, and the whole petition and complaint went to the House of Lords, and that House maintain their right, when a cause is before them, to decide, if they see fit, on any point embraced in the summons, whether it has been discussed or not in the Court below. They did so in the case of *Vans Agnew*; and though they recalled their judgment, the Lord Chancellor declared, that they had the right to pronounce any judgment they liked when the whole summons was before them. Now the summons of ranking and sale has been taken to the House of Lords, and they may dismiss the ranking and sale if they like; but could they, under that summons, say any thing to this preferable right? The appeal in the ranking does not take away the right of any party to apply for an order on the factor, independent of the ranking and sale altogether; and I see no ground, because the ranking and sale is in the House of Lords, to hold that the sequestration, another separate process, is thereby stopped. I cannot therefore concur in dismissing this application, though I have no objection to supersede in the circumstances, as the creditor will suffer no harm. As to what Lord Meadowbank observed, I always understood there was a separate extract for the sequestration, and that it formed no part of the ranking and sale; and I have no idea that the Lord Ordinary can sequester as a mere step in the ranking and sale.

LORDS JUSTICE-CLERK and MEADOWBANK concurred in the proposal to supersede, without making any farther observations.

THE COURT accordingly superseded the petition till the competency of the appeal should be determined by the House of Lords' committee.

W. A. G. and R. ELLIS, W.S.—J. KNOX, W.S.—H. INGLIS and DONALD, W.S.—Agents.

JOHN BUCHANAN, Petitioner.—*D. F. Hope—M'Neill*.

No. 87.

WILLIAM PATERSON and Others, Respondents.

Judicial Factor—Sequestration.—Sequestration awarded of an heritable estate alleged by the petitioner to have been sold to the respondent, but which allegation the respondent denied—an action of declarator being about to be brought, and the respondent not opposing.

ec. 19, 1833. Mr BUCHANAN of Ardoch presented a petition, setting forth that he had been proprietor of the estates of Batturich, &c., until 21st February, 1833, when they were sold by missives exchanged between him and Mr William Paterson, a minor, with authority of his curators, for a price of £28,650; that Mr Paterson had subsequently exercised acts of proprietorship, by letting the game, and some of the farms, and taking

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one farm into his own hands; but that he was now attempting to withdraw from the purchase, in consequence of which a declarator and action for implement was about to be raised against him: that, in the meantime, the quarries were lying idle, and some farms were out of lease, and therefore he prayed for sequestration, and the appointment of a judicial manager until the issue of the declarator. No. 87.
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Mr Paterson and his curators lodged answers, stating that no purchase had ever been completed, and no acts of proprietorship exercised; that Mr Buchanan was both feudally the undivested proprietor of the estate, and in reality the only person having any right to the property; but that the respondents had no interest to oppose the prayer of the petition, as they had nothing to do with the subject to be sequestered.

THE COURT granted sequestration as craved.

DOUGLAS, W. S.—GIBSON—CRAIGS, WARDLAW, and DALZIEL, W. S.—Agents.

PETER YOUNG and Others, Advocators.—*Sol.-Gen. Cockburn—Tait.* No. 88.
WILLIAM ALVES WELSH, Respondent.—*Rutherford—Neaves.*

Landlord and Tenant—Arrestment.—A landlord to whom arrears of rent were due for crops 1828 and 1829, obtained a sequestration in security of the current rent for crop 1830; and the tenant, to supersede farther proceedings therein, authorized him to sell the crop, "and apply the proceeds in payment of rents due by me, without obtaining a warrant from the Sheriff:" the landlord, under this authority, sold the crop to an amount exceeding the rent for crop 1830, and a creditor of the tenant arrested in the hands of the purchasers before they had paid or granted bills to the landlord for the price—held, in a question with the arrester, that the landlord was not entitled to apply the proceeds of the sale, except to the rents of crop 1830, and that, quoad ultra, as the sale was made by the landlord as mandatory of the tenant, the surplus was arrestable by the creditor.

Expenses—Process—Advocation.—Though a Sheriff found no expenses due to either party,—competent to award these expenses to the respondent in an advocacy.

On 1st September, 1830, Turner, accountant in Edinburgh, who was infest in the Culloden estate, as trustee for the creditors of Forbes of Culloden, applied to the Sheriff of Inverness for a sequestration of the crop and stocking of the farms of Balloch and Balnaglack, possessed by Dr George Forbes, in security of the rent for crop and year 1830, which was payable at Candlemas and Whitsunday, 1831. At the date of the petition, the whole rent for crop and year 1829 remained due, as well as part of the rent for 1828. Sequestration was awarded and executed, and on 9th September, Dr Forbes addressed this letter to Turner's agent:—"It is quite unnecessary for you to follow out proceedings under the sequestration, at the instance of Culloden's trustee against me, as I hereby authorize you to advertise and sell off the crop, &c., on 18th instant, and apply the proceeds in payment of rents Dec. 19, 1831
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No. 88. due by me, without applying for, or obtaining, a warrant from the Sheriff."

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In consequence of this letter, warrant of sale was not applied for, and on 18th September, the crop was exposed to sale by public roup. The articles of roup stated that the crop was "exposed to sale by Culloden's trustee," and provided, that though the lots should become the property of the purchaser, so soon as sold, they should not be carried away "until the price is paid, or bill granted with security to the satisfaction of the exposer:" failing such adjustment, the exposer was to have an option of rescinding the sale, or pursuing for payment. The proceeds of the roup considerably exceeded the rent for crop and year 1830; and on the day after the sale, Welsh of Melburn, a creditor of Dr Forbes, used arrestments in the hands of Young and others, purchasers, but who had not then paid the price, nor granted bills. They, however, afterwards accepted bills for the price drawn by Turner's agent, and dated as on the day of the roup.

Welsh thereupon raised an action of forthcoming, before the Sheriff of Inverness-shire, against the arrestees and Dr Forbes: and the arrestees raised a process of multiplepoinding, in which Turner made appearance, and which was conjoined with the forthcoming.

Pleaded by Welsh—

In virtue of the arrestments, he is entitled to be preferred on the surplus proceeds after the rent of 1830 was satisfied. That crop was under no hypothec except for the rent of that year, and the process of sequestration, though followed out, could not have conferred a preference to a greater extent than this. The letter of Dr Forbes was not intended to enlarge the preference, but merely to save expense. Turner was a common creditor as to all prior arrears, and could only compete with the other creditors of Dr Forbes on an equal footing, and according to their respective diligences.

Pleaded by Turner—

The letter authorized him to apply the proceeds of the roup, not merely to a single year's rent, but generally to "payment of rents due," and consequently to the whole rents then due. This was equivalent to an assignation of the whole crop and stocking in security of all arrears of rent, and such an assignation is preferable to any subsequent arrestment. Besides, the sale was made by Turner, and he stipulated that no purchaser should be entitled to carry away any part of the crop until payment was made, or satisfactory bills granted to him. The arrestments were therefore inept, as the purchasers were not debtors to Dr Forbes, but to Turner; and as an arrester can be in no better situation than the common debtor, and Dr Forbes could have no demand against Turner until the whole arrears of rent were paid, so Welsh could make no more extensive claim.

The Sheriff found, "in respect the roup of corn and straw, which took

place at Balnaglack and Balloch, on the 18th September, 1830, was in consequence of authority from the common debtor, as expressed in his letter of the 9th of said month, and to avoid the necessity of selling the crop under the sequestration, and that the proceeds of the same exceeded the amount of rent protected by that process, by a sum at least equal to the fund in medio, that the said crop was not transferred to the claimant, William Ainslie Turner, Esq., so as to entitle him to a preference over arresting creditors, but that the purchases made by the arrestees was an arrestable subject, and attached by the diligence of William Alves Welsh;" but found no expenses due.

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Welsh and the arrestees brought an advocacy, in which the Lord Ordinary found, " that the sum in dispute consists of the prices of parts of the crop of the farms of Balloch and Balnaglack, on the estate of Culloden, which crop was sold by public roup on the 18th day of September, 1830; that there is a competition for this sum between the advocator, William Ainslie Turner, trustee on the estate of Culloden, and William Alves Welsh, a creditor of the tenant, Dr Forbes, who used arrestments in the hands of the other advocators, purchasers at the said sale; that the crop 1830 had been sequestrated by the landlord for the current rent, that of the year 1830; that while so sequestrated, authority was granted by the tenant, in his letter of the 9th of September, to the factor, for the landlord to sell off the crop on the 18th of September, 1830, and that the crop was sold accordingly; that the said letter authorized the factor ' to sell off the crop, &c., on the 18th instant, and apply the proceeds in payment of the rents due by me,' &c. But, in respect of the terms of that letter, and the special reference in it to the sequestration, found, that the authority to apply the proceeds in payment of rents, must, in sound construction, be limited to the rents protected by the sequestration: that, in regard to any excess in the proceeds of the sale above the amount of the rents so protected, the sale must be held to have been made by the exposor, merely as the mandatary of the tenant; and that, therefore, such excess was arrestable by his creditors in the hands of purchasers: that the proceeds of the sale, already realized on the part of the landlord, by the advocator, his trustee, and exclusive of the fund in medio, exceed the amount of the rent of 1830, protected by the sequestration: Therefore, sustained the claim of the respondent, the arresting creditor, repelled the reasons of advocacy, remitted the case, simpliciter, to the Sheriff of Inverness-shire, and decerned, and found the advocator liable in expenses."

The advocators reclaimed on the merits, and the respondent as to the expenses of the Inferior Court.

LORD BALGRAY.—On attending to the extent of the right of hypothec, which was possessed by the landlord, I think this case admits of a satisfactory solution. He could not use the remedy of sequestration, except in so far as his hypothec

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reached; and that could reach no farther, over the crop of 1830, than for the rent of that crop and year. The landlord was entitled to draw full payment of that rent out of that crop; but his sequestration could go no farther. He gave up his sequestration in consequence of the letter of 9th September, from the tenant, Dr Forbes, and certainly he is not to be placed in a worse situation on that account. The letter was granted, according to a very common and prudent practice, to save the expense of judicial procedure; and I think its fair import was, to save the landlord's right of preference under his hypothec, on the one hand, and not to add to it, on the other. It was just a mandate to the landlord to sell the crop, reserving the rights of all parties entire. I cannot see, therefore, any obstacle to Mr Welsh, or any other creditor of Dr Forbes, arresting the surplus proceeds of the sale, as soon as the hypothecated rent was satisfied. Had the landlord sold under the sequestration, this might have been done; and it was equally open to a creditor to do it after the extrajudicial sale.

LORD GILLIES.—I am of the same opinion. I can see no reason why the landlord should be in a better situation than any other creditor, as to past arrears of rent. The letter of 9th September does not appear to me to be any thing but a mere mandate to sell, and pay the rents covered by the hypothec out of the proceeds, leaving the rights of parties quoad ultra entire.

LORD PRESIDENT.—I also am clearly of opinion that the interlocutor ought to be adhered to. Under the letter of 9th September, the landlord was not authorized to appropriate more of the proceeds of the sale, than he would have been under the process of sequestration had he insisted in it.

LORD CRAIGIE.—If I could adopt the view that the landlord, or his trustee, by accepting the letter of 9th September, constituted himself the mere mandatary of the tenant, I should be inclined to adhere. But, in this case, where a bankrupt tenant gives to his landlord, or to the landlord's trustee, a power to sell his stock, &c., and to take bills for the price, the object could only be, to enable the seller, as a trustee, to distribute the price among the creditors according to their rights at the time—the landlord being preferred for the rent, so far as secured by hypothec, and expenses of sale, while the residue would be divided among the ordinary creditors, including the landlord, for arrears not secured by the hypothec. In such circumstances one creditor could not by arrestment exclude the others, and least of all the landlord, or his trustee, who, placed as he was, could not use any farther or separate diligence.

Rutherford, for Respondent.—On the part of the respondent, I crave to be allowed the expenses of the Inferior Court.

Solicitor-General, for Advocate.—The respondent has brought no advocacy of the Sheriff's judgment, and that judgment found him not entitled to the expenses in the Inferior Court.

LORD PRESIDENT.—It has been solemnly decided,¹ that this Court can award the expenses of an Inferior Court to a respondent who has brought no advocacy, though the judgment of the Inferior Court had found the respondent not entitled to expenses.

LORD GILLIES.—If we advocate the cause, the whole cause comes here.

¹ Murdoch and Brown, March 8, 1832 (ante, X. 444).

THE COURT "found the respondent entitled to his expenses, both in this Court and in the Sheriff Court; and quoad ultra, adhered." No. 88.

Æ. MACLEAN, W.S.—J. STUART, S.S.C.—Agents.

Dec. 19, 1833.
Mollison v.
Murray.

JOHN MOLLISON and WILLIAM REID, Raisers.—*D. F. Hope—Moir.* No. 89.
MRS MURRAY and WILLIAM MURRAY, Claimants.—*Cuninghame.*
JOHN MURRAY and OTHERS, Claimants.—*G. G. Bell.*

Minor—Tutor and Curator—Proof—Trust.—1. Circumstances in which parties named trustees, and tutors and curators, under a deed of settlement, were held by their acts and deeds to have accepted; and having failed to make up inventories, were bound (notwithstanding a clause of protection) to account under the liabilities of the act 1672, c. 2. 2. The representative of a tutor, who has died prior to litiscontestation, is not liable to the penalties of the act.

THE late James Murray, farmer, who held a long lease of the farm of Westertown, died in February, 1806, leaving a deed of settlement, by which he conveyed his whole heritable and moveable estate to his brothers, John and William Murray, and to John Mollison and William Reid, as trustees, for behoof of his wife and children; any two to be a quorum, and one of the brothers a sine quo non. The deed contained this clause:—"My said trustees shall not be liable for omissions of any kind, nor for the insolvency of factors or others whom they may have occasion to employ for uplifting any sums of money, or disposing of any of my effects, nor for the insolvency of any person to whom they may lend out money for answering the purposes of this trust; nor shall they be answerable for the omissions of one another, but each only for his own actual intromissions. And I do hereby nominate and appoint my said trustees, and the survivors or survivor of them accepting, not only to be my sole executors and intromitters with my whole goods, gear, and effects, but also to be tutors and curators to such of my children as shall be minors at the time of my death; granting and committing to them all the powers competent to the tutors and curators of minors by the law of Scotland, declaring that the said tutors and curators shall not be liable in diligence, nor in solidum, nor for omissions, but each for his actual intromissions." The trust was to subsist till the youngest child reached majority.

All the trustees were present when the repositories were opened, on 22d February, 1806, and a minute was written, holograph of William Murray, in these terms:—"We having met at Westertown this day, and found that James Murray, late tenant here, had, by a disposition dated 2d January last, appointed us trustees and tutors to his family, viz. John Mollison, John Murray, William Murray, and William Reid; after considering said deed, we examined the press where he kept

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1ST DIVISION.
Ld. Corehouse.
D.

No. 89. his papers and cash, we found a holograph minute of tack, &c., and £ 3s. sterling, &c. ; and we appointed Tuesday the 3d of March to n here and make up an inventory of the whole moveables upon the fa and to be appretiated by Thomas Brand and Alexander Webster." 7 minute was not signed.

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Another meeting was held at Westertown, on the 3d of March which William Murray, Mollison, and Reid were present. A mir was written, also holograph of William Murray, but not signed, bear that " John Mollison, William Murray, and William Reid proceeded took an inventory of the hail subjects, which were valued by Tho Brand and Alexander Webster, which we and they have subscribes this date ; and we appointed one of our number to employ Mr Chris (a law-agent) to present it to the Judge of the county to sanction proceedings." The effects appraised amounted to £706.

Accordingly, on 21st May, 1806, a summons was raised before Sheriff of Kincardineshire, in name of the trustees, setting forth, : they had been named " tutors and curators to such of the children of deceased as should be minors at the time of his death ;" that it was ne sary for them to make up an inventory in terms of 1672, c. 2. ; and the fore concluding for citation of the children's next of kin, on both si to concur in making up inventories, or for the appointment of a deleg The Sheriff, on 11th June, in respect of no appearance, delegated Christian " to concur with the pursuers in making up the invento mentioned in the libel ;" but no inventories were ever made up.

From this period until 1818, William Murray took an active shar the management of the farm, and generally of the trust-estate. He h a book in which he entered statements relative to his management, minutes, (but which were unsigned,) purporting that the other trust had examined his accounts and approved of them from time to time. died in 1818, leaving his co-trustee, William Reid, who was also his in-law, his executor.

John Murray and William Reid entered into a transaction with landlord in 1825, by which the lease was renounced, and a new le was granted to them for behoof of the family of the truster. youngest of the family became of age in 1827, and the stocking of farm was sold off, the articles of roup being signed by William R and part, at least, of the proceeds of the roup uplifted by him.

An action of count and reckoning before the Sheriff of Kincardinesl was afterwards raised by the widow and children against the surviv trustees, which was advocated ob contingentiam, and conjoined wit multiplepinding in their name. During the process, John Mur one of the trustees, died ; and it was averred in defence by Molli that he had never had any intromissions with the estate ; and by R that he had never acted or intromitted, except, 1st, at renouncing the

and getting a new one for the family, on which occasion no money was paid; and, 2d, at the roup in 1827, at which he alleged that the son of the truster was the chief purchaser, and the whole proceeds were accounted for. Both Reid and Mollison averred, that they had taken up the office of tutors and curators; that though they had at one time intended to accept the office, and had directed Mr Christian to prepare a curatorial inventory, yet they proceeded no farther, as they had their powers as trustees sufficiently ample for the administration of the estate; that William Murray, being an active man of business, had taken the sole management, as trustee, until his death in 1818, when the truster's eldest son had then come of age, he and the widow managed the farm thereafter, and maintained and educated the family thereby. They therefore pleaded, that they were liable only each for his own actual commissions; and although Reid represented William Murray, he could not be responsible for his actual intromissions; and as he was dead before the action was raised, the penal accounting under 1672, c. 2, against such persons who did not make up inventories, did not apply to the representative of a deceased person.

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The widow and children, on the other hand, averred, that the management of the farm and of the effects of the deceased had been joint; that the trustees had also acted as tutors and curators; and that the eldest son never managed the farm except under their directions. They therefore pleaded, that there was evidence of acceptance not only of the office of tutors and curators, and of acting in that capacity, but also as the tutors had confessedly not made up inventories, they were bound to account agreeably to the rules of the statute 1672; that as Reid represented William Murray, he was equally accountable as William Murray himself; and as they had omitted to preserve evidence of the precise returns of the farm from year to year, there could be no other basis of accounting, except that of debiting the trustees with the value of its fair average produce in grain and cattle, when under good management.

The Lord Ordinary found, "that the late James Murray, tenant in the town, by his settlement dated the 3d of January, 1806, appointed trustees and his brother, the late William Murray at Gallowhine, trustees, for the management of his estate, and also tutors and curators of his children: found, from the facts admitted or proved, that the trustees, and the said William Murray, under the authority of this deed, had the management of the property of the deceased, and of the property of the children, or acted and interfered in the management of both: that they did not record their acceptance of the office of trustees, nor their rejection of the office of tutors and curators, but acted and interfered indiscriminately in both characters; and, in particular, that they raised a summons against the nearest kin of the pupils and minors, and that the defenders in that action should concur in making up

No. 89. tutorial and curatorial inventories; and on this summons an interlocutor was pronounced, wherein the Sheriff named a delegate for that purpose in common form, but no tutorial or curatorial inventories were ever made up. It was found that William Murray died in the year 1818, and that the pursuer, William Reid, is his representative: found, in these circumstances, that the pursuers are bound to account, not only as trustees, but in so far as the children are concerned, as tutors and curators; and that in terms of, and under the liabilities imposed by the statute 1672, c. 2, reserving all questions as to the express or implied consent of any of the children, after attaining majority, to the actings of the pursuers, and of its effect in the accounting with such child or children; and, with these findings, and before farther answer, remits of new to Mr James Brown, accountant, to examine the accounts, to call for vouchers, and to take such proof as he may judge necessary."

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Reid and Mollison reclaimed.

LORD PRESIDENT.—I think the interlocutor ought to be adhered to. The minute or scroll of a minute, in which the parties are designed tutors and trustees, was drawn up by William Murray, who was one of themselves, and whom the state to have been an active man of business, and to have taken the chief management. It is true that it remains unsigned, but the Court are not called upon to rest upon it either solely or chiefly. On the contrary, it is followed up by a summons raised in name of the whole parties, expressly as tutors and curators, for the purpose of making up inventories. This summons was never disclaimed by any of them. It was insisted in until a delegate was named by the Sheriff to concur in making up inventories. The failure to make up inventories after that does not infer that the office of tutor was never taken up, but that its duties were not fulfilled.

LORD GILLIES.—I am not inclined to rest at all upon the holograph minute of the late William Murray. It is not proved that the others were parties to the minutes. But the summons which was raised in all their names stands in a different situation. That summons was insisted in until its conclusion for the appointment of a delegate was satisfied. This is positive evidence of their acting as tutors. Besides this, there is negative evidence in corroboration of their having acted. The same deed which named them trustees also named them tutors. They accepted and acted under that deed. They did not limit their acceptance to the one character of trustee, and express their repudiation of the other character of tutor. They acted generally under the deed, and this, in all the circumstances, I hold to infer their acceptance generally of the deed. I consider therefore that they cannot now repudiate the character of tutors.

LORD CRAIGIE.—I was inclined to think that the judgment of the Lord Ordinary was at least premature, and I should wish to supersede the farther consideration of this interlocutor until the accounting be fully expiscated.

LORD BALGRAY.—I conceive it to be necessary to fix the principles of the accounting, before remitting to the accountant. The true liability of these parties should first be determined; and, on that subject, I agree with the Lord President and Lord Gillies.

THE COURT intimated an opinion, that William Reid, in so far as he was the representative of William Murray, was not liable in the penal accounting of

the statute 1672, c. 2, as the penalties do not transmit against heirs, at least where there has been no liti-contestation during the life of the party. Their Lordships considered that it would be proper to express this specially in the interlocutor. Accordingly, the Court "adhered, with this variation or explanation, that William Reid, in so far as he is the representative of the deceased William Murray, is not liable in the penalties of the act 1672, c. 2; and with this farther variation, that any proof to be led by the accountant shall only be for the purpose of ascertaining the omissions and actual intromissions of the trustees, and tutors and curators."

No. 88.

Dec. 19, 1835
Jaffray v.
Simpson's
Trustees.

J. GORDON, W.S.—J. JOFF, W.S.—DENHINGTON and CHRISTIAN, W.S.—Agents.

WILLIAM JAFFRAY and OTHERS, Pursuers.—*Keay—McNeill—
J. Hamilton.*

No. 90.

SIMPSON'S TRUSTEES and LEGATEES, Defenders.—*D. F. Hope—
Sol. Gen. Cockburn—Rutherford.*

Process—Jury Trial—Issue.—The general issue, whether a deed is not the deed of the grantor, held to be not the proper issue in a reduction on grounds not inferring nullity of the deed, but only that it is reducible.

THE pursuers, heirs-at-law of the late Francis Simpson of Plean, raised an action of reduction of a contract of marriage, a trust-deed of settlement, and a latter will executed in the years 1829, 1830, and 1831, respectively, on the ground that he was a person of a weak and facile mind, and that the deeds sought to be reduced had been obtained by fraud and circumvention on the part of the parties favoured thereby. A draft of issues for the trial of the cause were prepared, in these terms:—"Whether," of the dates when the respective deeds were executed, "the said Francis Simpson was a person of a weak and facile mind, and easily imposed on; and whether the defenders, or any of them, taking advantage of his said facility and weakness, did, by fraud and circumvention, cause the said Francis Simpson to execute the said deed and codicils, or any of them, to the lesion of the said Francis Simpson." The defenders objected to this form of issue, and craved a general issue, whether the deeds challenged "were not the deeds" of Simpson; and the Lord Ordinary, to have a general rule laid down for the form of issues in such cases, reported the draft to the Court, and stated as his own view, that when the ground of reduction inferred absolute nullity, (as when it was averred that the grantor was insane, or had not executed the deed in terms of law,) the proper issue was, whether the deed challenged "was not the deed" of the party; but that when the ground of reduction did not infer nullity, but only that the deed was reducible, it was incorrect and contrary to principle to put that issue, which the Jury could not truly answer in

Dec. 19, 1833.
2d DIVISION.
Jury-Cause.
Ld. Moncreiff.
R.

No. 90. favour of the pursuer, seeing the deed was the deed of the party, tho
 voidable ; and consequently, that, in the present case, where the gro
 Dec. 19, 1833. Robertson v. of reduction were facility, and fraud, and circumvention, the draft of
 Exley and Co. issue as prepared was properly framed.

In opposition to this view, the defenders maintained, that the
 proper consideration for the Court was, what form of issue was best
 culated to do justice between the parties, and that this object was m
 better secured by the general than the special issue, which last put
 defender to undue disadvantage.

With reference to this last observation, the Lord Ordinary stated
 the result of his own personal experience at the Bar, that he had alv
 found, under a general issue in causes like the present, that when cou
 for the pursuer, he had suffered disadvantage not consistent with
 justice of the case, and when for the defender, he had a most undue
 vantage from the form of the issue.

THE COURT, with the view of permanently settling the form, held a con
 ation with the whole Judges in the robing-room, when, after hearing
 ties, their Lordships approved of the draft as prepared, and it was ord
 to be tried accordingly.

JOHN CAMPBELL, W.S.—DALLAS and INNES, W. S.—Agents.

No. 91.

ROBERTSON and Co., Pursuers.—*D. F. Hope—Neaves.*
 EXLEY, DIMSDALE, and Co., Defenders.—*Skene—A. Wood.*

Process—Jury Trial—Expenses.—A party found not entitled to the expen
 preparing for a trial postponed on the motion of the other, when he himself wa
 ready to have gone to trial ; and the Court inferred that he was not ready, fro
 having moved for a prorogation of the time to report a commission to take evid
 till the morning of the day fixed for trial.

Dec. 19, 1833. THIS cause had been set down for trial for the 19th July last, at
 sittings after the summer session. Both parties had obtained a com
 2d Division. sion to examine witnesses in London. The commission had not been rep
 Jury-Cause. ed ; and on the 6th July, the pursuers gave notice of a motion to have
 R. term for reporting prorogated to the 19th. The defenders, on the c
 hand, gave notice of a motion for postponing the trial, in respect of
 report of the commission not having been returned. The trial was j
 poned, and the pursuers now claimed the expenses they had been put
 preparing for trial, in so far as not available afterwards. This was oppo
 on the ground that a party is only entitled to expenses in consequen
 a postponement obtained by the opposite party, when he himself
 bona fide ready to have gone to trial on the day for which the cause
 set down ; but that here the notice of motion, on the part of the purs
 for a prorogation of the commission, showed that the return of it
 necessary to enable them to go to trial, while, if returned only on

morning of the day of trial to which the prorogation was asked, it was clear they could not have gone on. No. 91.

Dec. 19, 1833
Nasmyth v.
Connell.

LORD JUSTICE-CLERK.—It would be stretching the provision of the Act of Sederunt egregiously, if we imposed expenses on the defenders here. It was a sufficient ground to delay the trial, that the pursuers had craved a prorogation of the commission till the morning of the day of trial.

The other Judges concurring—

THE COURT refused expenses.

DAME HARRIET NASMYTH and OTHERS, Claimants.—*Rutherford*— No. 92.

H. Bruce.

ARCHIBALD CONNELL, W. S. Common Agent.—*Anderson.*

Testament—Provisions to Children.—A father, by bond of provision, settled a sum to be divided among his younger children, and at a subsequent period, by a special deed, settled a provision on a natural child, whom he afterwards legitimated by marrying her mother; held, that this child could not claim both a share of the general provision, and also the special provision settled on her while a natural child.

THE late Sir James Nasmyth of Posso, by bond of provision, dated 10th April, 1807, on the narrative, that, by the entail of Posso, he was entitled to provide his younger children in three years' free rents out of his entailed estates, bound himself and his heirs of entail "to make payment to my younger children, other than the heir who shall be entitled to succeed to the said entailed lands and estate, of the sum of £6000, and that at the first term of Whitsunday or Martinmas after my death, with a fifth part more of penalty in case of failure, and the legal interest of the said principal sum, from and after the said term of payment, during the not-payment of the same; declaring that the said sum of £6000 sterling shall be payable to my said younger children, who shall be in life at the said term of payment, equally, and share and share alike." At the same time, by general deed of settlement, Sir James, in implement of the obligations in his marriage-contract, conveyed all his property to his son James, since deceased, whom failing, to his son John, now Sir John Murray Nasmyth, "but always with and under the burden of my lawful debts and deeds, and particularly of the sum of £6000 sterling, which the said James Nasmyth, or whoever shall succeed to my said estate, heritable and moveable, hereby conveyed, shall be bound and obliged to pay to my younger children, other than the heir so succeeding, and that at the first term of Whitsunday or Martinmas after my death, and a fifth part more of penalty in case of failure, and the legal interest of the said principal sum from and after the said term of payment, during the not-payment of the same; declaring

Dec. 19, 1833
2D DIVISION.
Lord Medwyn
T.

No. 92. that the said sum of £6000 sterling shall be payable to my said younger children, who shall be in life at the said term of payment, equally, and share and share alike; declaring also, that the said provision is over and above what is contained in a bond of provision by me, of this date, (April 10, 1807,) in favour of my said younger children, in virtue of the power reserved to me by the entail and investitures of my entailed lands and estate of Posso."

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Nasmyth v.
Connell.

Besides a family of legitimate children, Sir James, after the death of his first wife, had a natural daughter, Jamima Nasmyth, in whose favour he executed, of date 6th June, 1827, a bond of provision, whereby he bound himself, his heirs, and successors, "to make payment to Jamima Nasmyth, my daughter by Mrs Harriet Jones of Buccleuch Place, Edinburgh, of the sum of £500 sterling, and that at any term of Whitsunday or Martinmas that shall first happen after the said Jamima Nasmyth shall be married, with one-fifth part more of penalty in case of failure, and the due and legal interest of the said principal sum from the said term of payment until the same shall be paid; and in the meantime, until the term of payment of the foresaid provision, I farther bind and oblige myself and my foresaids to make payment to the said Jamima Nasmyth, in case of her surviving me, of a free yearly annuity of £50 sterling, and that half-yearly and termly, beginning the first payment of £25 at the first term of Whitsunday or Martinmas next, and immediately following my death, for the period preceding that term, and the next term's payment of the said annuity at the term of Whitsunday or Martinmas thereafter, for the half-year immediately preceding, and so forth by equal portions at the terms foresaid, yearly and termly, during all the days of the life of the said Jamima Nasmyth, and her remaining unmarried: But in the event of her marriage, the said annuity shall then cease and determine, and the said provision of £500 sterling shall be paid to her as above expressed, with a fifth part more than each of the said termly payments of liquidate penalty, in case of failure, and the due and ordinary interest of the said annuity from the respective terms of payment thereof during the not-payment: Declaring, that during the lifetime of the said Mrs Harriet Jones, the said annuity shall be paid over to her, to be laid out and applied by her in the maintenance and education of the said Jamima Nasmyth, and that the receipt of the said Mrs Harriet Jones alone shall be a sufficient acquittance to all concerned for the said annuities: But these presents are expressly granted, with and under this special condition, that the payment of the said provision of £500 sterling, and of the said annuity, shall in every event be postponed to, and shall in no way be allowed to come in competition with, the payment of all my just and lawful debts, and of my funeral expenses."

In the month of October subsequent to the date of this bond, Sir James married Mrs Harriet Jones, the mother of his daughter, Jamima, and by a deed of settlement, executed of date 2d August, 1828, he made

some provisions in favour of his wife, in addition to those contained in a No. 92.

marriage-contract with her. He also assigned to his daughter, Jamima, Dec. 19, 1833.
certain articles of furniture, stock, and moveables, "declaring that the Nasmyth v.
provisions before conceived in favour of the said Jamima Nasmyth, my Connell:

daughter, are made to her over and above any other provision or allowance already made, or to be made by me or others in her favour, and that these and the whole other provisions and legacies above written shall be satisfied and paid without any deduction for legacy-duty, or otherwise, which duty and other charges shall be borne by those succeeding to the residue and remainder of my personal estate, or to my heritable and real estate."

A multipoleinding raised by Sir John Murray Nasmyth, after the death of his father, as to the provisions out of the entailed estate, and by Sir James's trustees, under a general trust-deed executed by him in 1817, to his moveable effects, a claim was lodged, among others, by Lady Nasmyth, the widow, and certain other parties nominated tutors and curators to Jamima Nasmyth, craving to be ranked for her behoof, along with the other younger children, for her share of the provisions contained in the bonds of 1807, and also for the £500 contained in the bond of 1827, as well as the special bequests in the settlement of 1828. This was objected to on the part of the common-agent, on the ground that the £500 provided in the bond of 1827 was given to Jamima Nasmyth exclusively as a natural daughter, and that Sir James's subsequent act in marrying her mother, and thereby making her legitimate, and so giving her right to share in the provision in favour of younger children in the bond of 1807, must either be held a revocation of the special provision of £500, or a fulfilment of the obligation thereby come under, but that she could not possibly claim both.

The Lord Ordinary, as to this claim, pronounced as follows:—"Finds, that the claim of Miss Jamima Nasmyth, that the provision made by her father, by his holograph bond of 6th June, 1827, was granted to her as an illegitimate child, and that the subsequent marriage of Sir James with her mother, in July, 1828, which rendered her legitimate, and gave her right to share with the children of the first marriage in the provisions contained upon his younger children, operated as a virtual revocation of the bond of 1827: finds that Miss Jamima is also entitled to the special bequests of furniture and stock, contained in the subsequent deed of 2d August, 1828, and that the clause that this was to be 'over and above any other provision or allowance already made or to be made by me,' must be held to apply to the provision under the deeds in 1807, and not to the bond in 1827, which might have been revived by a special reference to it; and therefore finds that Miss Jamima can only claim a share with the other younger children under the bonds in 1807, together with the special bequest in the deed 1828; and, upon the whole, approves of the report of the common-agent as to these two claims."

No. 92. Lady Nasmyth, and the tutors on behalf of the daughter, reclaimed.

Dec. 19, 1833.
Nasmyth v.
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LORD JUSTICE-CLERK.—My view of the case is, that the claim of this lady for £500, over and above her legal provision as a lawful daughter, cannot be sustained. At the date of the bond of 1827, Sir James was living in a state of concubinage with her mother. He afterwards married the mother, and this girl then became a lawful child, and, as such, entitled to her provision under the former deeds. In a subsequent deed, he bequeaths certain specific articles, to which she is undoubtedly entitled, but not to that made on her as a natural child. On all the authorities referred to, I can find none to warrant extending to her that provision, while she also claims the other.

LORD GLENLEE.—I entirely agree. We cannot lay down any general rule, except this, perhaps, that where two deeds set forth considerations not incompatible, both may be sustained. But suppose a father gives a provision to his daughter of a sum, payable at her marriage—if, on marriage, he pays the exact sum, without taking a discharge, she will not have that sum over and above the provision. In like manner, here the father has extinguished the deed of 1827, by doing a great deal more than he was thereby bound to do, giving her a right to a provision as a lawful child. But, besides, she can have no claim at all under the bond, because it is postponed to debts and obligations, &c.; and the only fund really the father's, out of which payment of it could be demanded, is exhausted by what are real debts in the marriage-contract, and the other funds out of the entailed estate are specially destined to the younger children.

LORD MEADOWBANK.—On the second ground stated by Lord Glenlee, I concur; but, as to the other, I have formed a different opinion on the construction of the deeds. I think Sir James could not have used any other words to preserve all previous provisions to Jamima; and I think the whole deeds indicate a greater affection for this girl than the rest, and we cannot gather the testator's intentions from her being or not being a natural child.

Rutherford.—We wish the Court to determine specially if the bond of 1827 is held as revoked, or if she may take her election to abide by the bond, and abandon the provision.

LORD JUSTICE-CLERK.—I did not mean that more should be decided than that she was not to have the one over and above the other.

LORD GLENLEE concurred; and

THE COURT accordingly adhered to the interlocutor of the Lord Ordinary in so far as it "finds that the claimant cannot claim, and be entitled to both sets of provisions," but quoad ultra remit to the Lord Ordinary.

Claimants' Authorities.—*Moncreiff v. Nasmyth*, Feb. 27, 1798 (11380); *Clark v. Hay's Trustees*, May 16, 1823 (ante, II. 313); *Lindsay*, Feb. 6, 1827 (ante, V. 297.)

Common Agent's Authorities.—*Belshes and Oliphant v. Murray*, Dec. 22, 1752 (11361); *Gallie v. M'Kenzie*, Dec. 18, 1782 (11374).

J. ANSTUTHER, W.S.—A. CONNELL, W.S.—Agents.

GERRIT SCHUURMANS and SON, and Mandataries, Pursuers.—

No. 93.

*Jameson.*WILLIAM STEPHEN and SONS, Defenders.—*Moir.*Dec. 20, 1833
Schuurmans &
Stephen.

penses—*Auditor*.—Objections sustained to the report of the auditor, 1. That he disallowed a fee to counsel, for advising whether the action should be raised. That he had struck off £1, 1s. from a fee of £2, 2s., sent to counsel to advise whether the record was in a fit state to be closed.

That where there had been three counsel at a jury trial, he had disallowed one of the second counsel, who opened the cause, in place of disallowing the fee of a junior. But,

Objection that he had not allowed fees to three counsel at the trial, repelled.

THE pursuers were successful at the jury trial, reported ante, X. 839, Dec. 20, 1833, found entitled to expenses, and, on being taxed, they objected to the auditor's report.

1st Division.

That he had disallowed a fee to counsel for advising as to raising the action, contrary to many recent decisions.¹

Answered—In these cases the fee had been allowed for advising as to propriety of an advocacy; but here there was no cause depending before any Court at the time the fee was given, and therefore such fee did not fall under the expenses of process.

THE PRESIDENT.—The question whether a party should go into Court or not, is a subject for advice. The cost of obtaining such advice, is part of the expenses incurred by the party in seeking his legal remedy. It ought to have been allowed to him by the auditor. The other Judges concurred.

Objection sustained.

That the auditor had deducted £1, 1s. from the fee of £2, 2s., to enable him to advise whether the record was in a fit situation to be closed. Being so, the whole record and productions required to be considered; the closing of the record was a most important step of procedure. The Court had expressly sanctioned a fee at this stage in a recent case.² Answered—In matters of detail, the Court should leave the auditor to his own view. It was on a complex view of the whole previous account, and the fees paid to counsel in preparing its previous stages, that the auditor made this deduction.

THE PRESIDENT.—I think the objection should be sustained. Under the form of process the closing of the record is of the most vital importance, and, bona fide, disbursed on that occasion by the pursuers, ought to be allowed.

¹ *Black*, Feb. 3, 1831 (ante, IX. 429); *Osborne*, May 26, 1832 (ante, X. 578); *Black*, July 10, 1832 (ante, X. 806); *Laing*, Nov. 24, 1832 (ante, XI. 90); *Black*, Feb. 7, 1833 (ante, XI. 554).

² *Jameson*, Feb. 15, 1832 (ante, X. 337).

No. 93. The other Judges concurred.

Objection sustained.

Dec. 20, 1833.
Dixons v. Fullarton.

3. That the auditor had disallowed a fee to a third counsel at the trial. It was discretionary whether to allow three counsel or not,¹ and the case was of sufficient importance to justify the employment of a third counsel. But if any fee were to be struck off, it ought to be that of the youngest counsel, and not of the second counsel, who had actually opened the case.

Answered—It is only in a case of unusual magnitude that the Court would subject an opposite party in the expense of three counsel. This case was not of that character. The auditor had done right in disallowing the fee of the second counsel, because he still left the fees of the senior and the proper junior; the second senior being truly supernumerary.

THE COURT allowed fees only to two counsel, but allowed the fees of the two senior counsel.

HOPKINS and IMLACH, W.S.—J. KNOX, S.S.C.—Agents.

No. 94.

ANTHONY DIXON and Others, Petitioners.—*Rutherford*—

H. J. Robertson.

ALLAN FULLARTON, Respondent.—*D. F. Hope—Christison.*

HOUSTON'S TRUSTEES, Respondents.—*D. F. Hope.*

MRS BROWN or DIXON and Others, Respondents.—*More.*

WILLIAM DIXON and Others, Respondents.—*Forsyth.*

Judicial Factor.—A judicial factor having been appointed over an extensive mercantile concern, "with power to take the funds and estate under his charge, and to manage and wind up the whole affairs of the company;" and no cause of complaint being verified against him; the Court refused to subject his accounts to an unusual audit and order of distribution, or to ordain him to consign all sums above £100, or to allow certain parties to make up titles to the heritage placed under his charge and sell it, subject to the orders of the Court.

Dec. 20, 1833.
1st Division.
D.

IN 1821, Jacob Dixon, and John Dixon, became sole partners of the Dumbarton Glass-Work Company, and of several subordinate and relative companies. At this time a very considerable sum was due to retired partners. In February, 1822, John Dixon died, and it was said that the share due to him by the company was £38,188. Jacob adopted as partners his son Jacob Dixon, junior, and his nephew John Dixon, junior, the son of the deceased John Dixon. The concern was divided into forty-one shares, of which the senior partner held twenty-one, and his son and nephew held ten each. In 1828, John Dixon, junior, died, and it

¹ Mitchell, May 14, 1831 (ante, IX. 588); Mackenzie, June 17, 1831 (ante, IX. 768).

was said that he then had at his credit, in the books of the concern, his advanced stock on ten shares, rated at £24,000, and cash advances to the amount of nearly £12,000. Jacob Dixon, junior, died on 23d September, 1831, leaving a widow and children, and Jacob, senior, died on the day following. The latter left a trust-settlement in favour of several parties, of whom none accepted but his two surviving sons, Joseph and Anthony Dixon. By the settlement, these gentlemen were only entitled to a sum of £5300 between them, being the balance of provisions, part of which had been paid up in their lifetime by their father. A sum of £8000 was provided to Jacob Dixon, junior, who left issue, and he had also been named residuary legatee.

No. 94.

Dec. 20, 1831.
Dixons v. Fullarton.

At this date, it was said that a balance of £16,000 still remained due to the trustees of Mr Houston, and of Mr Seton, two partners who retired prior to 1821. Adding this to the claim of William Dixon and others, as representatives of the deceased John Dixon, junior, and a sum of about £15,000 of debts due to general creditors of the company, there existed claims of about £70,000 against the company.

Anthony and Joseph Dixon, as the only accepting trustees, and as executors of their father, the last surviving partner, took possession of the books and premises of the company, and began to carry on the business. On 22d December, 1831, an application was made by William Dixon and others, representatives of John Dixon, junior, in circumstances formerly reported,¹ to have a manager or judicial factor appointed, with power to wind up the affairs of the company. The application was opposed by Anthony and Joseph Dixon. The Court named an interim-factor, and subsequently made a more permanent appointment² of a gentleman, who resigned, and was succeeded by Allan Fullarton, agent in Glasgow. The judgment of the Court was taken to appeal by Anthony and Joseph Dixon, but the judgment was affirmed.³ In winding up the affairs of the concern, it became the duty of Mr Fullarton to collect large outstanding debts due in England and Ireland; and also to call Anthony and Joseph Dixon to account for their intromissions with the affairs of the company.

On 8th July, 1833, Fullarton presented a petition to the Court, setting forth debts to the amount of £32,965, conform to a list exhibited, which he alleged ought to be satisfied out of the company funds, as soon as these were realized; but that he was opposed by the trustees of the late Jacob Dixon, senior, in attempting to recover the debts due to the company in England and Ireland, and to realize its estate. He craved warrant from the Court to pay the debts in the list, so soon as he should recover these funds. Opposition was made by these trustees, but the Court, on 11th July, granted the prayer of the petition.⁴

Thereafter, in November, Anthony and Joseph Dixon, along with

¹ Ante, X. 176. ² Ibid. 209. ³ Aug. 13, 1832 (1 Supp. p. 38). ⁴ Ante, XI. 962.

No. 94. William Dixon, a co-trustee whom they had assumed under powers contained in the late Jacob Dixon, senior's, trust-deed, presented a petition, Dec. 20, 1833. stating, inter alia, that the accounts hitherto lodged by the judicial factor, were unintelligible and unvouched; that he was overcharging his commission, and embarrassing the winding up of the concern with a view to augment his own commission; that, under the judgment on the petition of July, 1833, he ought to have applied any free fund in his hands in payment of the creditors there referred to, yet he had failed to do this, though holding nearly £12,000 in his hands; that a great part of the different parcels of heritage which had, at various times, been acquired by several successive companies, forming a series of firms, from 1780 downwards, and ending in the Dumbarton Glass-Work Company, stood in such a situation that they, as trustees of the last surviving partner of that company, could more conveniently and cheaply than any one else make up titles, and convey to a purchaser, which they desired to do, at the sight of the Court; but they objected to the price passing into the hands of the judicial factor, at least until the terms of his bond of caution should be enlarged, as at present the bond was inadequate to cover such intromissions. They therefore prayed the Court "to remit to the Lord Ordinary, with instructions and authority to ascertain the amount of funds realized by the said judicial factor, at the date of your Lordships' remit, and capable of division among the creditors; to audit and settle the accounts of the said judicial factor, and to authorize a scheme of division of the funds realized, or such part thereof as may appear reasonable, to be made among the creditors of the said company, as specified in the appendix of the foresaid petition, and to grant warrant for payment of the dividend effeiring to such of the said debts, as may appear to be justly due, according to their legal preferences; and in the meantime, to appoint and ordain the said Allan Fullarton, to consign in bank, on receipts, payable to your Lordships' order, the whole or such amount of the realized funds, as to his Lordship may seem fit; and also, in all time coming, to consign, on similar receipts, all sums of money realized by him, above the amount of £100 sterling: Secundo, To authorize the petitioners, as trustees foresaid, subject to the future orders and directions of Court, to complete their titles to the foresaid heritable subjects, and to put in articles of roup thereof, for your Lordships' approbation; to grant warrant to expose the same to public roup and sale, at prices to be arranged by the parties, or fixed by your Lordships, and to grant warrants for intimation of such sales; and authorize the petitioners to convey the lots to the respective purchasers thereof, on consignment of the price or prices, as aforesaid, in a bank, or banks, on receipts, payable to your Lordships' orders, or on payment thereof, if so directed by your Lordships, to the judicial factor for the time being, on the said company's estate, he always, in the first place, finding good and sufficient caution, to your Lordships' satisfaction, acted in your Lordships' books, for the due accounting for such price or prices, and the due administration of his office in relation thereto; farther, to find

the petitioners, or other parties, disbursers thereof, entitled to the expense of this application, and of completing the said titles, and effecting the said sales; and to grant warrant for the payment thereof, out of the price of the said subjects, or out of the first and readiest of the realized funds of the said company."

No. 94.

Dec. 20, 1833.

Dixons v. Fullarton.

The judicial factor lodged answers, in which he met the charges of irregularity, stating, *inter alia*, that the proper time had not arrived for fixing his commission; that his vouchers had always been open to inspection, and, though required to be with him, for daily reference, they were ready to be produced at the due season for investigating his accounts; that he was ready, if required by the Court, to consign the whole balance in his hands, being under £5000, which, however, seemed an inexpedient measure, as he had found ample caution, and the balance was already subject to several heavy claims, so as to afford no fit fund for division among the creditors, (previous to which some questions of preference must be decided;) that, on account of current expenses, he required to have the command of a considerable sum; that no cause was shown for the adoption of any unusual procedure towards him, and that he was entitled to proceed, as hitherto, in the discharge of his official duties. He also objected to the petitioners being allowed to make up titles to the heritage, and this objection was supported by several other respondents.

The representatives of John Dixon, junior, also opposed the petition. They stated, that hitherto they were satisfied with the manner in which the judicial factor had done his duty; that they had a much larger interest at stake than the petitioners; that the petitioners, by obstructing the judicial factor in the recovery of the English and Irish debts, and by impeding him in selling the works and heritage, had adopted a course of proceeding for the purpose of embarrassing and thwarting him in the discharge of his important duties, which had proved highly injurious and dangerous to the interests of all parties concerned, even including those of the petitioners themselves, and that in so doing, they had disregarded the earnest recommendation even of some of their own agents and advisers; that they possessed no peculiar advantage in making up a title to the chief part of the heritage, over the representatives of any of the other partners; that the heritage in question might amount to £30,000, or £40,000, and the respondents had no confidence in the petitioners, and objected to their interference with it. In support of this last point, they farther averred, *inter alia*, that Anthony and Joseph Dixon had made claims against the heritage in name of their father's private estate, which were hostile to the interests of the company; and also that these gentlemen had considerable funds still in their hands, arising out of their intromissions prior to the appointment of a judicial factor, for which they refused to account.

Mrs Dixon, widow of Jacob Dixon, junior, her children, and the representatives of Mr Houstoun, a retired partner, and considerable creditor of the company, concurred in opposing the petition, so far as related to

No. 94; authority to interfere with the property of the Dumbarton Glass-Work Company.

Dec. 20, 1833.
Dixons v. Ful-
erton.

LORD BALGRAY.—I do not think it necessary to hear counsel for the respondents. The first prayer of the petition is to remit to the Lord Ordinary, to ascertain the amount of funds in the judicial factor's hands, to authorize a division among the creditors, as far as seemed reasonable, and to ordain him to consign the balance in his hands, and every future sum received by him above £100. I should require some good cause to be shown against the judicial factor before granting any prayer like this, while he is proceeding in the execution of his office. The effect of it would be to occasion great expense to the parties, and substantially to bring the factor's office to an end. I see no ground stated for granting it. As to the second prayer, to authorize the petitioners to make up titles to the heritage in question, and expose it to public roup, subject to our directions, if this were granted, it would just be, *pro tanto*, a substitution of these petitioners in the room of the judicial factor. It appears to me that, in presenting this petition, the interests of some parties have been not a little overlooked; I mean the innocent third parties who are under the protection of the Court, and I mean the Court itself. It is our own duty to support our officer, the judicial factor, so long as he faithfully discharges the office to which we have appointed him. There has been a good deal of mutual recrimination in these papers. I do not go into that farther than to observe, that until some case is established against the factor, the Court are bound to protect him. I may observe, that there is one point in the conduct of the petitioners and some of their friends of which I cannot approve. It was their duty to have lent their aid to the judicial factor in the collection of the English and Irish debts; any obstruction was most unwarrantable. As to the sale of the works, it will be recollected by your Lordship that it was the unanimous opinion of this Court, when the affairs of this concern first came before us, that it would be best to sell as soon as possible, and while the works continued in working order. All parties ought to concur in forwarding a sale. It appears to me that the opposition which the petitioners have given to the factor has arisen in part from the circumstance of their apprehending that, if they conveyed to him, they might thereby sacrifice or compromise some of their own rights. This is an erroneous apprehension. Though the officer of the Court be in the management, that does not compromise the rights of any of the parties. On the contrary, he acts for behoof of all, and I hold the petitioners bound to convey to him any right which is in them, subject to their claim. I am clearly of opinion that the Court should refuse both of the prayers of this petition.

LORD GILLIES.—I am entirely of the same opinion. I think if the petition were granted it would lead to mischievous results.

LORD PRESIDENT.—I am of the same opinion, and I may express my regret that the petitioners did not take the advice of their former agents.

LORD CRAIGIE concurred.

THE COURT refused the petition, and found the petitioners liable in expenses.

T. GRAHAME, W.S.—W. BENNY, W.S.—D. FISHER, S.S.C.—W. A. G. and R. ELLIS, W.S.
—DUNDAS and WILSON, W.S.—Agents.

nissions, ordaining his bond of caution to be delivered up, and declaring that proceedings in the sequestration shall cease—Opinion by the Court, that it was instant for the cautioner for the composition to present a summary petition at the trustee and his cautioner, to ordain them to exhibit full accounts of the estate's intrusions, to remit to the auditor to examine these, and report the amount of funds appearing to be in the trustee's hands, and the sum that should be paid in name of commission, &c., and in the meantime to find the petitioner entitled to retain the trustee's bond of caution.

THE estates of Morris, Kirkwood, and Company, having been sequestrated, Dec. 20, 1833.
1st DIVISION.
John Macarthur, accountant, Glasgow, was appointed trustee, and George Douglas, merchant there, became his cautioner, and granted bond for £3000. The only surviving bankrupt, Hugh Morris, obtained a discharge, under a composition-contract, on 11th September, 1833, which, in the decree, "declared that all proceedings in the sequestration shall cease; ordered the trustee of his intrusions, and ordained his bond of caution to be delivered up; found the petitioner, Hugh Morris, discharged from all debts contracted, &c. prior to the date of the sequestration, except the payment of the composition, and decreed." The composition amounted to 8s. per pound, and was payable within six months after the composition should be approved of. Isaac Baxter, merchant in Glasgow, acted as cautioner for the composition.

In November, Baxter presented a petition against Macarthur and Douglas, stating that the bankrupt had assigned the whole estate to him; he had undertaken the obligation of cautioner in reliance on having had access to the whole funds and estate; that though Macarthur and Douglas had a fund of £1415, part of the bankrupt estate, lying in their joint names, they refused him access to it; that Macarthur had committed many irregularities as trustee;

No. 95. deposit-receipts held by them, or by the said George Douglas, for sum of money, part of the realized proceeds of said sequestrated estate ; also to ordain the said John Macarthur to lodge with the clerk the who books, accounts, bills, and other vouchers, belonging to the sequestrated estate, together with full and complete states of his accounts and intrusions with the sequestrated estates of the said Morris, Kirkwood, and Company, and partners thereof ; and upon these being lodged, to refer to the auditor to examine the same, and to report the sum that ought to be allowed to the said John Macarthur, as trustee foresaid, in name of commission ; and to report the amount of the trust-funds appearing to be in his hands, or the sum due by him, on his intrusions as trustee ; and on the same being so ascertained, to decree and ordain the said John Macarthur, and his cautioner, the said George Douglas, to pay and make over the same to the petitioner ; and, in the meantime, to find the petitioner entitled to retain the bond of caution lodged by the said John Macarthur and George Douglas in said sequestration, or to grant the petitioner such other redress in the premises as to your Lordships shall appear to be just.”*

Dec. 20, 1833.
Baxter v.
Macarthur.

Both parties objected that the petition was incompetent ; and that after the decree of the Court discharging the bankrupt, exonerating the trustee of his intrusions, declaring that the whole proceedings under the sequestration should cease, and ordaining the bond of caution to be delivered up, it was no longer possible to call them to account by means of a summary petition. Macarthur denied the averments of irregularity, and both he and Douglas stated, that they were ready to indorse the bank-receipts to the petitioner as soon as he gave up the bond of caution ; but so long as he withheld it, in the face of the decree ordering it to be delivered up, they refused to part with these funds.

LORD BALGRAY.—The whole accounts of the trustee should have been fitted and settled before decree was pronounced exonerating him. But after the discharge of the bankrupt, and exoneration of the trustee, and the declaration by this Court that the whole proceedings in the sequestration shall cease, I consider a summary application of the tenor of this petition to be incompetent.

LORD GILLIES.—I think the objection of incompetency is well founded ; but it appears to me to be a little inconsistent that the late trustee should at the same time profess his desire to give every explanation that can be required, and yet object to do so in the simplest and shortest form.

LORD PRESIDENT.—If it could be shown that the petitioner, from being improperly deprived by the respondents of access to the bankrupt estate, was likely to be incarcerated under his bond for the composition, during the time that a ordinary action of count and reckoning by him and the bankrupt against the la

* A petition in similar terms had been previously presented by the bankrupt, but was withdrawn.

was going on, it would be a case of great hardship, and I should not wish
 at present that more summary means of getting access to the bankrupt
 might not be competent.
 CRAIGIE was understood to consider the petition incompetent.

No. 95.

Dec. 20, 1833.
 Clarke v.
 Newmarch.

parties intimated that they were ready to consent to a judicial reference
 to Mr Walter Moir, Sheriff-substitute of Lanarkshire. A remit was made
 accordingly "to Mr Moir, as judicial referee, to decide upon the merits of
 the cause, and also all questions of expenses between the parties."

and SMITH—CAMPELL and MACDOWALL, W.S.—BOWIE and CAMPBELL W.S.—
 Agents.

MRS ANNE CLARKE, Pursuer.—*D. F. Hops—D. Dickson.*
 JOHN LUDAVEZ NEWMARCH, Defender.—*Keay—Shaw.*

No. 96.

Action—Foreign.—In an action against a domiciled Scotswoman, concluding
 should be ordained to concur with the pursuer in uplifting a sum of money,
 to belong to him, lying in the hands of a clerk in the English Court of
 Exchequer, to whom (after certain proceedings in that Court) it had been paid under
 a writ of attorney granted by her; and it being disputed whether these proceed-
 ings had decided the question of right between the parties; the Court stated
 that the pursuer might apply to the English Court of Exchequer, although
 she had to prove by opinions of English counsel, that the proceedings could not
 have any effect.

Decision—Domicile.—Opinion by the Lord Ordinary, that an Englishman, an
 officer in the army, who was appointed Governor of Fort-Augustus in 1746, and
 who resided there till his death in 1796, married in Scotland a domi-
 ciled Scotch lady, and acted as a Justice of the Peace, had acquired a Scottish
 domicile.

From the year 1746, Mr Alexander Trapaud, an Englishman, and Dec. 20, 1833.
 an officer in the army, was appointed Lieutenant-governor of Fort-Augus-
 tus. He resided in the governor's house at that place until his death in 1796.

1st Division.
 Ld. Moncreiff.
 D.

During that time he possessed a farm,* and he also acted as one
 of the Justices of the Peace for the county. In 1779, he married in
 Scotland a domiciled Scotswoman. In 1785, Mrs Dorothy Campbell,
 who was in England, died, leaving a legacy of £600 to Mrs Trapaud.
 The legacy was not recovered during the lifetime of Governor Trapaud. There
 was no issue of the marriage, but the Governor had a daughter by a pre-
 marriage, who left a son, John Ludavez Newmarch, in whose

the parties were not agreed whether he held this farm like any other tenant,
 or whether it was a farm attached to the office of governor; and whether the office
 was hereditarily or not.

No. 96. favour the Governor executed in Scotland a will, bequeathing the fee of his effects, under burden of Mrs Trapaud's liferent. It was not alleged, that, during the fifty-one years of his governorship, he had ever been out of Scotland. His wife survived him, but died in 1798, leaving her whole property to her two nieces, Mrs Clarke and Mrs Grant.

Dec. 20, 1833.
Clarke v.
Newmarch.

Both parties were agreed that Mrs Dorothy Campbell's legacy of £600 vested in Mrs Trapaud, during her marriage, by the law of England as well as by the law of Scotland. But Mrs Clarke maintained, that, by the law of England, it never vested in Governor Trapaud, as he had never obtained possession of it.

The executor of Mrs Dorothy Campbell was a Mr Robinson, residing in England, and in 1805 a bill was filed in the English Court of Exchequer, (Equity side,) by Mrs Clark and Mrs Grant, as executrices of Mrs Trapaud; and after a long discussion, Mr Robinson was ordained, in 1812, by the interim decree of the Barons, to pay the sum of £544, 10s. to the Deputy Remembrancer.

Robinson, on the motion of Mrs Clarke and Mrs Grant, accordingly paid the sum into Exchequer, and the Barons ordered that any farther sum found due out of the legacy and interest "shall be paid to the plaintiffs, Beatrice Grant, James Clarke, and Anne Clarke, being the executrices, and personal representatives of Mrs Trapaud, deceased;" and they directed the Deputy Remembrancer "to pay out of Court to the said plaintiffs, Beatrice Grant, widow, and James Clarke, and Anne Clarke, his wife, the said sum of £544, 10s., cash in Court, in part payment of said legacy and interest." A power of attorney in favour of Mr Bowyer, a clerk in the Court of Exchequer, was signed by Mrs Clarke and Mrs Grant, under which the sum of £544, 10s. was paid to Bowyer. Mrs Grant then executed an assignation of her share, on the narrative that the bill had been filed in Chancery, in name of Mrs Clarke and Mrs Grant, as executrices of Mrs Trapaud, with consent of the guardians of Newmarch, under an agreement between herself, Mrs Clarke, and the guardians of Newmarch, that the money, when recovered out of the hands of Robinson, should be consigned in a Scottish bank, to await the determination of the claims of these parties in regard to it. Early in 1814, Newmarch raised a process of multiplepoinding in this Court, in name of Bowyer, which was dismissed as incompetent, in respect that Bowyer was not subject to the jurisdiction of a Scottish Court. Thereafter, on 29th December, he instituted an action of count and reckoning against Mrs Clarke, who was domiciled and resident in Scotland, concluding, inter alia, that she should be decerned to concur with him in uplifting from Mr Bowyer one-half of the sum of £544, 10s. He then, in February, 1815, made an application to the Court of Exchequer, who, after hearing counsel for Mrs Clarke and Mr Bowyer (said to have been of the nature of a caveat), issued an order to show cause why Bowyer should not pay the money to

Clarke. No farther proceeding took place in Exchequer, and Mr Newmarch afterwards got decree by default in the action of count and damages, in terms of the libel.

No. 96.
Dec. 20, 1833.
Clarke v.
Newmarch.

Mrs Clarke thereafter raised an action of reduction, and pleaded, 1st, that the question of right to the legacy had been raised and decided in the Court of Exchequer, the action was barred by *res judicata*; 2d, at least, the proceedings in that Court constituted *lis alibi pendens*, and the sum must be held to be in the hands of that Court, it was the proper forum for determining the rights of parties; and even if it was competent to discuss these rights here, there was still a judicial propriety in leaving them to be decided in the English Court; and, 3d, that as Governor Trapaud was an Englishman, and had merely resided in Scotland as an officer of the army, he had never acquired a Scottish domicile, that his wife's domicile followed his, and as the legacy was bequeathed by a lady, who, as well as her executor, was domiciled in England and the fund was situated there, the question of right to the legacy should be determined by the law of England, under which Mrs Clarke was referable.

Newmarch answered, 1st, That the sole object of the English proceedings was to recover the money out of the hands of Robinson, and place it in safe keeping; and that if, on perusing these proceedings, the Court had the slightest doubt that this was their true nature, he was ready to submit by the opinions of English lawyers, that they had not decided, and could not decide the question of right, and therefore the plea of *res judicata* was inapplicable; 2d, That as Mrs Clarke resided in Scotland, the proper object of the action was to constitute a legal obligation against the Scottish Court was the proper tribunal for that purpose, and any proceeding would, in England, be inept, and as no similar suit decided there, the plea of *lis alibi* was unfounded; that the fund was not in the hands of the English court, but of Mrs Clarke's agent, Bowyer; 3d, That although the circumstance of Governor Trapaud being in the army was a circumstance of importance in the question of domicile, it was not only not conclusive, but might be overcome by other circumstances—that there were circumstances showing both an animus on his part to be domiciled in Scotland, and also the fact of acting on that animus;—he resided at Fort Augustus for fifty years, cultivated a farm, acted as a Justice of Peace, married a Scotswoman in Scotland, lived in Scotland without ever leaving it till he died, and executed his will there in the Scottish form. But, independent of the domicile, there was a question arising out of a Scottish marriage:—By the law of Scotland, the legacy vested in Mrs Trapaud; and by the law of Scotland and in virtue of the Scottish marriage, it passed *jure mariti* to her husband; and having so passed, he alone had the right to dispose of it, and accordingly, if he had died intestate, it would have fallen to his executors, and not to those of his wife.

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Dec. 20, 1833.
 Clarke v.
 Newmarch.

The Lord Ordinary found, “ 1mo, That the proceedings and judgments, or orders in the Court of Exchequer in England, referred to in the record, do not constitute, as between the parties to the present action, either *res judicata* or *lis alibi pendens*, to bar the present defender, John Ludavez Newmarch, from insisting in the action raised by him in this Court on the 29th December, 1814, against the present pursuer, Mrs Clarke, as one of the executrices of Mrs Trapaud deceased, she (Mrs Clark) being then legally domiciled and resident in Scotland, according to the conclusions expressed in the summons: 2do, That the conclusions of the summons in the said action were legal, and competent to receive effect in this Court: 3tio, That the deceased Alexander Trapaud, some time governor of Fort-Augustus, who died there in the year 1796, after having been constantly resident in Scotland for fifty years, must, under all the circumstances of the case, be held to have been legally domiciled in that country at the time of his death: 4to, That the said Alexander Trapaud having, in the year 1779, he being then resident in Scotland, married Miss Anne Campbell, a native Scotchwoman, also then resident and domiciled in Scotland; the legal effect of that marriage, in regard to any property then belonging to her, or which might become vested in her thereafter, during the continuance of the parties to reside in Scotland, must be regulated by the law of Scotland: 5to, That it is admitted by both parties, and fully established by the proceeding in the Court of Exchequer in England, that the legacy of £600, bequeathed by the will of Mrs Dorothy Campbell, who died in 1785, did, by the law of England, become vested in the said Mrs Anne Campbell or Trapaud, during the lifetime of her husband, Governor Trapaud; and found, that it was also so vested according to the law of Scotland: 6to, That the legacy being so vested in Mrs Trapaud, it did, *eo ipso*, according to the established rules of the law of Scotland, pass to the said Alexander Trapaud, the husband, by the force of the legal assignment of the wife’s personal estate, implied in the marriage of the parties celebrated in Scotland, as aforesaid, and become part of his personal or moveable estate at his death, notwithstanding that he had not received payment or possession thereof, or brought any suit or action for the recovery of it: therefore, 7mo, that the defender in the present action, the decree in which is now under reduction, as the legal representative in *mobilibus* of the said Alexander Trapaud, has the only good right to the said legacy, and is entitled to recover payment and possession of such part thereof as he may not yet have received; and in respect that it is admitted that a certain sum of money, part of the said legacy, is now in the custody of William Bowyer, in the summons mentioned, under and in consequence of the proceedings instituted jointly in the names of the pursuer and her sister, Mrs Grant (who is no party to this action, but has assigned her interest to the defender), and of the present defender, found, that the pursuer is bound to concur with the defender, in

g him to uplift and receive the said money, and for that purpose
 t a power of attorney, as required by the summons in the said
 therefore, in the original action at the instance of the said John
 z Newmarch, repelled the defences, and found and decerned for
 ad reckoning against the said Mrs Anne Clarke, in terms of the first
 ion of his summons, and found him entitled to require a special
 or rendering accounts, if so advised; and found, decerned, and de-
 in terms of the second conclusion thereof; and to this effect, on
 rits of the present action, sustained the defences, assoilzied the
 r, and decerned: found no expenses due." *

No. 96.

Dec. 20, 1833.

Clarke v.

Newmarch.

NOTE.—This case is important, and not without difficulty.

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 though the suit in the English Exchequer was raised in the joint names of
 er and her sister, and of the guardians of the defender, then an infant, it
 rly raised for the sole purpose of compelling Mr Robinson, the executor of
 pbell, to pay up the legacy; and, because, though the question which might
 o the claim of the pursuer and her sister, on the one hand, or of the defend-
 e other, to the legacy, was indeed stated by the defendant as a pretence for
 ing the money; and though the Remembrancer of Exchequer did, in his
 ke it for granted, that, because the legacy had not been in the husband's
 m, it must belong to the executors of the wife, the question never was dis-
 t all, nor was any appearance even made for the guardians of the defender,
 subsequent order for paying the money to Mr Bowyer was also made on
 e motion of the pursuer and her sister, without any discussion whatever.
 ther hand, the intervention of the defender at a later period, by a mere
 prevent the money being paid to the pursuer, did not take place till after
 the multiplepoinding had been raised and dismissed as incompetent, but
 nt defender's action for count and reckoning, and for compelling the pur-
 oncur in uplifting the money, had been instituted in this Court. The action
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 son the submission, which was entered into between the parties in Scotland,
 l the question regarding the legacy, does not seem to be very material.
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 ave been an error, which could not prejudice the party,—more especially
 ;; and he observes, that the pursuer had already the very best advice (Sir
 Grant's) that the question did not depend on English law. But on a con-

No. 96. The Lord Ordinary found, “ 1mo, That the proceedings and judgment or orders in the Court of Exchequer in England, referred to in the record do not constitute, as between the parties to the present action, either *res judicata* or *lis alibi pendens*, to bar the present defender, John Ludav Newmarch, from insisting in the action raised by him in this Court on the 29th December, 1814, against the present pursuer, Mrs Clarke, as one of the executrices of Mrs Trapaud deceased, she (Mrs Clark) being the legally domiciled and resident in Scotland, according to the conclusions expressed in the summons: 2do, That the conclusions of the summons in the said action were legal, and competent to receive effect in this Court: 3tio, That the deceased Alexander Trapaud, some time governor of Fort Augustus, who died there in the year 1796, after having been constantly resident in Scotland for fifty years, must, under all the circumstances of the case, be held to have been legally domiciled in that country at the time of his death: 4to, That the said Alexander Trapaud having, in the year 1779, he being then resident in Scotland, married Miss Anne Campbell, a native Scotchwoman, also then resident and domiciled in Scotland, the legal effect of that marriage, in regard to any property then belonging to her, or which might become vested in her thereafter, during the continuance of the parties to reside in Scotland, must be regulated by the law of Scotland: 5to, That it is admitted by both parties, and fully established by the proceeding in the Court of Exchequer in England, that the legacy of £600, bequeathed by the will of Mrs Dorothy Campbell who died in 1785, did, by the law of England, become vested in the said Mrs Anne Campbell or Trapaud, during the lifetime of her husband Governor Trapaud; and found, that it was also so vested according to the law of Scotland: 6to, That the legacy being so vested in Mrs Trapaud, it did, *eo ipso*, according to the established rules of the law of Scotland, pass to the said Alexander Trapaud, the husband, by the force of the legal assignment of the wife’s personal estate, implied in the marriage of the parties celebrated in Scotland, as aforesaid, and become part of his personal or moveable estate at his death, notwithstanding that he had not received payment or possession thereof, or brought any suit or action for the recovery of it: therefore, 7mo, that the defender in the present action, the decree in which is now under reduction, as the legal representative in *mobilibus* of the said Alexander Trapaud, has the only good right to the said legacy, and is entitled to recover payment and possession of such part thereof as he may not yet have received; and in respect that it is admitted that a certain sum of money, part of the said legacy is now in the custody of William Bowyer, in the summons mentioned under and in consequence of the proceedings instituted jointly in the names of the pursuer and her sister, Mrs Grant (who is no party to this action, but has assigned her interest to the defender), and of the present defender, found, that the pursuer is bound to concur with the defender, in

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Newmarch.

enabling him to uplift and receive the said money, and for that purpose to grant a power of attorney, as required by the summons in the said action: therefore, in the original action at the instance of the said John Ludavez Newmarch, repelled the defences, and found and decerned for count and reckoning against the said Mrs Anne Clarke, in terms of the first conclusion of his summons, and found him entitled to require a special order for rendering accounts, if so advised; and found, decerned, and declared, in terms of the second conclusion thereof; and to this effect, on the merits of the present action, sustained the defences, assoilzied the defender, and decerned: found no expenses due."*

No. 96.

Dec. 20, 1833.
Clarke v.
Newmarch.

* = NOTE.—This case is important, and not without difficulty.

"1. The opinion which the Lord Ordinary has formed as to the competency of the action at the instance of Mr Newmarch, coincides with that which was expressed by Lord Newton, after a full hearing, in a note on the 13th November, 1827. He pronounced no interlocutor, only because the parties had not been heard on the merits, and he thought that the whole points should be decided together.

"It appears to the Lord Ordinary, that the plea of *res judicata* is untenable. Because, although the suit in the English Exchequer was raised in the joint names of the pursuer and her sister, and of the guardians of the defender, then an infant, it was clearly raised for the sole purpose of compelling Mr Robinson, the executor of Mrs Campbell, to pay up the legacy; and, because, though the question which might arise as to the claim of the pursuer and her sister, on the one hand, or of the defender, on the other, to the legacy, was indeed stated by the defendant as a pretence for withholding the money; and though the Remembrancer of Exchequer did, in his report, take it for granted, that, because the legacy had not been in the husband's possession, it must belong to the executors of the wife, the question never was discussed at all, nor was any appearance even made for the guardians of the defender, and the subsequent order for paying the money to Mr Bowyer was also made on the single motion of the pursuer and her sister, without any discussion whatever. On the other hand, the intervention of the defender at a later period, by a mere caveat to prevent the money being paid to the pursuer, did not take place till after not only the multiplepoinding had been raised and dismissed as incompetent, but the present defender's action for count and reckoning, and for compelling the pursuer to concur in uplifting the money, had been instituted in this Court. The action was raised on the 29th December, 1814, and the order in Exchequer, to show cause upon the pursuer's demand of judgment against Mr Bowyer, for payment to herself, was made on the 15th February, 1815, after hearing counsel for the pursuer and Mr Bowyer only, and not for the defender. Nothing more took place. The plea, therefore, of there being any *res judicata*, seems to be out of the question.

"With regard to the plea of *lis alibi pendens*, it is to be observed that the defender is domiciled in Scotland. The jurisdiction of this Court, therefore, is clear. For what reason the submission, which was entered into between the parties in Scotland, excluded the question regarding the legacy, does not seem to be very material. The money was still to be recovered by some suit in England, but if it was supposed that the question depended on English law, the Lord Ordinary would hold that to have been an error, which could not prejudice the party,—more especially an infant; and he observes, that the pursuer had already the very best advice (Sir William Grant's) that the question did not depend on English law. But on a con-

No. 96. Mrs Clarke reclaimed.

Dec. 20, 1833. **LORD PRESIDENT.**—The Court in England is custodier of the fund in dispute, Clarke v. arising from Mrs Dorothy Campbell's legacy. Proceedings have actually been Newmarch.

sideration of the whole proceedings in England, and the judicial statements of the pursuer regarding them, the Lord Ordinary is perfectly satisfied, that the sole object of them was to get the money out of the hands of Robinson, Mrs Campbell's executor. The defender was an infant, and the very fact of the pursuer and her sister not attempting to proceed in their own names, but taking the concurrence of the defender's guardians, shows that that was the purpose; while there being no appearance for the defender or his guardians, and no discussion on his right, demonstrates that there was no intention of bringing that question before the English Court, or doing any thing more than forcing payment of the money, by the title of one or both of the parties.

"No point can be more clearly settled, than that the circumstance of the subject in dispute, being personal funds, having been recovered in England, and brought into the Courts of equity there, does not bar an action in this Court for determining the rights of the parties to that subject, if they are so situated that this Court has otherwise jurisdiction. February 27, 1705, Cunningham v. Lady Sempel; January 2, 1728, Mores v. York Building Company; March 8, 1709, Coutts and Company v. Callin; June 25, 1799, May v. Wharton; Queensberry Executors v. Hyslop, 13th November, 1822. Neither does it appear to the Lord Ordinary to be at all sufficient for establishing the plea of his alibi, to say that the question might possibly have been discussed and determined in the English suit. That might have been said in every one of the above cases. If parties had joined issue on the questions, they might have been tried in Chancery even in the Queensberry case, though reference to the law of Scotland would have been necessary.

"2. It may be doubtful whether, or to what extent, the question as to the domicile of Governor Trapaud is essential to the merits of the case. It can only be so in one view of the operation of the marriage; that is, if it depends not on the law of the locus contractus; but on that of the domicile of the husband, or if it is modified by the latter. The Lord Ordinary is inclined to think this view, if taken broadly on constructive domicile, incorrect. But as it may affect the question more or less in different views, he has given his judgment on the point of domicile. The question where a man's legal domicile is, is always a question of circumstances. The principle which regulates it is clear enough, that it is in that place where he had fixed his residence, *animo remanendi*. Residence alone does not fix it, if it be transitory. But the question, whether the intention, and the fact of permanency exist, depends on all the circumstances of the man's situation. A student does not acquire a new domicile by residence at a university, nor a soldier in the king's army, by residence in the place where he is temporarily quartered. But these are not absolute or arbitrary rules. They depend on the principle, and must be regulated and modified by the substance and common sense of the thing, and if the residence is in its reality permanent, the attendance on the lectures in a university, or the subjection to the laws of the army, will not prevent the effect of it. This is the principle laid down by Voet and the civil law writers. It is clearly the doctrine of Pothier in the passage referred to by both parties, *Cout d'Orleans*, p. 5. It has been recognised in all the cases of authority, and is particularly marked in that of Sir Charles Douglas, who was nearly all his life in service, and when on shore, constantly shifting his residence, yet was held to have lost his Scottish domicile and acquired an English one, *chiefly*

n that Court for recovering and paying away the fund, and I cannot adopt
 opinion of the Lord Ordinary that the sole object of these proceedings was to
 the money out of the hands of Robinson, and had no reference to the de-
 of the respective rights of the pursuer and defender to it.

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se he had a house for his wife and family at Gosport. In the present case,
 it enquiring whether the appointment of Governor of Fort-Augustus was
 ad vitam aut culpam, or whether Governor Trapaud was subject to the mu-
 it, and liable to be called into service or not, it is surely enough for the point in
 on, that he had been in the place for fifty years, and constantly resident; and
 ere is no averment either of an intention to remove him, or of an intention on
 t to resign, or to leave Scotland: That he occupied and cultivated a farm is
 aterial, whether it was attached to the office or not; in either view, it implies
 acency: That he acted as a Justice of the Peace is still more important; and it
 verred in the record that he did so as governor; and, on the whole, the Lord
 ry cannot conceive a stronger case of change of domicile. And having formed
 inion upon principle, it is certainly very satisfactory to him to find that it is
 eed by the opinion of such a lawyer as Sir William Grant. In a case laid
 him, on the part of the pursuer and her sister in 1799, the question of domicile
 ough distinctly under his notice, and Governor Trapaud was described as
 rnor Trapaud, an English gentleman, residing in Scotland, merely in his capa-
 an officer in his Majesty's service, happening to die in that country; and with
 ce to this, Sir William Grant says, 'I think it will be difficult to contend that
 the law of the domicile that must govern the case, and I do not see any
 l for disputing, that Scotland was Governor Trapaud's proper domicile.' Yet
 in, as stated in the case, were not nearly so strong in favour of the Scotch
 le, as they are now admitted to be on the record.

But the question does not exclusively depend on the domicile, though it may
 cted by it. This is not properly a question in the succession of Governor
 id. It is as much a question in the succession of Mrs Trapaud, who survived
 and, and was certainly domiciled in Scotland. But the real question is,
 was the effect of the marriage in Scotland, on the rights of Governor Trapaud
 wife? Was the legacy which was vested in Mrs Trapaud, legally transferred
 husband before his death? That it was by the law of Scotland, there can be
 bt. But the Lord Ordinary apprehends, that it is a question which must be
 ined by the law of Scotland. In the same opinion of Sir William Grant,
 ating that, by the law of both countries, the legacy vested, he adds, 'But a
 uent question arises, whether a legacy thus vested falls under the husband's
 riti, so as to pass by his will, though he die before his wife, and before the
 is paid. Now that question must be determined by the law of the country
 in the relation of husband and wife has been contracted and subsists.'

at the time of the marriage Governor Trapaud had been, in the ordinary
 a domiciled Englishman, and only accidentally married in Scotland, the locus
 tus might not regulate the effect of the marriage; or if, before the legacy
 vested in 1785, the parties had removed from Scotland, and been properly
 led in England, there might be room for a similar construction as to the
 of their marriage as subsisting. But in a case in which the husband had
 irty-three years resident in Scotland before the marriage, and the wife was
 e Scotchwoman, in which they were still resident in Scotland, where the
 became due six years after, and in which the marriage subsisted in Scotland
 ill the death of the husband in 1796; it would surely be a monstrous stretch
 iple to say, that upon any idea of a constructive domicile, in consequence

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Keay, for defender.—The pursuer has not printed these proceedings, and we are confident that, on perusing them, the Court will arrive at the same conclusion as to their nature which the Lord Ordinary did, and we are willing to print them. But at all events we are ready to prove, by the opinions of English counsel, that these proceedings had no other object or effect but to recover the fund out of the hands of Robinson, and that there is no *res judicata* as to the respective rights of the pursuer and defender to that money.

LORD PRESIDENT.—There appear to be express orders pronounced by the Barons in favour of Mrs Clarke and Mrs Grant, as executrices of Mrs Trapaud. In such a case, I doubt whether we should send to ask English lawyers whether the Barons of Exchequer exceeded their powers in pronouncing these orders, or have not decided what the orders bear.

LORD GILLIES.—I certainly am not prepared at present to assent to all the views of the Lord Ordinary. His Lordship states that the plea of *res judicata* is untenable, because the English proceedings were adopted “for the sole purpose of compelling Mr Robinson to pay up the legacy,” and did not decide the question of right as between the pursuer and defender. But I demur to the authority of a Scottish Judge, as an interpreter of English judgments, just as I should to that of an English Judge interpreting Scottish judgments and proceedings. I am not prepared at present to dispose of the plea of *res judicata*.

LORD BALGRAY.—Was it competent, under the bill filed in Exchequer, to determine the rights of the defender and pursuer to the fund?

Keay.—We aver that it was not, and has not been so, and we offer to prove this by the opinions of English counsel.

Dean of Faculty, for pursuer.—The pursuer avers as broadly, that it was competent to decide that question, and that, *de facto*, the question was decided.

Keay.—The parties then are at issue, and a proof by opinions ought to be allowed.

THE COURT, however, “sisted process until Mr Newmarch shall have applied to the Court of Exchequer in England, to have the rights of parties to the fund in dispute there determined, so far as they are embraced in the proceedings of that Court.”

S. WORDSWORTH, W.S.—W. MACKENZIE, W.S.—Agents.

of the husband's appointment being of a military character, the effect of that marriage should be regulated by the law of England. If the legal domicile was in Scotland, there can be no question in it; but even if that were doubtful, there can be no question that it was in Scotland exclusively that the marriage was contracted, and did continually subsist.

“If the Court shall concur in the opinion of the Lord Ordinary, the effect will be, that the present pursuer must grant the power of attorney, and may be charged with horning to that effect. But the Lord Ordinary conceives, that it will also be competent to Mr Newmarch to demand payment from Mr Bowyer, in virtue of the decree, and, if necessary, to apply to the Court of Exchequer for an order to compel payment.”

MRS SMITH OF THOMSON, Petitioner.—*Penney*.
 WILLIAM MACKERSY, Respondent.—*Jameson—Neaves*.

No. 97.

Dec. 20, 1833.
 Smith v.
 Mackersy.

Right in Security—Sequestration—Judicial Factor.—Where there was no party entitled to uplift the rents of an heritable subject belonging to a person who was dead, the Court sequestrated the subject, on the application of a party stating himself a creditor, holding a real burden over the subject.

MRS SMITH, or Thomson, presented a petition for sequestration of an heritable subject, consisting of a plot of land and a dwelling-house, which had been sold to her late brother, William Smith, S.S.C. She set forth, that she had disposed of the subject under burden of a part of the price, amounting to £150, now reduced to £96, 3s. 3d.; that her brother was intestate, and had died in embarrassed circumstances; that his son, Francis Smith, confirmed as executor dative, and granted a mandate to, James Mackersy, W.S., who acted under it till the death of Francis Smith, after which his authority fell; that there was now no party to take charge of the subject, as the heir-apparent of William Smith was a grandchild, a pupil, and those acting for him did not mean to interfere at all with the grandfather's estate. As it was necessary to have some person appointed to uplift the rents, and to look after the subject, Mrs Thomson desired the Court to serve the petition on the grandson of William Smith, also on Mr Mackersy, and thereafter to sequester the subject, and appoint a judicial factor thereon.

Dec. 20, 1833.
 1st Division.
 D.

Answers were lodged by Mackersy, who objected to the petitioner's petition, and separately contended, that as there was only one creditor appearing, and as her debt was much inferior in value to the subject, there were no termini habiles for sequestration.

MR GILLIES.—What authority has Mr Mackersy to appear? His constituency is dead.

MR JAMESON, for Mackersy.—Service of the petition was made upon him; besides, he is agent for the general creditors of Mr William Smith.

MR PRESIDENT.—I think sequestration an expedient measure in the circumstances of the case.

The other Judges assented, and the Court granted the prayer of the petition.

H. TOD, W.S.—W. MACKERSY, W.S.—Agents.

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Dec. 20, 1833.
Brown v.
Rainsford.

CARRICK BROWN and Co., Petitioners.—*Skene—Moncreiff.*WILLIAM HENRY RAINSFORD, Respondent.—*M'Neill.*RICHARD WILLIAMS, Respondent.—*Robertson.*

Bankruptcy—Sequestration—Expenses.—1. An advocate who had purchased shares in a joint-stock trading company immediately before applying for sequestration, held not to be within the description of persons subject to the provisions of the bankrupt act. 2. A concurring creditor, who, in his affidavit, had made oath that the party was within the description, held liable in the expense of a petition for recall of the sequestration.

Dec. 20, 1833.

2^D DIVISION.
F.

THE respondent, Rainsford, an advocate, who had incurred debts to the extent of about £20,000, by signing bills to accommodate one Mr Gibb of Great King Street, Edinburgh, after having absconded, purchased, by the assistance of a friend, in the month of August last, a few shares of the Edinburgh Portable Gas Company, which had ceased to carry on business some years before, and also certain shares of the Scottish Union Insurance Company. Immediately on a transfer of these shares being completed, he presented a petition for sequestration in the character of a gas manufacturer and underwriter, with concurrence of the other respondent, Williams, his tailor, a creditor to the extent of £100, who emitted the usual affidavit, setting forth, *inter alia*, that Rainsford “is a gas manufacturer, insurance broker, and underwriter in Edinburgh, and as such is within the description of persons whose estates, heritable and moveable, real and personal, may be sequestrated,” and that he “is not within any of the exceptions stated in the act.”

Sequestration was awarded by the Lord Ordinary on the bills, and a meeting of creditors was held for electing an interim factor. The creditors for whom appearance was made, were an aunt of Rainsford, the concurring creditor Williams, and the friend who had advanced the money to purchase the shares, and who had taken a bill from Rainsford for the amount, *viz.* £20. An interim factor was elected, who immediately applied for and obtained a personal protection for Rainsford. Subsequently a trustee was also appointed, and a statement made up of the bankrupt's affairs, from which it appeared that the amount of debts due by him, so far as ascertained, was £19,127, while his estate and effects consisted of the Gas and Insurance Company shares above mentioned, valued at £19 5s., together with the contingent right of succession to an entailed estate in the event of an uncle and aunt dying without issue, estimated by the trustee at between £4000 and £5000.

Thereafter Carrick, Brown, and Co., bankers in Glasgow, and Colone Camac, creditors of Rainsford, presented a petition, praying to have the sequestration recalled, on the ground that Rainsford was not within the

tion of persons set forth in the act, not being a trader, or a party No. 98.
ought to obtain his living by buying and selling, and they prayed Dec. 20, 1833.
e Williams, the concurring creditor, found liable in the expenses Brown v.
application. Rainsford.

answer, Rainsford contended, that it was sufficient to bring a party the statute, if he held shares in a company which traded, though not thereby make his living,¹ and that the requisites of the act fully complied with if he held such shares bona fide as his own, and trust for another.

Williams did not oppose the recal of the sequestration, but pleaded there was no ground for subjecting him in expenses.

D JUSTICE-CLERK.—I have formed a very clear opinion, that, notwithstanding the cases referred to, there are no grounds on which we can support the action in this case. I am aware of the broad terms of the statute, and I rest on the terms "bona fide," used in reference to the exceptions, but I entirely in the exposition of the law by Mr Bell, (Vol. II. p. 314,) and to be clear that where a party, manifestly for the purpose of bringing within the clause, collusively, and just before the application, acquires shares in such companies, we are bound to refuse the benefit of the statute. what is the present case? It is clear, that the acquisition of the shares was effected solely for the purpose of making this application; and therefore, in the cases of Bristow Fraser, and Molle, we thought, (with great difficulty, &c,) that bona fide shareholders in these companies were within the provisions of the statute, we never for a moment contemplated sanctioning a proceeding like this. It is a manifest fraud on the law, which cannot be countenanced, and we are to mark our reprobation of it by immediate recal of the sequestration which was awarded. As to the concurring creditor, he made affidavit that Rainsford was within the description in the statute, and he should be subjected in expenses.

D GLENLEE.—I entirely agree.

D MEADOWBANK.—I believe the conclusion is correct, that this is a fraudulent law, to obtain the benefit of sequestration in a case where the law never intended it, and on that broad ground I agree.

THE COURT accordingly recalled the sequestration, and found both respondents liable in expenses.

—CRAIG, WARDLAW, and DALZEL, W.S.—D. MITCHELL, S.S.C.—SMITH and KINNEAR, W.S.—Agents.

ugton v. Molle, May 31, 1831 (ante IX. 647); Grant v. Baillie, May 20, 1830 (VIII. 778).

No. 99.

Dec. 20, 1833.
 Renton v.
 Girvan.

JAMES RENTON, Petitioner.—*Jameson—Walker*.
 ANDREW GIRVAN, Respondent.—*Rutherford—Innes*.
 Mrs Ross and Others, Respondents.—*D. F. Hope—Penney*.

Bankruptcy—Sequestration—Adjudication.—A party executed a settlement of his estate in favour of a brother, on condition of paying certain burdens to a sister and her family; he thereafter executed a trust-deed for payment of his debts, and reconveyance of the residue to himself, or the party called by his settlement; and the brother after his death did not make up titles, but having become bankrupt, and his estates being sequestrated, he granted a disposition of the property of his brother deceased, in favour of his trustee—held, that the trustee was not entitled to an adjudication in implement of the estate on a charge to the bankrupt to enter heir to his brother, under the previously subsisting investiture, but that he could only adjudge the right of reversion in the bankrupt's person, under the trust-deed and the settlement of the deceased brother.

Dec. 20, 1833.

2^D DIVISION.
 F.

THE late Kenneth Mackenzie, in 1824, executed a trust-conveyance of his estate of Dundonnell, for payment of his debts, and for reconveyance of the residue to himself, and the heirs specified in his marriage-contract, or in “any deed of settlement already executed or to be executed by me.” Some time prior to the date of this trust, viz. in 1817, Mackenzie had executed a deed of settlement, whereby he conveyed his estate to himself and the heirs of his body, “whom failing, to Thomas Mackenzie, my brother, and the heirs whomsoever of his body, (but under the express burden always of his paying, in the event of his or their succeeding, to Mrs Mackenzie, otherwise Ross, my sister, spouse of the Rev. Dr Thomas Ross, minister of Lochbroom, the sum of £5000, and that to her in liferent, and her children in fee, as after mentioned;) whom failing, to the said Mrs Jane Mackenzie, my said sister, and the heirs whomsoever of her body; whom all failing, to my own nearest heirs and assignees whomsoever; the eldest daughter or heir female through the whole course of succession excluding heirs portioners, and succeeding always without division; heritably and irredeemably, but always with and under the declarations, provisions, reservations, powers, and burdens after mentioned; all and hail,” &c. There then occurs the following clause: “Declaring always, as it is hereby specially provided and declared, that the said Thomas Mackenzie my brother, and his foresaids, shall be bound and obliged, at the first term of Whitsunday or Martinmas, which shall happen after his or their succeeding to the lands and others before conveyed, to make payment to the said Mrs Jane Mackenzie, otherwise Ross, my sister, whom failing, to the heirs whomsoever of her body, equally amongst them, of all and hail the sum of £5000 sterling, with one-fifth more of penalty in case of failure, with the due and

interest thereof from the time the same shall become due and till
 nt; which sum, after being paid by the said Thomas Mackenzie,
 t and appoint to be settled and secured, so as that my said sister, in
 ent of there being children in existence of her body, shall receive
 erent use, and her said children the fee thereof; and I hereby ex-
 declare that the destination of the foressaid lands and others is made
 ur of the said Thomas Mackenzie, on the express condition of his
 the foressaid sum; and in the event of his resisting or defeating
 esaid payment, I hereby exclude and debar him from the foressaid
 ion altogether."

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 Renton v.
 Girvan.

kenzie died without issue, in 1826, leaving other {settlements.

however, were set aside by the Court, in an action at the in-
 of his brother Thomas, and it was found that his succession fell to
 dated by that above quoted. Thomas Mackenzie, who was entitled
 the estate under this settlement, made up no titles. He became
 pt, and his estates were sequestrated in 1832, and the petitioner
 was appointed trustee thereon. The usual general adjudication
 been granted in his favour, Renton obtained from the bankrupt a
 disposition to the estate of Dundonnell, containing an obligation
 e himself heir to his brother Kenneth, and obtain himself infeft.
 upon Renton charged the bankrupt to enter heir-male of the de-
 under the existing investitures in the person of the latter, and he
 resented a petition to the Court, setting forth the disposition by
 krupt in his favour, and that the bankrupt had failed to implement
 rge, and praying the Court specially to adjudge in implement the
 o belong to him, as trustee—to ordain him to be infeft and seised
 to grant warrant for horning against the superiors for receiving
 This petition was opposed by the respondent Girvan, trustee infeft
 Mackenzie's trust-deed of 1824, and by Mrs Ross and her children,
 eaded—

he application is incompetent. The summary mode of making up
 1 the person of the trustee, provided by the bankrupt act, only
 to the taking up of rights which are in the bankrupt's person, as
 sonal right to the estate in the present case, but is not applicable
 completing of a real right not in the bankrupt's person, and which
 nerely a personal title to make available, according to the ordinary
 f law.

he trustee can have no other right than that belonging to the
 pt; and as his right to the estate was under the settlement of
 o that he could not have passed it over, and made up titles as heir-
 the trustee can as little pass it by, and thus evade the burdens
 hich that right is qualified. And,

le is excluded by the subsisting trust executed by Dundonnell,
 which the respondent Girvan is infeft, and which leaves nothing

No. 99. in the bankrupt's person but a claim to denude in his favour, when the purposes of the trust are fulfilled.

Dec. 20, 1833.
Renton v.
Girvan.

To this it was answered—That a sequestration undoubtedly supercedes a voluntary trust for behoof of creditors, where the truster himself is the party against whom sequestration is awarded, and there is no good reason why the same rule should not apply where the party, against whom the sequestration is awarded, is not the truster himself, but his heir: and, further, that as trustee for Thomas Mackenzie's creditors, he had an important interest to see that the estate was disposed of in the most advantageous manner, so as to leave the largest possible reversion for their behoof.

LORD GLENLEE.—There is no ground in law whatever for this application, on the part of Thomas Mackenzie's trustee. In 1815, Kenneth makes a settlement, in virtue of which Thomas succeeds. Long after, Kenneth denudes himself by a trust-deed, declaring, that his trustees are to reconvey the reversion to the person he might name, who was Thomas. The only right of Thomas therefore is, to call the trustee to account, and to retrocess him into any reversion which may remain after fulfilment of the purposes of the trust. So far as the prayer of the petition is limited to an adjudication of that interest, it is competent, though it is unnecessary, as he has already a disposition. But the prayer to be infeft in the estate is altogether out of the question. It is an overleaping all the bounds of feudal law, and it would be a very improper interference.

LORD MEADOWBANK.—I have no doubt earthly that this is an improper proceeding.

LORD JUSTICE-CLERK.—It is clear that we must refuse this petition, as on no construction of the bankrupt act is this a warrantable proceeding. Thomas Mackenzie's trustee can ask nothing but adjudication of what belonged to the bankrupt, and nothing belonged to him but under the will of Kenneth, which is nothing more than a reversion, in respect of which he may have a right to a superintendence to see Girvan do his duty; but it is quite out of the question what he demands.

THE COURT accordingly refused the petition, with expenses.

WALKER, RICHARDSON, and MELVILLE, W.S.—DALLAS and INNES, W.S.—R. ROY, W.S.—
Agents.

J. and W. CAMPBELL and Co., Suspenders.—*Jameson.*
ALEXANDER PATTEN, Charger.—*D. F. Hope—Steele.*

No. 100.

Dec. 20, 1833.
Campbell v.
Patten.

Exchange.—The drawer of a bill, which had been indorsed to a bank, having
give to the acceptor indulgence for a month from the time it fell due,
orized him to show a letter to that effect to the bank; and the bank having
juence allowed the bill to lie over without intimation of dishonour, either
ell due or at the expiry of the month for which indulgence was given—
, whether the bank had thereby lost recourse against the drawer?

agents at Inverary of the Renfrewshire Banking Company held Dec. 20, 1833.
r £62, 15s. 10d., drawn by the suspenders, J. and W. Campbell 2D Division.
, merchants in Glasgow, upon and accepted by one Collins, mer- Bill-Chamber.
Inverary. The bill was payable on the 4th April. On the 1st, Ld. Moncreiff.
wrote Campbell and Co. in these terms: "I am sorry to trouble T.
t cannot help it. My bill to you for £62, 15s. 10d., due here
I find impossible for me to retire. We are not collecting 5s. in
and cannot before the summer markets. I therefore beg you
me for the amount at three months, and post it to me, so as I
ire the one due."

us Campbell and Co. returned the following answer, dated April
We have your letter, dated 1st instant, requesting us to renew
l to us due 4th instant, per £62, 15s. 10d.; but as you now have
extent of our credit upon the goods you purchased when last in
v, we cannot grant the indulgence you request. We shall, how-
nsent to allow the bill to be paid by instalments during the pre-
nth, providing that the whole is paid up by the 1st of May; you,
e, settling with the bank for any charge for additional interest, &c.
conditions meet your approval, we believe the agents of the bank
in the bill until the term stated above, by your showing them this
We remain," &c.

obell and Company's letter having been shown by Collins to the
ents, they retained the bill, and although payment was not made
1st May, they sent no intimation to Campbell and Company.
stopped payment on the 5th July, and Campbell and Company

No. 100. after remaining in the hands of the agents on a totally different footing which those rules were not applicable, and that it was the duty of Campbell and Company to have looked after Collins, and seen that the bill, if they had not meant to extend the indulgence beyond the 1st of May, was paid up by the 1st of May, if they were first resolved to give no farther indulgence. It must always be remembered, that instructions were given by the suspenders directly to the bank, that they were to do strict diligence after the 1st of May, and that there is no appearance of any application of payments to other debts which ought to have been placed to the charge of the present bill."

Dec. 20, 1833.
Campbell v.
Patten.

Lord Medwyn having refused the bill of suspension, and the first bill being a joint note,* Campbell and Company presented a second, which was in like manner refused by Lord Moncreiff, for the reasons stated below.†

Campbell and Company reclaimed, and without any discussion, the point at issue, but in consideration of its being attended with difficulty, the Court remitted to pass the bill.

CAMPBELL and MACDOWALL, S.S.C.—J. PATTEN, W.S.—Agents.

* "It is quite plain that the suspenders' letter of 2d April required no other acceptance than being exhibited to the bank, which held Collins's bill, and that superseded the necessity of notice of dishonour. After this, it was the duty of the suspenders to see that the bill was paid up by the 1st of May, if they were first resolved to give no farther indulgence. It must always be remembered, that instructions were given by the suspenders directly to the bank, that they were to do strict diligence after the 1st of May, and that there is no appearance of any application of payments to other debts which ought to have been placed to the charge of the present bill."

† "NOTE.—Though the Lord Ordinary refuses this bill, he is far from thinking it a clear case. If the sum had been greater, he might perhaps have thought it right to pass the bill, notwithstanding that his opinion, on the whole, is against the complainers. But having, upon full consideration, formed that opinion, though he was with difficulty, he thinks it best for the party to pronounce the above judgment."

"He has no doubt on the first point argued. He thinks that the letter of the 2d April, 1833, had clearly the effect of relieving the respondents from the obligation to give immediate notice of the dishonour of the Bill. It is not the case of a man who, with knowledge, however certain, that the bill would not be paid when due. The point is, that the letter bears expressly, that they had no doubt, on its being shown to the banker, he would grant the delay and retain the bill; and it must be held that in giving such an instruction, they knew perfectly who the banker was, Collins's letter bearing, that the bill was due 'here' (viz. at Inverary), where the Bank of Scotland had no agent. Therefore the Lord Ordinary holds, that the banker was warranted without any other notice, in giving the indulgence, and retaining the bill till the 1st of May, and that he would have been clearly safe if the bankruptcy had happened in the interval."

"But the Lord Ordinary's doubts are on the second point. The license given by the letter was special and limited. The bank took it without observation: The bill was not paid on the 1st May, and no notice of this was given till after bankruptcy. Is it clear, that so holding the bill without any direct communication with the drawee, the bank was not bound to give notice? The acceptor was apparently solvent: I have ascertained that the bank got payments after the 1st May, and that the complainers could have saved themselves if they had notice, and the complainers farther say that, instead of having refused an order by Collins (an averment strangely repeated in the answers, and without notice of the statement in the second bill), they actually sold goods to him on credit in the interval. But although the Lord Ordinary is, on these considerations, far from thinking that the complainers have

ALEXANDER URQUHART, Pursuer.—*Robertson.*
 T BROWN (MANAGER OF AUSTRALIAN COMPANY), Defender.—
Cunninghame.

No. 101.

Dec. 21, 1833.
 Urquhart v.
 Brown.

nd Client—Expenses.—A process was conducted ostensibly in the name of a fictitious agent, but the actual agent neither possessed a license, nor belonged to any class of procurators or agents qualified to act before the Court; the client moved for expenses; held, that the losing party was liable not only for outlay, and not for fees of agency.

EL of the jury trial reported ante, XI. p. 567. The pursuer maintained his cause, moved for expenses; the defender objected to the amount claimed, that the agent who conducted the cause was not qualified to act without any license, but did not belong to any class of procurators, or agents who were entitled to act before the Court. He had merely assumed the name of a qualified agent, who had no real connexion with the cause, but who, when the action was raised, had been asked to allow the name to be used. The defender therefore pleaded, that as the real agent was a person without license or qualification of any sort, the whole cause or agency was untenable. He also stated that the pursuer had not paid the account.

Dec. 21, 1833.
 1st Division.

PRESIDENT.—The fees of agency cannot be allowed where there has been no lawful agency, or such as the Court can recognise. But the actual outlay,

on the ground of objection to the claim, he has, on the whole, come to the conclusion that, on the principle laid down by Lord Ellenborough, in the case of *Foster v. Wood*, cited in the answers, the bill having been once relieved, in this case, of objection, on the ground that the dishonour was not notified when the bill was presented to the bank thereafter came to act simply as agents for the drawers, and any action against them for negligence is an illiquid claim, to be otherwise established, apart from the rules as to the negotiation of bills of exchange. He cannot adopt the other view suggested, (though with every respect for the authority,) that it is solely incumbent on the drawer to look after the acceptor as his debtor; he is sensible of grounds of doubt in applying the English case to the present case, where the dishonour had been at first notified; and it may be said that, in the order of notification was departed from, the case was taken, for both parties, by the strict mercantile rules as to bills of exchange; and, 2d, Because, though the law of England in all the principles applicable to bills, it may be doubted whether, as to the mode of doing justice to a party situated like the com-
 mercial man, it must throw him on an ordinary action or implied contract, corresponding to the rule in that law. But, on the whole, he thinks the cases identical in principle. If he is right on the first point, and that it is safest to follow the rule laid down by the English Chief Justice.

See *Smith v. Wright*, turned on the failure of the bank to notify the drawer of the dishonour of the second bill. But for this, it would have a strong affinity to the case of *Smith v. Wright*.

No. 101. consisting of fees of Court, fees of counsel, &c., stands in a different situation. Actual disbursements should be allowed.

Dec. 21, 1833.
M'Whir v.
Oswald.

THE COURT remitted to the auditor to tax the account, separating what was outlay from what was charged in the name of agent's profits, and found the defender not liable for the latter.

Ker v. Hop-
kirk & Imlach.

— W. ALEXANDER, W.S.—Agents.

No. 102.

JAMES M'WHIR, Petitioner.—*D. F. Hope—Ivory.*

R. A. OSWALD and Others, Respondents.—*Sol.-Gen. Cockburn—Maitland.*

Execution Pending Appeal—Salmon Fishing.—In granting execution pending appeal of a judgment decerning for the removal of a stake-net fishing, the Court allowed the stakes to remain.

Dec. 21, 1833.
2D DIVISION.
T.

PETITION for execution pending appeal of the judgment mentioned ante, XI. 552. The Court granted execution, except as to the stakes for fixing the nets, which they allowed to remain.

WM. MARTIN, S.S.C.—A. GOLDIE, W.S.—Agents.

No. 103.

THOMAS C. KER, Suspender.—*Maidment.*

HOPKIRK and IMLACH, W.S., Chargers.—*Jameson—Penney.*

Process—Reference to Oath.—An examination of two joint chargers under a reference to oath, in the Bill-Chamber, by the complainer, in a bill of suspension, having been commenced, and the deposition of one emitted, and the diet adjourned for a few hours to take that of the other, and the suspender's agent having excused his attendance on the ground of another engagement, and the Lord Ordinary having thereafter refused the bill, the Court adhered, and refused to remit to allow the examination to proceed.

Dec. 21, 1833.
2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.

KER being charged on a bill of exchange by Hopkirk and Imlach, W.S., presented a bill of suspension, referring to their oaths, that no value had been given. The Lord Ordinary sustained the reference, and granted commission to the Bill-Chamber Clerk to take the oath. A diet was accordingly fixed for this purpose on Tuesday the 10th, at three o'clock, when the chargers attended, and the agent for the suspender. Mr Imlach was examined, but his examination having occupied the time till five o'clock, the commissioner adjourned the diet till seven, for taking Mr Hopkirk's deposition. That gentleman attended at the hour appointed, but the suspender's agent sent a note, saying, that a previous engagement prevented him being present, and begging the commissioner to postpone the examination till next day. This the commissioner declined, and returned his report to the Lord Ordinary, who, next day, pronounced

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the note, but that the suspender might apply to the Court, pro-
the clerk issuing a certificate for three days, adding the subjoined

suspender then presented a reclaiming note.

GLENLEE.—Every thing appears regular on the report, and I see no rea-
giving further delay. The agent had no right to say he would not attend
vening. When parties are once before the commissioner, they are not
to say they want delay, and it would be most dangerous to sanction the
of allowing it in the Bill-Chamber.

Other Judges concurring—

THE COURT refused the reclaiming note.

J. J. FRASER, W.S.—HOPKIRK and IMLACH, W.S.—Agents.

JAMES ANDERSON and Others, Suspenders.—*J. Anderson.*

No. 104.

WATSON and MUNRO, Chargers.—*Neaves.*

—*Reference to Oath.*—Commission having been granted to take an oath on
e, the Court refused to listen to an allegation, that the commissioner would
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2D DIVISION.

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Dec. 20, 1833.
Campbell v.
Patten.

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Campbell and Company reclaimed, and without any discussion on the point at issue, but in consideration of its being attended with difficulty, the Court remitted to pass the bill.

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† “NOTE.—Though the Lord Ordinary refuses this bill, he is far from thinking it a clear case. If the sum had been greater, he might perhaps have thought it right to pass the bill, notwithstanding that his opinion, on the whole, is against the complainers. But having, upon full consideration, formed that opinion, though he owes with difficulty, he thinks it best for the party to pronounce the above judgment.

“He has no doubt on the first point argued. He thinks that the letter of the 2d April, 1833, had clearly the effect of relieving the respondents from the obligation to give immediate notice of the dishonour of the Bill. It is not the case of a mere knowledge, however certain, that the bill would not be paid when due. The point is, that the letter bears expressly, that they had no doubt, on its being shown to the banker, he would grant the delay and retain the bill; and it must be held that in giving such an instruction, they knew perfectly who the banker was, Collins’s letter bearing, that the bill was due ‘here’ (viz. at Inverary), where the Bank of Scotland had no agent. Therefore the Lord Ordinary holds, that the banker was warranted, without any other notice, in giving the indulgence, and retaining the bill till the 1st May, and that he would have been clearly safe if the bankruptcy had happened in the interval.

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Cunninghame.

No. 101.

Dec. 21, 1833.
 Urquhart v.
 Brown.

and Client—Expenses.—A process was conducted ostensibly in the name of a qualified agent, but the actual agent neither possessed a license, nor belonged to any class of procurators or agents qualified to act before the Court; the client is the cause, and moved for expenses; held, that the losing party was liable for outlay, and not for fees of agency.

THE jury trial reported ante, XI. p. 567. The pursuer gained his cause, moved for expenses; the defender objected to the account claimed, that the agent who conducted the cause was not without any license, but did not belong to any class of procurators, persons who were entitled to act before the Court. He had merely used the name of a qualified agent, who had no real connexion with the cause, but who, when the action was raised, had been asked to allow the name to be used. The defender therefore pleaded, that as the real cause was a person without license or qualification of any sort, the whole for agency was untenable. He also stated that the pursuer had paid the account.

Dec. 21, 1833.
 1ST DIVISION.

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Ker v. Hop-
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R. A. OSWALD and Others, Respondents.—*Sol.-Gen. Cockburn—Maitland.*

Execution Pending Appeal—Salmon Fishing.—In granting execution pending appeal of a judgment decerning for the removal of a stake-net fishing, the Court allowed the stakes to remain.

Dec. 21, 1833.

2^D DIVISION.
T.

PETITION for execution pending appeal of the judgment mentioned ante, XI. 552. The Court granted execution, except as to the stakes for fixing the nets, which they allowed to remain.

WM. MARTIN, S.S.C.—A. GOLDIE, W.S.—Agents.

No. 103.

THOMAS C. KER, Suspender.—*Maidment.*
HOPKIRK and IMLACH, W.S., Chargers.—*Jameson—Penney.*

Process—Reference to Oath.—An examination of two joint chargers under a reference to oath, in the Bill-Chamber, by the complainer, in a bill of suspension, having been commenced, and the deposition of one emitted, and the diet adjourned for a few hours to take that of the other, and the suspender's agent having excused his attendance on the ground of another engagement, and the Lord Ordinary having thereafter refused the bill, the Court adhered, and refused to remit to allow the examination to proceed.

Dec. 21, 1833.

2^D DIVISION.
Bill-Chamber.
Ld. Moncreiff.

KER being charged on a bill of exchange by Hopkirk and Imlach, W.S., presented a bill of suspension, referring to their oaths, that no value had been given. The Lord Ordinary sustained the reference, and granted commission to the Bill-Chamber Clerk to take the oath. A diet was accordingly fixed for this purpose on Tuesday the 10th, at three o'clock, when the chargers attended, and the agent for the suspender. Mr Imlach was examined, but his examination having occupied the time till five o'clock, the commissioner adjourned the diet till seven, for taking Mr Hopkirk's deposition. That gentleman attended at the hour appointed, but the suspender's agent sent a note, saying, that a previous engagement prevented him being present, and begging the commissioner to postpone the examination till next day. This the commissioner declined, and returned his report to the Lord Ordinary, who, next day, pronounced the

ator:—"The Lord Ordinary having considered this bill, with the
 on of George Imlach, one of the chargers, and in respect that the
 charger, J. G. Hopkirk, attended before the commissioner, at the
 and hour fixed for completing the examination under the char-
 ference, and then declared his readiness to undergo the examina-
 d that neither the complainer nor any agent attended to examine
 uses the bill; finds expenses due," &c.

No. 103.

Dec. 21, 1833.

Anderson v.

Watson.

suspender's agent had prepared a note, praying the Lord Ord-
 appoint another diet for Mr Hopkirk's examination; but before it
 sented, the interlocutor was issued. His Lordship accordingly
 the note, but that the suspender might apply to the Court, pro-
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son and Munro, clothiers in Glasgow, holders of a bill for £38, Dec. 21, 1833.
 awn by one Sword, charged the acceptors, James Cumming and
 Stirling, and the indorser, James Anderson, who thereupon pre-
 a bill of suspension, setting forth that the chargers were creditors

2D DIVISION.

Bill-Chamber.

Ed. Moncreiff.

ere is plainly an object of delay not explained, because the charger has had
 rtunity; for, after Mr Imlach's deposition, it is idle to suppose that there is
 case on the merits. But the complainer may be entitled to state any case
 larity; and the Lord Ordinary does not think he can preclude him, though
 the time."

No. 104. of the drawer, Sword, who had obtained his discharge in a sequestration under a composition-contract; that they had refused to consent to the discharge unless they got a preference, which was constituted by a bill accepted by Cumming without value; that on Sword failing to retire the bill, the suspenders granted the bill charged on as a renewal, also without value; and that when it became due, they had accepted another renewal, but that the charger had nevertheless given the present charge and they referred these allegations to the oaths of the suspenders. A commission was accordingly granted to take their oaths at Glasgow, when the following procedure took place:—

Dec. 21, 1833.
Anderson v.
Watson.

“Compeared James Munro, clothier in Glasgow, one of the chargers, who being solemnly sworn and interrogated, Whether, at the date when the charge was given upon the bill in question, the chargers were onerous holders of said bill? Depones, That they were. And this is truth, &c.

“Compeared Walter Watson, clothier in Glasgow, the other charger, and only other partner of the firm of Watson and Munro, who being solemnly sworn and interrogated, Whether the chargers were creditors of James Sword, quartus, coal-merchant near Glasgow, prior to the date of the bill charged upon? Depones, That he believes they were, but he does not at present know to what extent; and he adds, that the accounts of his firm were kept and managed by his partner, Mr Munro, and the deponent never interferes with the books of the company, as he attends to the operative department of the business. And being interrogated, Whether the deponent has access to the company's books, and whether he is willing to examine the same, that he may be able to answer the questions already put to him?

“To which interrogatory it was objected for the chargers, and the commissioners having heard parties viva voce, sustain the objection, in respect said interrogatory does not fall under the commission.

“Being farther interrogated, depones, That he does not know whether said James Sword was sequestrated or not. Interrogated, Whether the deponent was told by his partner, Mr Munro, or knows of his own knowledge, that money was given by Mr Renwick to his partner, at or prior to the time the charge upon the bill was given to retire the same? Depones, negative. Interrogated, depones, That he does not know that said bill was paid from funds furnished by any person whatever, and he does not believe that, at the time the charge was given, the bill was paid; and depones that the deponent's firm were bona fide onerous holders of the bill in question at the date of the charge. And all this is truth, &c.”

This oath being reported, the Lord Ordinary refused the bill, adding the subjoined note.*

* “The examination has been very imperfect, but that is the fault of the complainer, who has not made any proper attempt to prove the case stated in the bill.

THE COURT adhered, except as to Anderson, the indorser, who had a separate plea founded on alleged want of notification of dishonour, and quoad him, they remitted to receive answers.

J. M'GILL, S.S.C.—G. GORDON—Agents.

JAMES SPENCE and OTHERS, Petitioners.—*Rutherford*.
KING'S ADVOCATE, Compearer.—*Lord Adv. Jeffrey*.

No. 105.

Sh—*Stat. 3 and 4 Wil. IV. c. 76*.—Held, that where there was not a sufficient number of qualified persons in a burgh to constitute a new magistracy and council the Burgh Reform Act, the former magistracy and council continued in office, in pursuance of § 18; and, therefore, that an application for the appointment of managers was unnecessary.

the 3d and 4th Wil. IV. c. 76, intituled, “An act to alter and amend the laws for the election of the Magistrates and Councils of the Burghs in Scotland,” it is, inter alia, by § 18, enacted, that “upon completion of the first elections of Councillors, Magistrates, and bearers to be made in all the royal burghs in Scotland, under the provisions of this act, and not sooner, the Provost, Magistrates, officers, and other Councillors now in office in such burghs respectively, go out, and their whole powers, duties, and functions, shall cease to determine, except only where any of the said persons shall have again elected under the provisions of this act.” By the act of the burgh of Kirkwall, the council consists of Provost, four bailies, of Guild, treasurer, and sixteen councillors—twenty-three in all.

Dec. 21, 1833.
2D DIVISION.
T.

No. 105. the 5th November, a meeting was held, in terms of the statute, when, after votes had been given for the different parties qualified, the meeting found, "that whereas the set of the burgh, and the uniform past usage thereof, require twenty-three councillors to be elected to form the council, that in present circumstances it is impracticable to elect the full number required by the act." It being thus impossible to have a council elected under the statute until after the next period of registration, Spence and others, the bailies and councillors in office at the passing of the act, (Laing, the Provost, having demitted on the 5th of November, immediately after the meeting above noticed,) thereupon presented a petition to the Court, praying their Lordships to appoint managers with the usual powers, on the ground that their offices had fallen, and that the provision in § 18 was not applicable to the case which had actually occurred.

Dec. 21, 1833.
Spence v.
King's Advocate.

The Court ordered intimation to the Lord Advocate, who this day attended in his place.

LORD JUSTICE-CLERK.—Has the Lord Advocate any statement to make to the Court, before they proceed to the consideration of this petition?

Lord Advocate.—I had determined not to sist the Crown as a party, and thus involve it in the trouble and expense of a discussion not properly belonging to it, unless in the judgment of the Court it should be deemed desirable that the Crown should become formally a party, for the purpose of a more deliberate consideration; and I shall therefore content myself at present with stating my views, and submitting myself to the opinion of the Court, as to the course to be adopted. I consider the petition unnecessary, and that it should be refused as such, being satisfied, that under sections 18 and 24 of the statute, the old Magistrates are continued in the full exercise of their functions until a new magistracy shall be elected. While the act renders it impossible for a new election to take place under the old form, it is provided in section 18th, that the existing Magistrates are not to cease their functions till the new election is completed. Now, it may be said that the present is a *casus improvisus*, and not contemplated by the statute, and that the 18th section was inserted because Michaelmas—at which term the period of the old council's continuance in office would expire—was to intervene between the passing of the act and the term for the new election. But suppose that by persons chosen councillors declining in a series, so that the election was kept incomplete, but still in progress for the whole year—in such a case, the old Magistrates would necessarily have remained in power; and I think, though the conatus in this burgh is at an end for the year, the cases are truly the same. The demission of the Provost in Kirkwall cannot make any difference—the council being continuous and existing; and therefore it appears to me, that the old council continue in office, and that this petition should be refused as unnecessary.

Rutherford.—The only object of my clients is to have the authoritative determination of the Court, so as to relieve them of personal responsibility, and if the Court shall hold that this duty devolves on them, they are perfectly willing to fulfil it. At the same time, the importance of the question requires that the arguments against the view taken by the Lord Advocate should be before your Lordships. This is completely *casus improvisus*. The statute never contemplated a case of no election taking place, or a case where there never may be an election.

THE LORD ADVOCATE.—I am happy that we have arrived at a unanimous opinion from both sides of the Bar—I say both sides, because I am to propose that the Lord Advocate be in a minute before we pronounce judgment—and I now proceed to the course which the Court are to adopt. We stated the matter to our Lordships and are prepared to give an immediate decision. We propose, in respect to the application, as altogether unnecessary. Looking to the nature, and particularly to that section, it obviously contemplates that there be no obstacles to the completion of a new election, and it provides, that till the elections are completed, the old magistracy shall retain their functions. The circumstances creating the failure in the present case, may not have been intended by the act, but the failure itself is not *casus improvisus*, and from whatever causes or motives such failure may have originated, we are satisfied that, in the fair and plain meaning to the statute, the old magistrates must continue till a new magistracy be elected, and therefore that there is no necessity in exercising this extraordinary power, and the demission of the Provost is of no consequence, there being still a sufficiency of magistrates and council. If by accident among them it became otherwise, that might afford ground for an application at present there is none. And a minute being put in by the Lord Advocate mentioning his appearance, and his having made a verbal statement to the Court, I can have no hesitation in pronouncing a judgment, refusing the petition as unnecessary, and I state this as the unanimous opinion of the whole Judges.

GLENLEE.—I entirely concur.

MEADOWBANK.—I had at first some difficulty, but I am now quite satisfied. While I can find another construction, I would not adopt one which would have the consequence of leaving without a magistracy burghs where a new election failed to take place.

THE LORD JUSTICE-CLERK, having been put in by the Lord Advocate,

THE COURT accordingly refused the petition “as unnecessary.”*

No. 106.

Jan. 14, 1834.
Reid v. Brown.ROBERT REID, Petitioner.—
JAMES BROWN, Respondent.—*Patton*.

Judicial-Factor—Proof—Service—Presumption.—Observed by the Court, 1. That where an absent party of middle age is shown to have been alive in 1819, and to then had two sons, the mere lapse of time and want of farther intelligence concerning them, do not afford a presumption, per se, either that the party or his children are dead; and 2. That a service, being an ex parte proceeding, does not raise the presumption of death in these circumstances.

Question, what title will suffice for opposing a petition by a factor loco absent to get up his bond of caution and to be exonerated, presented on the assumption his constituent is dead, and that he himself is now proprietor of the subjects which fell under the factory.

Jan. 14, 1834.
1st DIVISION.

IN May, 1830, the Court appointed Robert Reid, factor loco absent to George Niven, then in America. Reid and his cautioner presented petition, on 30th November, 1833, stating that the late Robert Niven, uncle of George, had died, leaving property; that George had died abroad and never made up titles; and that on 8th May, 1832, Reid had been appointed heir-in-general to Robert, the uncle, and, on 19th September 1833, was infeft. They therefore craved that the bond of caution might be delivered up, and themselves exonerated, as Reid was now proprietor of the subjects contained in the factory.

Appearance was made for James Brown, cousin-german, on the mother's side, to George Niven. He stated, as his title to appear, that he was son of one of the parties on whose petition Reid had been appointed factor, that he was a near relation of George Niven; and that he had an interest in some executry with which Reid had intromitted as factor. He produced letters which George Niven had written to this country in the years 1817, 1818, and 1819, in the last of which, dated from New-York, he mentioned his having a family of two sons; and the petition stated that Niven was then not past the middle age of life. The respondent therefore contended that the mere lapse of time and want of intelligence since 1819, afforded no room for the presumption of death, even if Niven had had no family, and still less was there room for the presumption that his children were dead. As the service was a mere ex parte proceeding, it ought not to be regarded in this question, and the petition should be refused.

No appearance was made in support of the petition.

LORD PRESIDENT.—I think it impossible to grant the prayer of this petition. The presumption is that George Niven or some of his family are alive.

CRAIGIE and BALGRAY concurred.

Jan. 14, 1834.
Baugh v.
Murray.

J. CAMPBELL, W.S.—W. BENNET, W.S.—Agents.

No. 107.

Will.—Circumstances in which a copy of a codicil held sufficient proof against a son of the testator, who admitted having received the will pending, but stated that he had mislaid it.

a strict entail of that estate in favour of himself in liferent, and Murray, his eldest son, and the heirs of his body, in fee; whom failing, James Murray, his second son, and the heirs of his body; whom failing, James Murray, and the heirs of his body; whom failing, his sons in their order, and the heirs of their bodies; whom failing, certain substitutes. The several prohibitions of the entail were all as follows:—"That it shall not be lawful to, nor in the power of the male or female of my body, or any other of the heirs of tailzie aforesaid," &c. Power was given to the heirs in possession to grant provision to their children, under certain limitations, to affect any part of the estate; and the deed contained a declaration, "that the heirs male and of tailzie aforesaid, shall be bound and obliged, out of the proceeds of my other funds and effects to which they may succeed, to pay the lands and estate above-mentioned of the sums contained in any provision granted, or to be hereafter granted by me to my younger son."

2D DIVISION.
Ld. Mackenzie.
T.

Murray died in Jamaica in 1800, leaving considerable unentailed

No. 107. property, to which his eldest son, the late Dr John Murray, succeeded, as well as to the entailed estate of Philiphaugh, whereto he made up titles under the entail. Mr Murray had before his death executed a will, which had, however, now disappeared; but a certified copy of a codicil, in the handwriting of his second son Charles, then in Jamaica, was transmitted to this country to the late Mrs Baugh, one of his daughters, and mother of the pursuers, James and Alexander Don Baugh. The codicil was in these terms:—"Additional codicil to my last will and testament, made and executed on the 1st day of June, in the year of our Lord 1795, sets forth, that I, John Murray, of the parish of St Thomas in the East, and island of Jamaica, being of sound and disposing mind and memory, do hereby give and bequeath unto Dr John Murray, my eldest son, and physician in London, and Sir James Nasmyth of New Posso, Baronet, the sum of five hundred pounds sterling, payable at the first term of Whitsunday or Martinmas after my death, in trust, for the sole use and behalf of Margaret Murray, my youngest daughter, wife of Captain John Baugh, the interest arising therefrom to be paid to her annually during her life, and the said principal sum of five hundred pounds sterling to be at her disposal at the time of her death."

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Baugh v.
Murray.

The interest of this sum was paid to Mrs Baugh by Dr Murray, till 1825, when she raised the present action against him, concluding for an account of it, and to have it duly secured for her behoof. The defence stated by Dr Murray was as follows:—"The defender has to state in defence, that the late Mr Murray of Philiphaugh, the grantor of the alleged codicil, (which the pursuer has not produced,) held the estate of Philiphaugh under titles in fee-simple. He executed an entail of these lands in favour of the defender Dr Murray, who has made up titles by crown-charter and sasine under the entail, which has also been duly recorded in the Register of Tailzies. The debt in question, therefore, supposing it really to exist, is an entailed debt; and as it will not, and cannot be alleged, that the debts affecting the estate of Philiphaugh in the defender's person exceed the value of it, or that the interest of them exceeds the rent, it is evident that the debt, if due to the pursuer, independent altogether of the personal security of the defender, is amply secured upon the entailed estate of Philiphaugh, and the pursuer does not, and will not deny that she has hitherto received punctual payment of her interest."

Dr Murray died in 1830, and was succeeded in the entailed estate by his brother James, the present defender, Charles, the intermediate brother, having predeceased without issue. James Murray thereupon sisted himself as defender in this action; and the original pursuer, Mrs Baugh, having also died, her sons, James and Alexander Don Baugh, sisted themselves in her place. A record was made up between these parties, in which the defender rested mainly on these pleas:—

best.

the declaration in the entail, that the heirs general and of tailie relieve the entailed estate of the sums contained in any bond of the entailer might grant in favour of his younger children, imported his will that such provisions should burden the estate;

the fetters of the entail are not directed against Dr Murray, the nominatum, and the general words in the prohibitory clauses, male and female of my body, or any other of the heirs of tailie, did not include him, seeing the reference to the "other heirs" showed that the heirs of the body mentioned in the former part were of the same class, viz. "heirs of tailie," while Dr Murray was institute and not an heir of tailie; and consequently, under authority in the case of Duntreath, the fetters of the entail did not attach to that he held the estate affectable by his debts and deeds; and he being undoubtedly debtor in the £500 in question, his successors must be liable to make payment of it.

Thus it was answered—

the copy is not proper evidence of the codicil, and the admissions of Dr Murray cannot affect the defender, unless it be established that he was indebted to him, which is denied.

It is impossible to draw the inference contended for by the pursuers, from the declaration as to relieving the estate of bonds of provision to the children, which imports nothing more than that if the entailer by such bonds of provision expressly burden the entailed estate, the heirs general and of tailie should be obliged to relieve it of that burden out of his other funds; and,

the case of Duntreath does not establish the rule, that in order to

No. 107.
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not reach Dr Murray, it does not follow that the next heir of entail is liable for all obligations incumbent on him. Upon that supposition, he might effectually have burdened the estate by heritable bond; but not having done so, and the original pursuer having neglected to secure payment out of the other funds to which Dr Murray succeeded by the death of the entailer, or to have the trust-fund bequeathed to him for her behoof properly vested, her representatives cannot now insist against the defender, who only represents Dr Murray in the character of heir of entail.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: * “ Finds no sufficient grounds for subjecting the present defender to payment of the bequest libelled, as heir of entail in the estate of Philiphaugh; therefore appoints the cause to be enrolled, that an order may be made for trying the question, whether the said defender does or does not represent his brother Dr John Murray, the original defender?”

The pursuers having reclaimed, the Court remitted to his Lordship “to order production of the will and testament executed in Jamaica by the late John Murray of Philiphaugh; and thereafter, if he shall see cause, to recal the interlocutor reclaimed against, and to proceed as to his Lordship shall seem just.”

On the cause going back to the Lord Ordinary, a diligence against havers was granted, under which the defender was examined, and deponed, that of a date subsequent to his sisting himself in this process, he had received his father's will from Jamaica, and had laid it aside among other papers, but that after a search he could not now find it. Thereafter, the Lord Ordinary, having again heard parties on the cause, pronounced this interlocutor, adding the subjoined note:† “ Finds it not

* “ The Lord Ordinary does not think there is evidence in process, or offered, that the bequest libelled was so constituted as to affect the entailed estate. The entail provides, that the entailed estate is to be relieved of any bonds of provision granted, or to be granted by the entailer. But that only implies that he had granted, or might grant, bonds in such form as to affect the entailed estate. It is no provision that the entailed estate was to be affected by all his bequests. Then he leaves a will (not produced) conveying apparently large funds, but certainly not conveying the entailed estate; and by a codicil to this will he conveys £500, payable to two trustees, for the use of the late pursuer. If this bequest was ever implemented by payment of the money, or any thing equivalent to payment of the money to the trustees, or Dr Murray as only acting trustee, then they or he alone became liable for it as trustees or trustee. If it was not so paid, then Dr Murray, as executor or residuary legatee, may be liable,—and his defences go far to admit his liability; but there is no reason to say with certainty, or even much probability, that the entailed estate, or the heirs of entail as such, were made liable, or even intended to be made liable for this bequest.”

† “ The entail, near the beginning, contains the expression, ‘ myself and the other heirs of taillie.’ Now, if the fetters had been directed against ‘ myself and the other heirs of taillie,’ there surely could be no doubt that the case of *Dumfriesshire* would warrant finding that this was not applicable to the entailer himself, because he

oursuers again reclaimed.

GLENLEE.—I take much the same view as the Lord Ordinary. We find this to be a genuine copy of the codicil ; and the point is, whether the testator is liable for this provision, on the supposition that he only represents Dr Murray as heir of entail. It is quite contrary to principle, to convert into a debt that a provision shall be an actual burden on the estate, a clause which at it was the entailor's intention to have the estate relieved, more especially as we see what was done as to this provision. A sum of money was bequeathed in trust for this purpose, as if just to secure it from being a burden on the estate. I have no idea that it can be considered as a bond intended to burden the estate. That Dr Murray became liable as trustee for this lady, to pay her the interest, there can be no doubt ; but it is said that as he became liable, all the

of an heir of tailie. So here, where the expression is ' the heirs-male of my body, or any other of the heirs of tailie aforesaid,' it seems impossible, by virtue of the decision in the case of Duntreath, that this is not applicable to John Murray, expressly called as the entailor's eldest son, the first of the heirs-male of his body. The decision in the Duntreath case cannot be taken beyond two points: 1. That the term ' heirs of entail ' must be held properly and technically not to include the institute; 2. That its technical meaning is not extended, even though it should appear, by inference from other parts of the deed, that the entailor used it in a wider sense. But in this case the entailor uses an expression perfectly common, and known in Scotch conveyancing, and which always does properly and technically include the eldest son of the person using such expression in any settlement of succession ; and there is therefore no need to extend its meaning by inference from other parts of the deed. The court says that the meaning of ' the heirs-male of my body ' is to be restricted, to exclude the eldest son, because the entailor speaks of the heirs-male and not of his body, or other heirs of entail. But that is, in the first place, to limit clear and unambiguous words by inference ; and, secondly, it is to limit them

No. 107. others must be so, because the fetters are not directed against Dr Murray, but only against the substitute heirs. Now, even although, if a bond had been granted by him over the estate, and the party had been infest, that might have affected the estate, it will not follow that all the heirs were to be liable for all the debts he should have paid, but did not; and as this is not an entailor's debt, but a mere provision, I incline to agree with the Lord Ordinary.

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Murray.

LORD JUSTICE-CLERK.—The opinion I have formed does not appear to me to trench on the Duntreath case. We must hold the copy of the codicil as authentic; and I agree with Lord Glenlee, that it creates a trust in the person of Dr Murray, and for behoof of the entailor's daughter; and Dr Murray being not only trustee, but heir in the other funds, he properly paid the interest, and it is clear that Dr Murray was liable for it, and every person in right of him. But is it a debt which affects the entailed estate? It appears to me clear, that it is not that description of bond of provision, of which the entailor directed the estate to be relieved out of his other funds, for I conceive that he there refers to bonds, wherewith he might burden that estate either expressly or as being his debts, and of which he accordingly provides that the entailed estate shall be freed out of his other funds. This provision, however, is not a debt, and it is not created a burden by the act of the entailor on the entailed estate. But supposing it otherwise, is the mere fact of Dr Murray having been once liable, and nothing having been done to make the provision real against the estate, enough to make all the future heirs liable? Without any intention to affect the case of Duntreath, I can see nothing inconsistent therein in the observations of the Lord Ordinary, that every case must depend on the phraseology of the entail, though here we do not need to decide any thing, but that nothing has been done to make this provision effectual against the entailed estate.

LORD MEADOWBANK.—I agree that this is not an entailor's debt, and that it cannot come under the class of provisions intended to affect the estate. But my difficulty is on the second point. In the case of Duntreath, it was decided that the institute held in fee-simple; then, if so, the estate so held by him being taken up by the next heir, does it not necessarily follow that the person taking it up must be liable for the debts of the institute? This forces on us the question, did the fetters in this entail affect Dr Murray? Now, in the case of Duntreath, it was impossible to doubt the intention of the entailor to fetter the institute, but the House of Lords held that unless specially included he was not to be affected, and under that case I think the fetters here cannot affect Dr Murray, and therefore I entertain doubts of the interlocutor.

THE COURT adhered.

SCOTT, FINLAY, and BALDERSTON, W.S.—A. ROLLAND, JUN. W.S.—Agents.

—FROM THE JUDICIAL RECORDS OF THE SCOTLANDS—
made to herself.

REPORTING as to the moveable estate of a party deceased in-
ch had remained many years in the hands of his trustee. The
ere, his daughter Mrs Stewart, who was his executrix, and the
the late General Baillie, the second husband and disponee of
s widow, now also deceased. In estimating the fund, the trustee
l with yearly accumulations of interest; and in giving effect
artial payments made by him to the widow during her life,
ant to whom it was remitted to make up a state had, in like
bited her with similar accumulations. The Lord Ordinary
oved of his report, General Baillie's trustees reclaimed, but
dhered.

Jan. 14, 1834.
2^D DIVISION.
Ld. Mackenzie.
R.

A. CLASON, W.S.—C. C. STEWART, W.S.—Agents.

THOMAS and JOHN H. MACK, Advocators.—D. F. Hope. No. 109.
OBRECK and JOHN M'DONALD, Respondents.—Cunningham—
Shaw.

and Tenant—Penalty.—The landlord of an inn, under lease for ten years,
eday, 1826, having agreed, in 1831, with the tenant (now a bankrupt) and
ee, to give a deduction of £30 from the rent, from Whitsunday, 1831, to
1832, if the tenant kept up the establishment, and carried on the business
lay 1832; and the stock of the tenant being sold off by the trustee, and
suspended for a few days in February, 1832, after which, a subtenant,
sent of the landlord, entered to the inn, and carried on the business till

No. 109. **JOHN THOMAS** and **John Hamilton Mack**, proprietors of the **Airdrie Inn**, granted a lease of it for ten years from **Whitsunday, 1826**, at a rent of £100 to **John Dumbreck**. He became bankrupt in **March, 1831**, and **John M'Donald**, writer in **Glasgow**, was appointed trustee on his sequestrated estate. On **13th February, 1832**, **Thomas and Mack** presented a petition for sequestration, to the Sheriff of **Lanarkshire**, against **Dumbreck** and the trustee, setting forth, that, after **Dumbreck's** bankruptcy, he "offered to possess the premises for the year from **Whitsunday, 1831**, to **Whitsunday, 1832**, and to keep the business of the inn going till the latter term, on condition of being allowed a deduction of £30 from the year's rent at the end of the year, and that as it was of great importance to the petitioners to keep the business of the inn going until the premises were set to, and occupied by, a permanent tenant, they consented to give the said **John Dumbreck** the £30 of deduction sought from the year's rent for **Whitsunday, 1831**, to **Whitsunday, 1832**, on condition only that the said **John Dumbreck** kept the inn open, and carried on the business thereof, in the usual way, without interruption, till the said term of **Whitsunday, 1832**;" and that the **Martinmas** rent remained unpaid. They therefore prayed for sequestration, and also an interdict of an impending sale of the furniture, &c. by the trustee. **Dumbreck** and the trustee alleged that the rent had been unconditionally fixed at £70 by **Mack**, in **March** preceding, but, in the meantime, they consigned the **Martinmas** rent, and found caution for the **Whitsunday** rent, at the full amount of £100 claimed, and then proceeded with the sale on **14th** and **15th February**. On the **17th**, **Thomas and Mack** made offer to let the inn to **Thomas Nokes** for two years from and after **Whitsunday**, at a rent of £60 for the first year, and £70 for the second. **Nokes** accepted the offer, and, on the **20th**, **Dumbreck** and his trustee granted a subset of the inn till **Whitsunday** to **Nokes**; and **Mack** subscribed his consent to the subset. **Nokes** in a few days entered into possession, and carried on the business of an innkeeper there.

In the meanwhile, the parties proceeded to make up a record, in which **Thomas and Mack** averred, that **Dumbreck** and his trustee continued to possess under the former set from **Whitsunday, 1831**, to **Whitsunday, 1832**, under "a conditional promise to give them a deduction from the stipulated rent, of £30, providing **Dumbreck's** complete establishment of furniture, horses, &c., were kept up, and the business of the inn carried on as usual till **Whitsunday, 1832**;" that the business of the inn was completely suspended for a week between **15th** and **22d February**; that this injured the inn; that **Nokes** would have given £10 per annum more for it, but for this cessation; and that **Nokes** had not above one-third of a full complement of horses, furniture, &c., until **Whitsunday**. They therefore contended, that the condition of carrying on the business of the inn uninterruptedly, and keeping up the establishment, had not been implemented, and the full rent of £100 must be due.

Jan. 15, 1834.
1st Division.
Ld. Corehouse.
B.

Thomas v.
Dumbreck.

and the cessation of business for a week was not enough to cause forfeiture of the deduction of rent. The Sheriff "allowed the as a proof of the second article of their statement, by the oath of the said."

For the reference, Mack swore that the deduction of £30 was only conditionally; and "that it was expressly stipulated and understood by both parties, that the said John Dumbreck was to go on with the business of the inn, for the year from Whitsunday, 1831, to Whitsunday, 1832, and thereafter during the remainder of the lease. And the Sheriff adds, that he would not have allowed the said defender to have remained in the possession unless he had made the stipulations before mentioned: that the said deduction of £30 had only reference to one year of the said lease, and given on these conditions."

Sheriff found Dumbreck and M'Donald liable for a rent only of £30, and found them entitled to their expenses.

And Mack brought an advocacy, in which they contended, that it was proved by the oath that the deduction was only allowed on condition of Dumbreck carrying on the business and establishment of the whole remaining years of the lease, which did not expire on Whitsunday, 1836, and as he had failed in this, the deduction should not be claimed. Dumbreck and M'Donald answered, that the period record made up by Thomas and Mack, showed that the only question which was alleged as to the deduction of £30, was, whether it was stipulated that Dumbreck should carry on the business of the inn till Whitsunday, 1832; that this was the proper point referred to Mack's oath, and that Mack was not entitled to allege in his oath any entirely new

No. 109. came bankrupt, and was sequestrated in 1831; that it was agreed by the advocates and him that he should remain in possession for a year from Whitsunday, 1831, at a rent of £70, on condition that he kept the inn open, and carried on business during that year; that the advocator sequestrated his furniture in February, 1832, for payment and in security of the rent, reckoning it at the rate of £100 per annum, and that it was sold on the 14th and 15th of that month; that the respondent M'Donald, as trustee on Dumbreck's estate, sublet the inn to Thomas Nokes, till Whitsunday, 1832; that the advocates consented expressly to that sublease, and that Nokes took possession of the inn, and carried on business there till Whitsunday, when a lease, previously granted to him by the advocates, commenced: Therefore, found that, in these circumstances, there was no violation of the condition under which the rent was restricted which entitled the advocates to recur to the original rent of £100 per annum; remitted simpliciter to the Sheriff, and decerned; and found the advocates liable in the expenses incurred in this and the Inferior Court."*

Jan. 15, 1834.
Thomas v.
Dumbreck.

The advocates reclaimed.

LORD BALGRAY.—I think the interlocutor right. There was a condition made as to the deduction of £30, and it appears, both from the petition and from the oath, that the advocates stipulated that the respondents should carry on the business of the inn till Whitsunday, 1832. The question therefore comes to be, Was this condition bona fide implemented? I think it was, and that the missive of sublet to Nokes, dated 20th February, and bearing the subscription of the advocator, Mack, as a consenter, takes away the very basis of the advocator's case.

The other Judges concurred, and the Court adhered.

WOTHERSPOON and MACK, W.S.—A. P. HENDERSON.—Agents.

* "NOTE.—The advocator, Mack, depones, that the rent was reduced on the condition that Dumbreck should carry on business till the end of his lease, that is, till Whitsunday, 1836; but he admits in his petition to the Sheriff, in his replies, and in his condescendence, that he bargained only that the inn should be kept open till Whitsunday, 1833. It is clear that he was not entitled to retract his admission on the record by his oath on a reference. It does not clearly appear whether there was not an interruption of business, for two or three days, between the sale of Dumbreck's furniture and Nokes's entry; but, though the interruption was proved, considering that the sequestration was laid on for a greater sum than was due under the restricted agreement, that there was an express consent to the sublease to Nokes, and that no notice was given that the advocates were to recur to the original rent, this short interval cannot, in equity, be held as a ground on which the sequestrated estate should forfeit the benefit of the condition."

MAGISTRATES and TOWN-COUNCIL of WIGTON, Pursuers.—*Keay—
Marshall.*

No. 110.

ALBERT M'CLYMONT and ALEXANDER GLOVER, Defenders.—
D. F. Hope—Pyper.

Jan. 15, 1834.
Magistrates of
Wigton v.
M'Clymont.

etude—Burgh—King.—An ancient Royal grant to a burgh effectual, as ex-
by use, to entitle the Magistrates to levy customs beyond the territory of the

charter of David II., dated at Ayr, 9th November, 1343, erecting Jan. 15, 1834.
rldom of Wigton in favour of Sir Malcolm Fleming, the King 2d Division.
d to him “omnes terras nostras de Farynes et del Rynnes, et to- Ld. Medwyn.
urgum nostrum de Wigtoun, cum omnimodis pertinentiis suis, ac T.
terras nostras totius vicecomitatus de Wigtoun, per metas et
suas subscriptas, a capite, videlicet, aquæ de Creech, et sic se-
illam aquam quousque perueniatur ad mare vbi aqua de Creech
in mare: et sic per mare vsque Molerennysnage: et de Moleren-
ge, per mare vsque ad antiquas metas comitatus de Carrik: et sic
idem metas de Carrik, quousque perueniatur ad prædictum caput
le Creech.” The charter contained this clause, “Volumus et con-
is pro nobis, et heredibus nostris, quod burgenses sui de Wig-
easdem libertates in omnibus habeant, quas iuste habuerunt tem-
s prædecessorum nostrorum regum Scotiæ: Et cum dictus locus
igtoun, pro principali manerio totius vicecomitatus de Wigtoun
atur.”

371, Thomas, second Earl of Wigton, sold the earldom, with all its
ges, to Archibald, Lord of Galloway, and it remained in the family
uglas till 1455, when, with their other possessions, it was forfeited

Crown. Two years thereafter, (1457,) James I. granted to the
a charter, which is the earliest in date now possessed by them,
or grants being no longer extant. By this charter, his Majesty
ned “omnes et singulas donationes et concessionones per nostros
essores temporibus retroactis fact. et concess. burgensibus, et com-
ti burgi nostri de Wigtoune tam de terris suis de Borrowmers,”
quam de aliis concessionibus donationibus libertatibus privilegijs
icuis per nostros prædecessores dicto burgo hactenus fact. et con-
enend. et habend. prædictas terras ac acres terrarum nec non mo-
am et piscationes præfat. una cum minutis custumis firmis burgali-
nofero et cruce ac cum omnibus alijs proficuis et privilegijs dicto
spectantibus præfatis burgensibus et communitate et eorum succes-
burgensibus ejusdem burgi de Wigtowne de nobis hæredibus et
oribus nostris in feodo et hæreditate in perpetuum per omnes rectas
suas antiquas et divisas prout dictæ terræ jacent. in longitudine et

No. 110. latitudine una cum potestate vendendi et emendi mercanticiis et alia bona ad burgenses burghi nostri spectan. ac cum omnibus alijs et singulis libertatibus priviledgiis commoditatibus et asiamentis ac justis pertinentijs quibuscunq. tam non nominatis quam nominatis ad burgum nostrum spectantibus seu quovis modo juste spectare valentibus in futurum et adeo libere quiete plenarie integre honorifice bene et in pace in omnibus et per omnia sicut dictus burgus per nos prædecessores temporibus retro actis liberius infeodatus fuerit. Volumus insuper quod dicti burgenses et communitas et eorum successores dicti burghi, burgensis habeant teneant et possideant perpetuis futuris temporibus omnes et singulas suas limites et bondas a le mydstreme aquæ de Cree usque ad mare de Ireland nostram de Wigtown et secundum eorum antiquam infeodationem spectan. prout hactenus eisdem et bondis usi et gavis quacunq. reddendo inde annuatim dicti burgenses et communitas et eorum successores dicti burghi de alia servitia antiquitus de dicto burgo."

By act of Parliament passed on the 3d April, 1661, these were ratified and confirmed "to and in favors of the provost, baillies, councill, and community of y^e burgh of Wigtown, and to their succ'ers for ever, all and sundry charters, gifts, acts, ratifications, and others granted to the said burgh of Wigtoun, and to the inhabitants and Magistrates thereof, be any of his Majesty's Most Noble Progenitors, of all and sundry their lands, tenements, milns, possessions, petty customs, deanry, and others belonging to y^e common good of y^e said burgh, and of y^e ancient libertys, freedoms, and immunities of the same, and yearly and weekly mercats of the s^d burgh, within the haill bounds of y^r libertys, in all the heads, tenors, contents, clauses, circumstances, and conditions of the same, after y^e forms and tenors thereof, in all points; and more especially, but pre-judice to the generality fors^d, our Sovereign Lord, w^t advice and consent foresaid, ratifies, approves, and confirms for ever, the weekly Thursday mercat of the s^d burgh, from the first of May to the twenty-fifth of December yearly, for selling and buying all sorts of nolt, sheep, wool, butter, cheese, and other the country commodities, wⁱⁿ the bounds of their libertys; and likewise, the weekly Munday mercat of the said burgh, for buying and selling all sorts of victual, such as meall, bear, malt, oats, wheat, rye, beans, and peas, as well growing and to be sold, as imported for sale, within the bounds of their libertys; and his Majesty, w^t advice and consent foresaid, ratifies, gives, and confirms to the said burgh, for ever, for the use of the common good thereof, the whole usual customs of the said weekly mercats, accrescing and arising, or that shall happen to accresce thereby, according to use and wont."

Finally, by Royal charter, dated 25th May, 1661, King Charles II. confirmed "omnes et singulas cartas donationis, acta ratificationis aliorum predicto nostro burgo de Wigtown ac Magistratibus et incolis ejusdem per quosvis nostrorum preclarissimorum progenitorum concessas

Jan. 15, 1834.
Magistrates of
Wigton v.
M'Clymont.

... tates quas nunc possident vel quovis tempore preterito possede-
nd specially and without prejudice to the foresaid generalty,
, " usitatam custumam duorum solidorum monetæ dicti Regni
iæ pro unoquoq. bove seu vacca aliave ejusdem generis bellua,
rtates dicti nostri burgi empta et extra easdem exportata, seu in
lem vendita, cum custuma duodecim denariorum monetæ ante-
o omnibus extraneis bestiis infra dictum nostrum burgum vel
ejusdem importat. vel per easdem transien. et similiter annuas
nadarias nundinas et foro dicti n'ri burgi."

ing on these charters, as explained by alleged immemorial use,
istrates and Council of Wigton maintained a right to levy cer-
and duties for all cattle crossing the Water of Cree out of or
district between it and the sea of Ireland, including the whole
the county of Wigton. This being resisted by the defenders,
ont and Glover, cattle-dealers, the Magistrates and Council
action of declarator, concluding (as afterwards restricted) to
ound and declared that they had right to levy certain specified
ustoms " upon cattle, sheep, swine, and wool, in so far as im-
ito, carried through, or exported from the district between the
Cree and the sea of Ireland, by the water of Cree, or across
water of Cree at any part of its course where it bounds the
f Wigton ;" and to have it farther found and declared, that they
itled to enforce payment of these dues by detention, seizure,
of the cattle for which they were payable.

efenders maintained, in defence—

at the grant to a burgh of a power to levy customs or dues be

No. 110. burghs to which similar grants were given, as Inverkeithing, Dumfries, Dundee, St Andrews, and Irvine.* And,
 Jan. 15, 1834.
 Magistrates of
 Wigton v.
 M'Clymont.

2. There can be no doubt on the construction of the charters, that the bounds and liberties there mentioned include the whole district of the county of Wigton between the water of Cree and the Irish sea; and the true extent and nature of the right given may validly be explained by immemorial usage, which the Magistrates are willing to instruct.

The Lord Ordinary pronounced this interlocutor:—"Finds that the Crown-charter, 1457, together with the ratification in Parliament, and charter of confirmation and novodamus, both in the year 1661, afford a sufficient title, when explained, and supported by a proof of immemorial possession, for insisting in this process of declarator, of the right to levy the customs or duties claimed."

The defenders having reclaimed, the Court ordered Cases, and thereafter a hearing in presence; and, finally, minutes and answers, as to analogous grants to other burghs.

LORD JUSTICE-CLERK.—I have no doubt that the bounds mentioned are to the sea of Ireland, across the country. The words are of great latitude; and if the charter, with the ratifications, require explanation, how can it be given otherwise than by proof of usage? By adhering to this interlocutor, we do not decide that these customs are to be exacted, but only that there is a title as to them, if usage be made out. There has been a great deal of argument, that the burgh can have no right beyond its own territory. Now I am satisfied there is no principle for such a doctrine; in practice, many burghs have grants with privileges in districts beyond their bounds; and there is nothing anomalous in a right being granted to levy tolls extra territorium of the burgh. Then is such toll illegal, so that, even admitting that it was granted, it cannot be enforced as being against constitutional law? I see nothing sound in that general objection, and particularly in the peculiar circumstances of this burgh. I am therefore for adhering.

LORD GLENLEE.—I am entirely of that opinion.

LORD MEADOWBANK.—I concur.

THE COURT accordingly adhered, with expenses since the date of the Lord Ordinary's interlocutor.

D. GRANT—TOD and ROMANES, W.S.—Agents.

* A right very similar to that in dispute is contained in the charters of the burgh of Dumbarton, and is still exercised by the Magistrates, of levying a custom on all cattle crossing the river Leven, from its source to its mouth.

been sequestrated, they offered a composition to the creditors. It was entertained by the first meeting called to receive it, and a meeting was ordered to be called, in terms of the statute. Intimation of this was sent to each creditor, through the Post-office, fourteen days before the meeting was to be held, but the advertisement in the Gazette was, by an oversight at the office, only inserted four days prior to the meeting.

The meeting having accepted the offer, and nine-tenths of the creditors in value, including all whose claims were of £20, and upwards, concurred, Johnstone and Company presented a petition to the Court for approval and discharge.

There was no opposition, but the clerk pointed out to the Court that the advertisement had not been fourteen days prior to the second meeting. It had been held a fatal objection in the cases of M'Donald (III. 113), and Sellar (ante, VIII. 145).

—In the prior case of Reid (ante, II. 278), it was decided that, if the creditors were put into the Post-office fourteen days before, it was not a fatal objection, that the advertisement in the Gazette was within that time. That special point seems not to have been brought under consideration of the Court in the more recent cases.

—Under the statute, fourteen days' intimation in the Gazette is positively required, and it is impossible to dispense with it.

Petition refused.

BOWIE and CAMPBELL, W.S., Agents.

MARIA NISBETT and HUSBAND, Claimants.—*Rutherford*—
A. Wood.

IN NISBETT'S TRUSTEES. Objectors.—*Lord-Adv. Jeffrey—Keay*

—
2^D DIVISION.
T.

No. 112.

No. 112. there as an American citizen after the declaration of independence. In 1797, being a minor, she married the late Sir John Nisbett of Dean, proprietor of a plantation in South Carolina, and of the estate of Dean in Scotland, and shortly afterwards came with him to Great Britain. In 1820, Sir John and Lady Nisbett entered into an indenture of separation, consequent upon which Lady Nisbett returned to America, where she resided for several years. In 1827, Sir John died, leaving a trust-deed of settlement, whereby he conveyed all his property, including his estate of Dean, (his American plantation having been disposed of by him before his death,) to trustees, for certain purposes therein mentioned. In a multiplepinding raised by the trustees for determination of the claims against the trust-estate, Lady Nisbett (with concurrence of a second husband, whom she had married in this country) put in a claim for terce out of the estate of Dean. This claim was resisted by the trustees on various grounds, including, inter alia, the objection, that Lady Nisbett having been born in America subsequent to the declaration of independence in 1776, was an alien, and as such, excluded from any right of terce.

Jan. 16, 1834.
Nisbett v.
Nisbett's
Trustees.

On this point, it was maintained for the trustees, that by throwing off their allegiance in 1776, the colonists in America forfeited their privileges as British subjects from the date of the declaration of independence, the more especially, as the treaty with Britain in 1783 contained a recognition of the independence, and not a grant or concession of it as from the date of the treaty, so that Lady Nisbett, being born in America after the declaration, and being the child of a party who acquiesced therein, and made his election of adherence to the new States, could not be deemed a subject of the King of Great Britain,¹ and that on the same principle on which, in America, natives of Britain, born after the declaration, but prior to the treaty, were deemed aliens there,² natives of America, born during the same period, ought to be deemed aliens here.

Lady Nisbett, besides maintaining that alienage was not in Scotland a bar to the claim of terce, contended—

The subject of a state cannot throw off his allegiance of his own will, without the concurrence of the state; and, on the other hand, a party born in the allegiance of a state, cannot lose his civil rights as a subject thereof, by the after cession or loss of the country in which he was born.³ The declaration of independence by the American colonists therefore, in 1776, could have no effect as in a question under the laws of this country, until that independence was recognised by treaty in 1783. Till then, all the colonists were, by the law of this country, subject to the allegiance of the Crown of Britain, and entitled to all the privileges of British sub-

¹ Doe v. Acklam, (2 Barn. & Cr., 779).

² See cases cited below, note 3, next page.

³ 7 Coke, 18, A—20, B; Blacket. 3. 2. 9; Fost. Cr. L. 59; Dyer, 220, 223; Calvin's case, (Vaugh. 279).

which they could not be deprived without their own consent; and No. 112. present case, even if an election to adhere to the new States would constituted the party so electing an alien, Lady Nisbett had adhered Jan. 16, 1834. Nisbett v. Nisbett's Trustees. allegiance to the Crown of Britain, by marrying a native-born sub- reof. The principle of the rule, that parties born in America be- the declaration and the treaty, are entitled to the privileges of British , has been recognised in England,¹ and there was an express de- to that effect in Scotland, by Lord Monboddo as Ordinary, in the Stewart v. Hoome;² while the judgments in America as to parties Britain during the same period claiming rights in America,³ on this distinguishing principle, that, antecedent to the declara- independence, there was no allegiance due by Britons but to the Crown of Britain, so that none could have rights under the new State, those residing in the colonies, and concurring in the establishment new government, while, as to Americans born, there was a pre- subsisting allegiance to Great Britain, the consequences of which ed, till, by the act of the Crown of Great Britain in 1783, the con- was severed.

Lord Ordinary having reported the cause on Cases, the Court, without any opinion as to the effect of Lady Nisbett having married a Bri- ject, were clear, on the general grounds pleaded, that a party born rica prior to the treaty of 1783, was to be deemed a natural-born of the Crown of Britain; and while they ordered new Cases for sions of the whole Judges on the other points of the cause, with e to this objection they pronounced as follows, being in terms of elocutor in the case of Stewart v. Hoome—"Repel the objection age to the claim of terce on the part of Lady Nisbett, founded on ing been born in South Carolina, in respect that at the time of 1, the North American colonies still remained within the dominion 'rown of Great Britain."

J. RENTON, W.S.—SCOTT and BALDERSTON, W.S.—Agents.

uty v. Mulcaster (8 Dowling, 593); Doe v. Acklam (Ibid.).
17, 1792 (4649).

v. Harrison (2 Johnson's Cases,* 32); Dawson's Lessee v. Godfrey
i's Rep.* 322); M'Ilvaine v. Cox's Lessee (Ibid. 209).

* These are American Reports.

No. 113. JAMES STIRLING STIRLING and Curator ad Litem, Pursuers.—

D. F. Hope—White.

an. 16, 1834.

Stirling v.
Stirling.

WILLIAM STUART CRAWFORD STIRLING, and Tutor-at-Law, Defenders.

—*Rutherford—Dundas.*

Entail.—A party entailed his estate A on a certain series of heirs, declaring that if any of them should come at any time to succeed to another estate, B, they should lose all right of succession to the lands A, which should fall to the next heir, as if the person so succeeding were dead; and an heir having first succeeded to B, and the succession to A having thereafter opened to him—held, that the prohibition was effectual to prevent his holding both estates, but that he was entitled to his election, which he should take.

an. 16, 1834.

3^d DIVISION.
d. Mackenzie.

IN 1706, John Crawford of Milton, who had a family consisting of daughters only, of whom the eldest had married Sir William Stuart of Castlemilk, executed a strict entail of his estate of Milton, the destination of which was in these terms:—"To me and the heirs-male of my body; whilks failing, to the second son to be procreate betwixt Sir William Stuart of Castlemilk, Knight, Baronet, and Dame Margaret Crawford, his spouse, my eldest daughter, and the heirs of his body; whilks failing, to their third son, and the heirs of his body, and so successivé to their haill younger sons to be procreate betwixt them, (secluding always the eldest son being heir,) and their descendants; whilks failing, to the eldest daughter to be procreate betwixt them and the heirs of her body; whilks failing, to their second daughter, and the heirs of her body, and so successivé to their haill daughters and the descendants of their bodies without division; whilks failing, to the second son to be procreate of their eldest son, and the heirs of his body; whilks failing, to his third son, and the heirs of his body, and so successivé to his haill younger sons and their descendants, (secluding always the eldest;) whilks failing, to the eldest daughter to be procreate of their said eldest son, and the heirs of her body; whilks failing, to his second daughter, and the heirs of her body, and so successivé to his haill daughters and their descendants without division; whilks failing, to the said Dame Margaret Crawford, and the heirs to be procreate of her body of any other or subsequent marriage; whilks failing, to Agnes Crawford, my second daughter, and the heirs of her body; whilks failing, to the second son to be procreate of the body of the said Sir William of any other subsequent marriage, and the heirs of his body; whilks failing, to his third son, so to be procreated be him as said is, and the heirs of his body, and so successivé to his haill younger sons so to be procreate be him of any other or subsequent marriage and their descendants, (secluding always his eldest son;) whilks failing, to his eldest daughter," &c.

ereupon, ipso facto, amit, lose, and tyne their right, title, and suc-
above-specified, to my saids lands and others foresaid, without any
tor, or other action, or sentence of law whatsoever, to follow
son, and the samyne lands and others foresaid shall, in the case
l, ipso facto, fall, accresce, appertain, and be transmitted to the
ir of tailzie in being for the time, who would succeed thereto, if
son so succeeding to the saids estate of Castlemilk were naturally
and if the person so succeeding to the foresaid estate of Castlemilk
he time actually infest in the lands and others foresaid, now be-
; to me, or have the right thereof some other way established in
er person, then, and in that case, the foresaid person, male or
by their acceptation hereof, shall be bound and obliged to dispone
ke over my saids lands and estate to and in favours of the next heir
ie thereof, and to denude themselves of the samyne in their favours
ngly, omni habili modo quo de jure, which, if they refoose to do,
case it shall be leisum and lawful to the foresaid heir of tailzie to
h the right of my said estate in his or her person, by any manner
or action whatsoever, consisting with the laws of this kingdom,
ffect they may be in a case to use all manner of action and execu-
npotent to them in law for causing, forcing, and compelling the
l heir of the said estate of Castlemilk to denude themselves, as
d, of my said lands and estate."

entailer was succeeded in this estate of Milton by John, Sir
n Stuart's second son, who made up titles under the entail, and
ed in possession till the death of his elder brother, Sir Archibald
of Castlemilk, without issue male, whereby the succession to the

No. 113. who, in 1793, executed an entail of Castlemilk, calling to the succession, failing heirs of his body, his wife, Lady Stuart (who was the daughter of his uncle, Sir Archibald) ; whom failing, his youngest sister, the late Mrs Stirling of Keir, and the heirs of her body, with a liferent in favour of the eldest sister, Mrs Rae Crawford, should she survive him and Lady Stuart. Sir John predeceased his lady, who accordingly took up the estate of Castlemilk, and, on her death in 1829, the fee descended to the late Captain Stirling, only child of Mrs Stirling, who had predeceased, while Mrs Rae Crawford became entitled to the liferent, and entered to possession. Captain Stirling died in 1825, leaving two sons, William, the eldest, and James, both in pupillarity. On this event, the fee of Castlemilk opened to William, but no titles were made up for him ; and, in 1827, the death of Mrs Rae Crawford disburdened Castlemilk of the liferent, and opened up the succession of Milton, which had now become greatly the more valuable estate of the two. To have the questions arising under the destination in the entail of Milton determined, the tutors instituted an action of declarator at the instance of James, the younger son, concluding to have it found and declared, 1. That his elder brother having succeeded to Castlemilk prior to the Milton succession opening, became thereby precluded from succeeding to Milton ; or, 2. That, at all events, he could not hold both.

Jan. 16, 1834.
Stirling v.
Stirling.

In support of these conclusions, it was pleaded—

1. The entail of Milton specially provides, that if any of the heirs of tailzie, called to the succession thereof, should “come at any time hereafter to succeed to the estate of Castlemilk,” the person “so succeeding” should “thereupon ipso facto amit, lose, and tyne their right, title, and succession above specified, to my said lands and others foresaid, without any declarator,” &c. By virtue of this provision, the mere succeeding to Castlemilk is an ipso facto amission of the right of succession to Milton, the destination in that case being altered so as to carry Milton to the heir next in order.

2. At all events, it is clear that the elder brother cannot hold both Milton and Castlemilk. In several cases of this description, and in particular that of Bruce Henderson,¹ which is identical with the present, it has been decided, that, in questions inter heredes as to matters of succession, the same strict rules are not to be applied as in construing fetters against third parties, but that the clear intention of the entailer is to regulate ; and, consequently, that although the words in a clause of devolution, such as occurs here, might seem in strictness to apply to the case of an heir having first succeeded to the estate of the entailer, and thereafter succeeding to the other estate prohibited, yet that the intent applied equally to the case of the succession to the prohibited estate having

¹ January 20, 1790 (15489) ; Aff. May 11, 1791.

and that the case of Bruce Henderson necessarily ruled the present case adhered to, but submitted whether the point did not deserve reconsideration; and as to the first, he pleaded that the defender was clearly the destination, and that the object of the clause of devolution being to prevent the two estates from being held together, there was nothing to prevent his making his election, and by renouncing the succession to Castlemilk, to which he had not made up titles, retaining his place and the heir of Milton.

Lord Ordinary reported the cause on Cases, adding the subjoined

D JUSTICE-CLERK.—I have no difficulty. If we were to listen to the doctrine that we are to apply here the strict rules as to the fetters of entails, as in questions affecting third parties, it would be a departure from the tenor of former deci-

The Lord Ordinary has no doubt that the defender is called in the destination to Milton, and that the case depends on the clause of devolution. He has no doubt that the devolution is operative, although the heir of Milton be not infeft or therein; his investment being specially provided for as a part only of the estate to which there is to be devolution. Nor has the Lord Ordinary any doubt, on a fair construction of the clause, it appears with reasonable certainty, from the words of it, that the entailer forgot, and did not contemplate at all, the case of the defender succeeding to Castlemilk before he succeeded to Milton, and consequently did not provide only for the case of an heir having previously succeeded to Milton and after that succeeding to Castlemilk. And it seems scarcely to be disputable that in this case the defender, in point of fact, did succeed to Castlemilk and did not even succeed to the two estates at the same time, (which last is a third case, not argued). But what the Lord Ordinary doubts, is chiefly

No. 113. sions. The point is thoroughly illustrated in the case of Earlsall (Bruce Henderson); and we have only to consider what was the intention of the entailor. The judgment in that case was affirmed on appeal. It is identical with the present, and we are bound to decide in the same way, as it is unequivocally made out to have been the intention of the entailor that the estate of Milton should never be held along with that of Castlemilk. This devolving clause must have full effect, and the eldest brother cannot hold both. As to the question of election, I have formed an opinion on that point also; but it is enough at present to say, that he cannot hold both.

no. 17, 1834.
amsay v.
airne.

LORD GLENLEE.—I am entirely of the same opinion. The clause of devolution is quite explicit, that if the heir shall succeed to Castlemilk at any time—it does not say before or after, but at any time—the destination is to be altered, and the right diverted before it opened to him. The other stipulation as to denuding, is provided for the different case of his being infest. I agree with the Lord Ordinary, that if tempestivè the defender gave up Castlemilk, he might have his election; but here he has been in possession for years, and I would just find that Milton does not belong to him.

LORD MEADOWBANK.—I agree on the first point; and as to the other, I think it equally clear that the defender is entitled to election, but he must first renounce Castlemilk.

LORD JUSTICE-CLERK.—I am also satisfied he has his election; but he must renounce absolutely Castlemilk, in order to take Milton.

THE COURT accordingly “find that the defender William Stuart Crawford Stirling, is not entitled to hold both of the estates of Milton and Castlemilk; that the clause of devolution in the entail of Milton applies to the defender, as having succeeded to the estate of Castlemilk, but that he is notwithstanding entitled to make his election of, and to hold either of, the said estates, upon condition of his renouncing all right of succession to the other, in favour of the pursuer, as the next substitute-heir of entail; and further find that the said defender, and his tutors and curators, are now bound to make such election, and execute such renunciation and other conveyance, if any, as may be requisite to give effect thereto accordingly, and with these findings, remit to the Lord Ordinary to do farther in the cause as to him shall seem just.”

AUGUSTUS MAITLAND, W.S.—JNO. DUNDAS, W.S.—Agents.



No. 114. LADY RAMSAY, Pursuer.—*D. F. Hope—Shene—Buchanan.*
JAMES NAIRNE, Defender.—*Sol.-Gen. Cockburn—Keay—Marshall.*

no. 17, 1834. *Expenses—Jury Trial.*—Sequel of the case reported ante, XI. p. 1033, which see. Each party now moved for expenses against the other. By the agreement of parties, the motions were submitted to the private determination of the Lord President, who was the only Judge who had been present at the trial.

17 DIVISION.

H. MACQUEEN, W.S.—W. COOK, W.S.—Agents.

JURL of this case mentioned ante, VII. 499, X. 534, and XI. 778. Jan. 17, 1834.

ursuers, Anderson, Child, and Child, had, in the years 1805 and used arrestments of a vessel named the Union, and of the freights of her vessel called the Diana, on the dependence of an action against Wood, the owner. The defenders, Pott and M'Millan, became pursuers in a losing, and the pursuers having obtained decree against them, brought a forthcoming against the defenders as to the value of the Union and the freights of the Diana. At an early stage of the proceedings, the Lord Ordinary granted interim decree for £500, which was paid by the defenders accordingly. Thereafter, a judicial reference to the members of Lloyd's was entered into, respecting the amount of the claim, and the following award was pronounced:—"In pursuance of the authority herein contained and given to us, we," &c., "do determine and award that the within-named Messrs Pott and M'Millan are liable to pay to the pursuers, for Abiel Wood's part or share of the freight of the ship Diana aforesaid, the sum of £342, 18s. 1½d., say three hundred and forty-two pounds eighteen shillings and three half-pence, more.

2D DIVISION.

Ld. Mackenzie.

F.

and we farther determine and award, that the within-named vessel, was, at the time of the arrest, of the value of £395, say three hundred and ninety-five pounds, and no more. All which we hereby award to the Lord Ordinary, as required of us."

When this award came to be applied, the pursuers contended that the sums mentioned were to be paid to them over and above the £500 paid under the interim-decree, and that interest on the sums

No. 115. intention, with regard to interest on the capital sums which the
to be due."

Jan. 17, 1834.
Anderson v.
Pott.

The pursuers thereupon reclaimed, and contended, first, that really was no ambiguity in the award; and, second, that it was intent to require referees, who had pronounced their award, to be by any further deliverance. The Court declined entering into the question, but recalled the Lord Ordinary's interlocutor, and, "in there is no ambiguity in the award," remitted to his Lordship the same.¹ The Lord Ordinary on this pronounced the following locutor:—"The Lord Ordinary interpones his authority to the of the judicial referees and oversmen; finds, in terms of the said that the defenders are liable to account for and pay to the pursuers Abiel Wood's part of the freight of the ship *Diana*, the sum of 18s. 1½d. sterling; and, farther, that the vessel *Union* was, at the of the arrest, of the value of £395 sterling: therefore decerns against said defenders for payment to the pursuers of the said sum of £3 1½d. sterling, together with the interest thereon, at the rate of 5 per cent per annum, from the 1st day of June, 1805, till paid: decerns also the said defenders for payment to the pursuers of the sum of £3 ling, together with the interest thereon, at the rate of 5 per cent annum, from the 7th day of April, 1807, till paid: finds the pursuers entitled to the expenses incurred by them, with the exception of expenses incurred in the reference."

The defenders reclaimed. The Court, after hearing parties satisfied that the referees meant to award the sums mentioned, not above the £500, but being equally divided as to the matter of the ordered minutes of debate. On advising these, their Lordships remained equally divided as to the meaning of the award on this point, the cause accordingly stood over for some time. The parties, however, at last agreed that a remit should be made to referees, to require explanation; and the Court accordingly (June 22, 1833, ante, XI.) remitted to them, to explain whether they had, in their award, dismissed the claims of interest, no judgment being in the meantime pronounced by the Court in regard to the £500, as to which they were of opinion that the sums in the award were to be paid over and above that point. An explanation was thereafter returned by the referees, from which appeared that they had merely determined the value of the vessel's freight as at the date of loosing the arrestment, for which the defenders were to account, and, consequently, had not disposed of the claim of interest, nor taken into view the partial payment of £500.

LORD JUSTICE-CLERK.—I do not consider this a new reference, but a continuation of a special point, on which we asked it. The referees say they

¹ Ante, X. 534.

into consideration the matter of interest at all. Then, it comes to us whether No. 115.
 reviewing the interlocutor of the Lord Ordinary giving interest, we are to ad-
 The Court kept the point of the £500 interim payment open, and I am Jan. 17, 1834.
 Anderson v.
 Pott.

I think we must give interest, though not 5 per cent, but bank interest.

LORD GLENLEE.—We luckily said nothing in our interlocutor about the £500,
 which must be deducted; and as to interest there may be some difficulty. I do
 say that if a defender in a forthcoming admits a claim of interest, we are to go
 upon it. But there appears room for a distinction as to this matter between
 freights and the value of the vessel. On the freights somebody must have got
 benefit of the interest which has accrued. It affords a natural foundation for
 claim of interest, and the pursuer should get it. But as to the value of the ves-
 sel there was no stock to yield interest, and we cannot say that there was any
 to settle, as it was never till now determined what was to be paid, and there-
 fore I doubt allowing interest on that.

LORD MEADOWBANK.—The referees simply pointed out what was the value to
 be paid at the date of the arrestment, and so could not have taken into view inte-
 rest subsequent to that date. Thus, the matter being open, is interest due? I do
 think there is any room to distinguish between the freights and the value of the
 vessel, as the vessel was given up; but I agree that it only can be bank interest.

Greenshields.—If the interest is to be limited to bank interest, it should be ac-
 cumulated as it would have been with a bank.

LORD MEADOWBANK.—I am against accumulation.

The other Judges concurring in this,—

THE COURT pronounced this interlocutor:—"Find the defenders liable to
 account to the pursuers for the sums of £342, 18s. 1½d., and £395, with
 bank interest thereon from the dates of the respective arrestments, at the
 various rates allowed by the Royal Bank of Scotland at Glasgow, deduct-
 ing £500, paid to account on the day of : Recal-
 the interlocutor of the Lord Ordinary of 24th May, 1832; and to this effect
 decern, and remit to his Lordship to hear parties farther as to expenses of
 process, and determine thereon as to his Lordship shall seem just."

No. 116.

UNION CANAL COMPANY, Pursuers.—*Whigham.*GEORGE JOHNSTON, Defender.—*Forsyth.*

Jan. 17, 1834.
Union Canal
Company v.
Johnston.

Relief—Proof.—A passenger on board a canal passage-boat having been injured by a blow from a crane in another boat swinging round, brought an action of damages against the owners of both boats, conjunctly and severally, who, as the case was about to go to trial, entered into a minute with her, whereby they agreed to pay her a certain sum of damages, reserving all questions of relief as between each other. The defenders had previously raised mutual actions of relief against each other, founded on counter-allegations of fault and negligence, but on a trial a verdict was returned, finding that the injury was not occasioned by the negligence or fault of either of the one party or the other. The owner of the passage-boat having paid the damages—Held, in a subsequent action at his instance, founded on the minute of agreement with the original pursuer, that the owner of the passage-boat was entitled to relief from the other to the extent of one-half, and that the latter could not prove by parole an agreement as between them at settling with the pursuer, that the owner of the passage-boat was only to obtain relief in the event of his establishing fault or negligence on his part. But Observed, that this would have been the rule of law had there been no agreement.

Jan. 17, 1834.

2^d Division.
Ld. Medwyn.
R.

ONE May Rogers, a passenger on board a passage-boat belonging to the pursuers, the Union Canal Company, having been injured by the swinging round of a crane fixed in a boat belonging to the defender Johnston, which was lying alongside the bank of the canal, and was struck by the passage-boat as she passed, raised an action of damages against the Company and Johnston, conjunctly and severally. Pending this action, these parties raised mutual actions of relief, founded respectively on allegations of negligence and fault against each other. When the trial in the action at the instance of May Rogers came on, it was settled by minute of agreement in these terms:—"We, the counsel for the parties in the action at the instance of May Rogers against the Union Canal Company, and George Johnston, tacksman of Redhall Quarry agree to settle the case upon the following conditions: First, The defenders shall make payment to the pursuer of £200, in name of damages and for all other claims on the part of the said May Rogers against the said defenders: Second, That the said defenders shall pay to the said May Rogers the expenses of the action, taxed as between party and party by the auditor of Court: And Third, That all questions of relief between the defenders shall be reserved entire."

In terms of this minute, May Rogers obtained decree against the Company and Johnston, conjunctly and severally, and having extracted it, she charged them thereon. Upon this some correspondence took place between the agents of the present parties, in which it was admitted by the agent for the Canal Company, that it had been agreed or understood that they were to pay the sum decreed for in the meantime, and they accor-

did so, taking from May Rogers an assignation to the decree. They No. 116.
 t, however, attempt to operate on this assignation, but proceeded
 he mutual actions of relief, in which, on a trial before a jury, a ver-
 as returned, finding that the injury sustained by May Rogers had
 en occasioned by the fault, negligence, or want of skill, either of the
 rty or the other. When this verdict came to be applied, the com-
 ontended that they were entitled to relief from Johnston, of the
 hey had paid, to the extent of one-half.

Jan. 17, 1834.
 Union Canal
 Company v.
 Johnston.

Lord Ordinary having given effect to this plea, and decerned
 Johnston accordingly, he reclaimed, and the Court considering
 der the action of relief at the instance of the Company, which was
 d exclusively on the allegation of Johnston's fault and negligence,
 ould not get decree in respect of a verdict negating the ground of
 sisted procedure till a new summons should be raised (ante, XI.

A new summons was accordingly raised by the Company, setting
 he circumstances—the actions—the agreement, and their having
 e full sum awarded, and concluding for repetition thereof to the
 of one-half.

efence, it was alleged by Johnston, that the understanding of par-
 the agreement was, that the Company should pay May Rogers,
 y on their action of relief for recovering from Johnston, and that
 only on that footing that he consented thereto. A record was ac-
 ly made up, embodying this averment, and being reported by the
 rdinary, Johnston contended that the reference in the minute to
 ms of relief must be construed as with reference to the depending
 , which were founded on alleged fault or negligence; and this, when
 l with the correspondence between the agents, showed that the
 ny were to pay the sums to be decerned for, relying merely on
 depending action of relief; but, at all events, if the terms of the
 (which was not intended to settle the questions as betwixt the
 parties themselves, but only as between them and May Rogers)
 ot considered explicit, that he was entitled to prove what was really
 erstanding and true agreement of the present parties as to their
 ive interests in entering into this minute. On the other hand, the
 ny maintained that the whole questions as betwixt the present par-

No. 116.

Jan. 17, 1834.
Union Canal
Company v.
Johnston.

the minute is general "of relief," in whatever manner founded, and not refer to the particular actions depending; and though the Company failed in their action on the ground of Johnston's blame, they are still entitled to raise another on ground, that they had jointly agreed to pay the damage to the original pursuer. be sure, if they had averred that the right of relief reserved was that under two actions only, there is no doubt it would be incompetent to go on the ground. But that is not the averment: The "questions of relief" mentioned in the minute are not said to be the particular pending actions, but any actions of relief, and therefore I rather think this action well founded. Apart from the agreement, however, the demand in law is not so clear as the Company seem to think. Johnston and Johnston are not on the same footing as to this woman. Johnston did not contract for her safe conveyance, and could only be liable to her in respect of his own fault, while the Company must have shown that it was by accident which the prudence could avoid, and unless they did so, they must have been liable. The defence, however, is not put on that ground, but only under the terms of the minute, and being so pleaded, I rather think the Company should succeed.

LORD MEADOWBANK.—I had great doubts on the ground stated by Lord Gleadow. The law being as his Lordship stated, and the agreement not being clear, is the question to exclude explanation? The minute was for the purpose of settling the question between May Rogers; and the only clause which refers to the defenders is the one reserving questions of relief. It is admitted that it is not perfectly clear; and how are we to give the minute an extended import to admit this action, and yet deny the necessity of proof? The action of relief properly is at an end; but a new action is obliged to be raised, not properly of relief, but for repayment, and we are obliged to extend the minute beyond its terms to admit this; and therefore, when not perfectly sufficient, and an offer is made to prove that the agreement had no reference to the particular matters which has arisen, I do not see the necessity of excluding the proof. Suppose the Canal Company had refused to advance the money in the first instance, which they admit it was part of the understanding that they should do, would Johnston have been allowed to prove that the Canal Company agreed so to pay the money in the first instance? I think they would, and also that the allegation made is so far relevant, as that the party should not be excluded.

LORD JUSTICE-CLERK.—I do not think we ought to allow the proof to be excluded. The parties settled matters by a solemn written minute. It is stated there that the defenders are to pay—not that the Company is to pay, and to rely on their proof. All questions of relief are reserved, and no doubt this had reference to the pending actions of relief. Now there was, it is true, a little higgling as to who was to pay in the first instance; but it makes no difference on the case, that, the decree being extracted, the Company paid in the meantime, taking an assignation to the debt, and, remembering that on the trial it was impossible to say there was culpability or want of culpability, established on the one side or the other, and that the parties found neither were to blame, I think the burden should be borne equally by both. We thought we could not give relief under the original summons; but now there is a new action, narrating the whole proceedings and agreement, and I am prepared to decide under it, correspondent to the former interlocutor of the Lord Ordinary, and I cannot allow a proof, in order to get over a written document which settles the matter, reserving relief in the actions depending. I would not allow no proof, but repel the defences, and discern.

Court accordingly repelled the defences, and decerned in terms of the No. 116.
 del, with expenses since the new summons was raised.

Jan. 18, 1834.
 Morison.

J. and L. DAVIDSON and SYME, W.S.—A. JOHNSTON, W.S.—Agents.

GEORGE MORISON, Petitioner.—*Baxter.*

No. 117.

Jurisdiction—Church.—Under deed, for erecting a church, granted to seven
 four being a quorum, it was provided that, when reduced to six, a seventh
 elected by the male church members, whom failing, by the remaining trustee
 four accepted, and when these were reduced to one, he applied to the
 iving to appoint a person to supply the place of the trustees or a quorum
 the Court remitted to the members who were males of the church, in
 the trust-deed, to elect new trustees, in order to fulfil the purposes of
 and to report the election to the Court.

th March, 1803, the late John Morison executed a feu disposi- Jan. 18, 1834.
 t piece of ground in Arbroath, in favour of George Morison, 1st Division.
 surer, Arbroath, and eleven other individuals, “and the survivor
 in trust, for the purposes, and under the conditions and declara-
 r mentioned, and to their successors in office to be elected from
 ime in manner hereinafter directed, and whose elections shall be
 ated by the sederunt or minute book after mentioned.” The
 of the trust were declared to be for keeping in repair a house
 cted on the ground, and to be employed for preaching the gos-
 rding to the Congregational or Independent Church, &c. The
 vided, that though twelve trustees were named, yet they should
 ed seven, after the original number should be reduced so far; that
 uld be a quorum from the first; “and that when the present
 of trustees shall have been reduced to six, by death or exclusion,
 election of another trustee shall be made by the church members
 men, to complete the permanent number of seven, that the trust
 cept up; and failing the church making such election within one
 ter the vacancy shall be intimated to them at a church meeting,
 required to make such election, then the election shall be made
 ther remaining trustees, or a majority of them, and so on during
 hereafter.” Various provisions were made as to the necessity
 trustee being a member of that church, or a similar church, and
 nce by which the fact should be ascertained; the trustees being,
 directed “to keep a sederunt-book, which shall be held pro-
 law with regard to the decease, exclusion, and election of trus-
 c.

th December, 1833, George Morison presented a petition, sta-
 t four of the twelve trustees had accepted and been infert, and
 was the sole survivor of these; that other four of the nominees
 ll alive, but two declined to act, and two had changed their
 tenets and were ineligible; that £700 had been expended in

No. 117. building a chapel, and the trust-estate was liable for about £400 of this sum, and that the members or managers of the church, having the sole beneficiary interest under the trust, were willing to take upon themselves the administration and management in any way which the Court should approve of. He therefore craved the Court "to appoint or provide for the appointment of some person or persons to supply the place of the trustees mentioned in the said deed, or a quorum thereof, and with such powers, and in such form, as to their Lordships may seem proper."

Jan. 18, 1834.
Ross v.
Webster.

LORD PRESIDENT.—The trust-deed gives no powers to the Court.

LORD GILLIES.—I do not think the Court has any power to appoint trustees.

LORD CRAIGIE expressed his concurrence.

LORD BALGRAY referred to an old precedent as countenancing the prayer of the petition.

THE COURT pronounced this interlocutor: "Remit to the members who are males of the Congregational or Independent Church of Arbroath, in terms of the trust-deed within mentioned, to elect new trustees in order to fulfil the purposes of the trust, and to report the election to the Court."

J. MORGAN, S.S.C.—Agent.

No. 118.

ROBERT ROSS, Suspender.—*Cunninghame*.

JAMES WEBSTER, Charger.—*D. F. Hope*.

Process—Lease—Stamp.—In an action of removing, founded on an unstamped missive, the tenant was ordered to find caution for violent profits, as a condition of giving in defences; he presented a bill of suspension, which the Lord Ordinary refused, but remitted to the Sheriff, of new, to ordain the tenant to find caution for violent profits, and if such caution be found, to receive defences; but the Court found the tenant entitled to expenses before the Sheriff and in this Court; and remitted to the Sheriff, with instructions to proceed according to the Act of Sederunt.

Jan. 18, 1834. SEQUEL of the case mentioned ante, p. 200, which see. Under the remit the suspender pleaded, 1. That as the lease on which the removing was founded was not produced along with the summons, the Sheriff should not have ordained the suspender to find caution for violent profits, as a condition of his defences being received; because it is required by c. 5, § 1, A.S. (Sheriff Court), that a party shall produce with his summons every writing founded on, if within his custody or his power. 2. That had the lease been produced, it was then unstamped, and could afford no ground of action, so that a process of removing could not have been founded on it, and the suspender was entitled to plead this defence appearing on the face of the lease, without being previously bound to find caution for the violent profits. The Lord Ordinary should therefore remit to the Sheriff to receive the suspender's defences, and to hear him.

1st Division.
Bill-Chamber.
Ld. Moncreiff.
B.

each part thereof as he could instantly verify: and as the suspender, a poor person in poor circumstances, had succeeded in the previous question of competency, and was also well founded on the merits of the suspension, he was allowed his expenses. No. 118.
Jan. 18, 1834.
Rosa v.
Webster.

The charger pleaded, 1. That as he had produced a copy of the lease with the summons, with a certificate from the Sheriff-clerk, that the lease had been previously produced, in a process of sequestration against the suspender, and that process was at avizandum when the summons came into Court, it was not in his power to have produced the lease with the summons, and, in the circumstances, a copy was sufficient. 2. That the want of a stamp could only have caused the lease to be sisted, until the lease should be stamped; and as the charger was bound to find caution for violent profits, "unless he invent a defence excluding the action,"¹ he must have been liable to find such caution, even had the principal lease been produced. 3. Although the suspension had been found competent, yet as its grounds were ill founded, there was no ground for awarding expenses, more especially as there had been no improper litigation on the part of the suspender.

Lord Ordinary, "in respect that the complainer alleges no title in question of the subjects in question, other than the lease as set forth in the libel, and does not deny that the charger is proprietor thereof; in respect of the certificate of the Sheriff-clerk produced, refused the bill, and remitted to the Sheriff, with instructions that he should ordain the complainer to find caution for violent profits, and if such caution be found, that he allow his defences to be received, and thereafter consider the merits of the same on their merits, according to justice; and that, if caution be found within such reasonable time as he may appoint, he should decern in the removing; and in respect of the expense incurred in bringing the question of the competency of the bill in which the complainer has prevailed, and, on the other hand, the nature and circumstances of the defender's objection to the order to find caution, found no ground due to either party, but prohibited the clerk from issuing a certificate of refusal till Friday."

The suspender reclaimed.

No. 118. a writ. The utmost he could do would have been simply to sist process. I would
 Jan. 18, 1834. incline to alter the interlocutor, and remit to the Sheriff to proceed according to
 Magistrates of the Act of Sederunt. I think the suspender ought to be allowed his expenses.
 Dundee v. The other Judges expressed their concurrence in holding the suspender entitled
 Kerr. to his expenses, and

THE COURT pronounced an interlocutor in the following terms:—"Reca
 the interlocutor of the Lord Ordinary; find the suspender entitled to the
 expense of the litigation before the Sheriff and in this Court; and remit to
 the Sheriff, with instructions to proceed in the cause according to the Act
 of Sederunt."

GREGG and MORRIS, W.S.—W. DOUGLAS, W.S.—Agents.

No. 119. MAGISTRATES OF DUNDEE, Advocators.—*Rutherford*.
 CHRISTOPHER KERR, Respondent.—*Shene*.

Expenses—Auditor.—Pending an advocation a declarator was brought by the
 advocator; and the respondent obtained a judgment in the advocation, with expenses;
 the auditor and Court disallowed a charge as in the advocation for a consultation
 with counsel as to the effect the declarator might have thereon.

Jan. 18, 1834. PENDING the advocation, mentioned ante, p. 173, the Magistrates of
 2d Division. Dundee raised a declarator of their right to regulate the occupation of
 the apartments in their town-house, in the manner proposed by them.
 On this a consultation of counsel was had on the part of Kerr, to consider
 whether the raising of the declarator should affect the conduct of the
 advocation; and on the advocation being dismissed with expenses, the
 charges for this consultation were included in the account given in for
 Kerr. The auditor having disallowed these charges, Kerr objected to
 his report, but the Court repelled the objection, reserving to him any
 claim for them in the declarator, and not allowing the Magistrates their
 expenses in appearing to oppose the objection.

BROWN and MILLER, W.S.—MACLACHLAN and IVORY, W.S.—Agents.

ice to an accountant, stipulating that the "losing party" should be ordered all costs; and the referee found, that out of a series of retail transactions, ding to upwards of £45,000, a few trifling errors had occurred, making a balance by the defender of £4, 3s, 11½d., but holding the pursuers to be the party, he ordered them to pay all expenses. Held, that this was consistent a terms of the reference, and the justice of the case.

the defender Hallam had acted as manager of an extensive establish- Jan. 18, 1834.
in Edinburgh, for the retail of tea, &c., belonging to the pursuers, 2D DIVISION.
and Company, merchants in London, for more than two years from R.
1827. During this period, the sales made by him amounted to
£12. In November, 1829, he was suddenly discharged, and there-
Gye and Company raised an action against him, concluding for
and reckoning, or on failure, for payment of £500. In the re-
statements were made as to certain specific quantities of stock,
as of money, alleged not to have been accounted for; and an issue
went to trial, whether Hallam was owing and addebted the sum
of £120. On the trial, Gye and Company led
evidence of their specific statements on the record, but adduced an
accountant, who deponed that he had gone through the books kept by
Hallam, and discovered certain other errors and omissions, amounting in
all to £84, 19s. 3d., for which sum the jury returned a verdict (see ante,
p. 2). This verdict was afterwards set aside, on the ground of sur-
rounding a new trial granted (see ante, X. 710). After the second trial
proceeded a certain length, it was agreed to withdraw a juror, and
the cause to an accountant, which was done by the following mi-
"The parties agree to withdraw a juror, and to refer the case to Mr

No. 120. times issued notes and additional notes and minutes, containing my view on the various points brought under discussion, and having also considered the various pleadings, statements, and explanations given in for the parties respectively, and in answer to each other in the course of the reference, with the relative documents—am of opinion that the defender is liable to the pursuers for certain immaterial errors or omissions in the books which were under his charge, and which he has failed to explain to my satisfaction, amounting, the said articles, to £4, 3s. 11½d. sterling on which sum I consider interest to be due since the 30th day of November, 1829 years. I think it fair to add, that keeping in view the extent and magnitude of the business under the defender's charge, the errors and omissions above alluded to are less in my opinion than might reasonably have been anticipated. And considering, on the whole matter, the pursuers to be the losing party, I order them to pay all the costs."

in. 18, 1834.
Gye and Co. v.
Hallam.

On a motion to have the authority of the Court interposed thereto, it was objected for Gye and Company, that the referee had gone beyond his powers as to the matter of expenses—that the minute expressly conditioned that the losing party should be ordered to pay the costs—that this left no discretion to the referee, who was bound to have awarded costs against the losing party—that Hallam was truly the losing party, being in the same situation as if a verdict had gone against him for the sum found due by the arbiter, which he had never tendered; and that instead of obtaining costs, he should be subjected therein.

LORD JUSTICE-CLERK.—I am entirely of the opinion of the referee. The justice of the case is entirely with the defender. Even after all the sifting, this petty sum of omissions, not in the issues, is all that is found due.

LORD GLENLEE.—I am entirely of the same opinion. Even if ultra vires of the referee to determine which was the losing party, we would find the pursuers to be so. The pursuers bring an improper action on unjust grounds, and they are justly liable as the losing party.

LORD MEADOWBANK.—I entirely concur. The action from the beginning has been made a means of gross oppression. It is incomprehensible how there should be so few errors in managing a retail trade of £45,000, and it reflects the highest credit on this gentleman. There cannot be a doubt that the pursuers are the losing party, and we must necessarily decern them to pay full expenses.

THE COURT accordingly interposed their authority to the award, and decerned against Gye and Company for expenses.

CAMPBELL and MACK, W.S.—T. and T. DARLING, W.S.—Agents.

ged, which the pawnbroker refused to account for, was an offence under pawnbrokers' act, which could only be dealt with as is provided as to offences act, or whether it was a civil claim competent in the Small Debt Court.

As a charger, Widow Wilson, on the 28th August, 1832, had im- Jan. 18, 1834.
posed a pelisse with the suspender, Henderson, a pawnbroker in
Greenock, for the sum of 3s. On the 31st August, 1833, she applied
to the Court to compel him to return it. Henderson refused to restore it, or to account for the
loss of it, on the ground that, by the lapse of a year, it had become for-
feited under the pawnbrokers' act (39th and 40th Geo. III. c. 99,) and
being impledged for an amount under 10s., he was entitled under the
act to dispose of it privately, and without any obligation to account for
the proceeds. On this Widow Wilson raised a summons against Hen-
derson, under the Justice of Peace small debt act, in these terms :—
To His Majesty's Justices of the Peace for the county of Renfrew —
Widow Elizabeth Wilson, residing in Greenock, complains that
George Henderson, pawnbroker in Greenock, for himself, and as repre-
senting the other partners of George Henderson and Company, pawn-
brokers there, is owing the complainer the sum of £1, 1s. sterling, which
he refuses to pay unless compelled. Therefore the said defender, George
Henderson, ought and should be decreed and ordained to make payment
to the complainer of the foresaid sum of £1, 1s. sterling, with expenses.”
On the back of this summons, and on the back of the copy served on
Henderson, was indorsed the following account :—

2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.
F.

“ GEO. HENDERSON,
1833.

TO WIDOW WILSON.

No. 121. action came, at a small debt court held at Greenock on the 24th October pronounced this judgment—"In respect that the defender refuses to give any account of the sale of the article pledged, decern for the sum claimed and for 2s. 4d. of expenses." Against this judgment, Henderson tendered an appeal to the Quarter Sessions, which the Justices refused to receive as incompetent; and being charged for payment, he presented a bill for suspension, on the grounds,

Jan. 18, 1834.
Henderson v.
Wilson.

1. That the procedure was not in terms of the small debt act, inasmuch as the ground of debt was not set forth in the body of the summons.

2. That offences under the pawnbrokers' act could only be dealt with agreeably to the special provisions of that act, which allowed an appeal to the Quarter Sessions from all judgments in suits brought in consequence of such offences; and,

3. That, on the merits, the Justices were wrong, and that under the pawnbrokers' act, pawnbrokers were not bound, after lapse of a year, to account for articles impledged for a less sum than 10s.

The Lord Ordinary refused the bill as incompetent, adding the subjoined note.*

* "The Lord Ordinary feels himself constrained by the unqualified terms of the act 6 Geo. IV., cap. 48, to pronounce the above interlocutor. The complaint, warrant, citation, and decree, are in the precise words of the schedules annexed to the act, which are materially different from those of the Sheriff small debt acts, 6 Geo. IV., cap. 24, and 10 Geo. IV., cap. 55, as now entirely regulated by the latter. The Lord Ordinary supposes, from what is stated in the bill, that the cause of action, as proceeding on the pawnbrokers' act, was stated in some note or writing left with the citation. But the documents forming the only record show nothing but a simple claim of £1, 1s. as a debt,—that act not requiring, like the 10th Geo. IV. as to the Sheriff Court, that the cause of action should be specified in the summons. But the process being thus simple, and all review, as well as appeal, being excluded, the Lord Ordinary finds it impossible to entertain a suspension on the ground that the cause of action was an infraction of the pawnbrokers' act; and that the Justices, in an action under the small debt act 6 Geo. IV., cap. 24, decided erroneously upon the cause of action, and the statute on which it depended.

"The Lord Ordinary says that he is constrained to this judgment, because he is of opinion that, in any correct proceeding under the pawnbrokers' statute 39 and 4 Geo. III., cap. 99, the judgment is very erroneous. Whatever generous person may think of the proceeding of taking advantage of the poor woman's omission to redeem till two or three days after the limited time, the law of the statute on which the claim was founded is as clear as the sun,—that where the sum advanced was under ten shillings, the pawnbroker was not bound to sell by auction, and was not liable to account for any surplus in any sale made; and it is out of all question to make the 19th section apply, as that relates only to persons entitled to redeem which of course supposes the intimation to be within the year and day, to which their right is limited. And as it is also clear, that under that act an appeal to the Quarter Sessions as to every forfeiture is competent, the decree would be wrong in relation to that statute. But as a simple decree in virtue of the small debt act, the Lord Ordinary does not see, how it can be reached. If it were to become a systematic practice to evade the provisions of the pawnbrokers' act in this manner, it might

person reclaimed; but the Court, holding the proceedings to have No. 121.
 regular in terms of the small debt act, and, consequently, that a sus-
 was incompetent, without giving any opinion on the merits, Jan. 21, 1834.
 Dewar, v.
 Dewar.

C. FISHER, S. & C.—J. PATTEN, W. S.—Agents.

PETER DEWAR, Petitioner.—*Whigham*.
 PETER DEWAR, Respondent.—*Cuninghame*.

No. 122.

or Bonis.—Where an application by a relative, for the appointment of a
 bonis to a party alleged to be imbecile by reason of old age, and incapable
 of managing his affairs, was opposed, the Court remitted to the Sheriff to enquire
 into his state, and suggest a proper person for the office.

petitioner, setting himself forth as heir-at-law of the respondent, Jan. 21, 1834.
 and-uncle, presented an application to the Court, accompanied with
 certificates, bearing that the respondent, who was near eighty, 2D DIVISION.
 was imbecile, and incapable of managing his affairs, and praying F.
 appointment of a certain person as curator bonis. Answers were
 to this petition in name of the respondent, admitting that he could
 properly manage his affairs, but averring that he was capable of ap-
 pointing a factor himself, and that the petitioner wished to obtain an
 undue and improper control in regard to his affairs. The Court, on this,
 referred to the Sheriff-substitute of the county of Haddington, (where
 respondent resided,) “to enquire as to the facts and circumstances
 by the parties, and report whether, in his opinion, it is necessary
 and expedient for the protection of the respondent to appoint a judicial
 factor or factors, or curator or curators bonis, with the usual powers; and,
 in event, to suggest to the Court the person or persons he may
 recommend as most eligible.”

The sheriff-substitute having personally visited the respondent, and
 after due enquiry otherwise, returned the following report:—“Peter
 as appears from an old family Bible in his possession, was born on

No. 122. tion or undue influence; and it is likely, that as he advances in years mental powers will be more and more impaired. It is quite apparent
Jan. 21, 1834. his mental weakness, and infirm state of body, are the result of old
Swan v. Buist. and a gradually breaking down constitution. In these circumstances reporter begs, with all submission, to give it as his opinion, That respondent is incompetent to the management of his affairs; and th is expedient for his protection, that a curator bonis should be appoi by the Court, with the usual powers."

He also suggested a particular individual as properly qualified for office; and the Court appointed him accordingly.

J. M'ANDREW, S.S.C.—GRAHAM and ANDERSON, W.S.—Agents.

No. 123.

JAMES SWAN, Advocate.—*Keay—Deas.*

HENRY BUIST, Respondent.—*Sol.-Gen. Cockburn—M'Neill.*

Servitude—Road—Process.—The right to a servitude road, eighteen feet subject to be used for carts and led cattle, implies a right of driving loose along it. 2. A Sheriff-substitute having allowed a proof, and the pursuer reclaimed, contending he was entitled to judgment in his favour without a pro Held competent for the Sheriff on that petition, while he recalled the interloc allowing a proof, to decide the cause against the party reclaiming, although t was no petition from the other side.

Jan. 21, 1834. THE lands of Riggs, belonging to the advocator Swan, are burde with a servitude-road, eighteen feet broad, in favour of a surround
2d Division. farm, possessed by the respondent, Buist. This road was unfenced,
Ld. Medwyn. Swan, alleging that Buist was not entitled to drive loose cattle along
F. but only led cattle, presented a petition to the Sheriff of Fife, praying have Buist interdicted from driving "loose bestial" along this road. this petition, a record was made up, in which Swan admitted that road was, as above mentioned, eighteen feet wide, and that Buist entitled, and had been in use, to drive carts and led cattle along the r while Buist did not specially aver that he had been in the custom driving "loose" cattle along it for the last seven years. The She substitute having allowed a proof, Swan appealed to the Sheriff, cont ing that Buist had not averred such possession as would, if establish entitle him to use the road by driving loose bestial along it; and that the cause stood, he was entitled to an interdict. On advising this petit the Sheriff recalled his substitute's interlocutor, but pronounced as lows:—"In respect that it appears the road in question is eighteen broad, which necessarily carries with it a right of using that road to fullest extent that a road can be used, by driving bestial and otherw and, in respect that the ground of the application necessarily implies the defender has been in the habit of driving loose cattle along that r refuses the interdict craved, reserving to the petitioner all actions of

age which may be incurred in consequence of trespasses made upon his property by the cattle of the defender when driven along that road : finds the defender entitled to his expenses, and allows account thereof to be given in, and decerns." No. 123
Jan. 23, 1834
Rodger v.
Kay.

Swan thereupon brought an advocacy, in which the Lord Ordinary having remitted simpliciter, he reclaimed, and contended—

1. The Sheriff, on the petition by Swan, was not entitled to decide at once in favour of Buist, who had acquiesced in the interlocutor allowing a proof; but if he thought that the prayer of the petition should not have been granted, he ought simply to have refused the petition, and allowed the proof to go on, instead of deciding the cause in favour of Buist, who had not reclaimed. And,

2. The Sheriff's interlocutor is wrong on the merits, as the actual possession had is the only rule as to the extent of a servitude not constituted by writing.

LORD JUSTICE-CLERK.—I cannot see any difficulty. It is admitted that the road is 18 feet broad, and that it may be used for all purposes, and for all cattle led, but it is contended that they must be led and not driven loose. Now, this is such a preposterous notion, that we cannot entertain it at all. The Sheriff guards against any injury being done, and it is absurd to suppose that a road is to be used for every other purpose, but that loose cattle ought not to be driven along it. I cannot entertain a doubt.

LORD MEADOWBANK.—The foundation of the Sheriff's interlocutor is perfectly sound.

LORD GLENLEE.—I agree. And as to the objection in form, the advocator declined a proof, and asked judgment on the cause as it stood, and it was quite competent therefore for the Sheriff to decide against him.

THE COURT accordingly adhered.

GEORGE GORDON,—T. LEBURN, S.S.C.—Agents.

JOHN RODGER, Petitioner.—*Jameson—Paterson.*

JAMES KAY, Respondent.—*Keay—Sandford.*

No. 124.

Bankruptcy—Sequestration.—A party, who was truly an operative weaver, held not to fall within the description of persons to whom the bankrupt act applies, though he generally worked webs which were his own property, and occasionally employed at least one weaver to work on his account.

Proof.—Question how far the water-mark in paper is evidence of the true date of its manufacture.

JOHN RODGER, residing at Springbank, petitioned for the recall of the sequestration of the estates of James Kay, residing at Partick, on the ground that Kay did not bona fide fall under the statutory description of Jan. 23, 1834.
1st Division.
B.

No. 124. "a manufacturer or artificer," "seeking his living by buying and selling or by the workmanship of goods or commodities." Answers were led for Kay, designing him "weaver and manufacturer, some time at Stirling now at Partick;" and for one of his creditors, and also for John Wrie shipchandler in Glasgow, trustee under the sequestration.

Jan. 23, 1834.
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Kay.

A proof was allowed, from which it appeared, that after having employed towards the end of the last century, at different times as a soldier, a common soldier, a shopkeeper, or manufacturer, and a quartermaster of dragoons, Kay was incarcerated for debt, and, in 1795, obtained the benefit of a cessio; after which he alleged that he made a composition with his creditors. Subsequently, he stated that he had carried on business in England for some time, but this turned out unprosperous, and he discontinued it in 1804; that he held a commission as an officer in the army till 1810, when he sold it and joined the Fifeshire Militia, which was disembodied in 1816; but that he was still a lieutenant on the pay of the Fifeshire Militia. He alleged that he had engaged in business subsequently to 1816, first in Fife till 1825, and afterwards in Glasgow, where he possessed some heritable property; and upon this allegation of trading, the recall of the sequestration came to depend.

The proof of trade in Glasgow showed that Kay had worked as an operative weaver, sometimes weaving his own web, and occasionally employing at least one other weaver to work for him at the same time; that at least eight or ten webs were thus worked for him after 1816; that pieces of cloth had been repeatedly seen in his house to a greater extent than it was usual for a journeyman weaver to have; that he occasionally worked as a weaver for hire; that he was possessed of some heritable property, and, as one witness said, "sometimes employed himself in weaving, and sometimes went about." No books, or accounts, or writings of any kind, were produced, except a receipt, dated 15th August, 1824, for water twist, which he had bought to the value of 9s. 6d.

The chief proof of Kay's trade in Fife, except that he had been an operative weaver there for some years, apparently working webs on his own account, rested on a letter from Kay, dated 4th January, 1824, addressed to a friend of the name of Faulds at Glasgow, and beginning in these terms:—"This very day last year, I sold the whole stock of goods I had on hand to a Robert Veitch, a travelling merchant. He has since this some years, and has always paid me well; but at last he has left me minus £67, 13s. 3d. I have his bill, but where he has gone to, God knows." "I have only three weavers and myself at work. I have a £30 worth of cross-overs and sheeting, excellent. I shall let you have them cheap," &c. "You will receive this by my friend James Brown."

The bill of Veitch was not produced, nor was it alleged that Veitch had ever retired it. No particular cause was assigned why Kay should have introduced that subject into his letter to Faulds; but Faulds deposed that he believed he had received the letter near the date which it bore.

as to the authenticity of the letter being allowed, Kay adduced persons in Glasgow who stated they believed themselves to be the paper-mould makers in Scotland; that it was not uncommon in paper-making a mould as late as November in one year, to give it the date of the ensuing year; or to post-date or ante-date the mould; or to put the words "London" or "Bath" to moulds to be used in Scotland. It was, at the time, making moulds with a date of 1828, under that order. Kay also produced a letter, dated Aberargie, 23d January 1824, bearing to be from Robert Veitch to him, and stating, "I have sold the lot of goods at the price I offered you yesterday, amounting to 13s. 3d., and I will grant you my bill," &c.

It was proved by a partner and foreman of the firm of Wood and Co., paper-makers, Yorkshire, that the watermark on the paper was such and that it was impossible that the paper could have been in Scotland in January, 1824.

It was pleaded, that the trade in Glasgow being truly that of an open weaver, was not sufficient to render Kay sequestrable; that the nature of trade in Fife was spurious, and, even if genuine, did not reach the trade as sufficed for the statute. Besides this, the negative evidence, arising from the want of all books, or invoices, or account-sales, was conclusive.

It was pleaded, that as he had not only worked as a weaver of webs of cloth, and on his own account, but employed men to work under him, he was a manufacturer or artificer, in the sense of the statute, in consequence of his trading in Glasgow. But, separately, as the letter of Veitch impeached by the proof, and supported the letter of Kay, it must

No. 124. **LORD BALGRAY.**—A proof was allowed, so as to ascertain whether the transaction to the extent of £67, 13s. 3d. really took place, as it might have given more room to Kay to maintain that he had been a manufacturer or trader within the statute. But the only proof of it consists in the two letters of Kay and Veitch and I cannot proceed on the footing of their authenticity. The letter of Kay, even assuming his own story that it should have been dated on 4th January, 1825 in place of 1824, (though his own witness, Faulds, swears he believes he received it about the date it bears,) will not tally with the letter of Veitch. Kay's letter says the transaction took place "this very day last year," and, therefore, on a 4th of January. Now, the letter of Veitch, offering to buy the £67, 13s. 3d. of goods, is dated 23d January 1824, so that the sale must have been later in the year, if it had ever occurred, than the 4th of January. It is impossible to rest any thing upon these letters. Laying them aside, and looking to the remaining question on general grounds, it would be a very important one indeed, if the Court were to hold that the trade and business of Kay entitled him to the privilege of mercantile sequestration. If they did so, I should look on the bankrupt statute as a nuisance and a grievance to the country. Kay had been at one time in a better rank of life, and a quartermaster of dragoons. He must have been able to keep accounts, or he never could have been in that situation. I consider, therefore, that the negative evidence in this case is worthy of the greatest attention. He says he was engaged in business as a manufacturer. Why are there no books—no invoices or account-sales produced—no writings whatever, but the single scrap as to a transaction for water-twist to the amount of 9s. 6d., and not one single letter which was ever addressed to him as a manufacturer? I think the Court cannot hold him to have been bona fide a manufacturer, or to have been so considered by those who had intercourse with him; and any attempt at positive proof of the trade he carried on is of the most meagre and defective sort. I am for recalling the sequestration.

LORD GILLIES.—I concur.

LORD CRAIGIE.—I am of the same opinion. The whole evidence in the case satisfies me that Kay does not fall within the description of persons to whom alone the process of mercantile sequestration is applicable.

The **LORD PRESIDENT** was not present.

THE COURT recalled the sequestration, and subjected the respondents to expenses.

C. FISHER, S.S.C.—A. HAMILTON, W. S.—Agents.

ALEXANDER MACKINTOSH, Pursuer.—*Cuninghame*—G. G. Bell.

No. 125.

ARTHUR JOHN ROBERTSON, Defender.—*Buchanan*.Jan. 23, 1834.
Mackintosh v.
Robertson.

to Pursue.—Although three out of four joint-tenants submitted an action of damages, raised for injury done to them in that character, and a decree-arbitral was pronounced, held competent for the fourth to waken the action for his own interest, and insist in it by himself.

ALEXANDER MACKINTOSH raised a summons of wakening, setting forth, Jan. 23, 1834, that he was "formerly one of the joint-tenants of the Parks of Culcabock, that the pursuer some time since, along with John Mackintosh, John Mackintosh, and Robert Mackintosh, also joint-tenants of the farm of Parks of Culcabock, raised a summons of damages and for payment at their instance before the Lords of our Council and Session, setting forth, that, previous to the year 1812, the said farm," &c.

1st Division.
Ld. Fullerton.

The summons of damages libelled injury sustained by the pursuers, as tenants, in consequence of surface damage to the farm; deficiency in the number of acres let, compared with the number for which rent had been paid; the nimious use of sequestration, &c. After reciting the sum of damages, the summons of wakening proceeded, "that to follow the said process, and bring the same to a conclusion, it is necessary that the pursuer, the said Alexander Mackintosh, have the same wakening in his instance," and concluded accordingly.

Robertson stated in defence against the wakening, that the action of damages had been made the subject of a submission between the other joint-pursuers and the defender; that it had been finally settled by a decree-arbitral; and that though the pursuer was not a party to the submission, this was because he had no real interest in the action of damages, as he previously ceased to be one of the tenants. He therefore pleaded, that as the action of damages was taken out of Court by the submission, settled by the decree-arbitral, it was incompetent now to waken it; further, that it was incompetent for one out of four joint-pursuers to waken a wakening, without the three co-pursuers being made parties. Mackintosh answered, that he was a joint-tenant of the farm; but,

No. 125. of Parks of Culcabock, and proceeds on the statement, that the defender, Arthur John Robertson, had subjected himself in damages, and was owing certain sums to 'the pursuers, as joint-tenants of the said farm;' that in regard to the said John, Donald, and Robert Mackintosh, being three out of the four joint-pursuers, the action has been taken out of Court by a submission confessedly binding on those parties; in these circumstances, refused to waken the said process, and decerned—reserving to the pursuer his right to take in his own name such measures as he may be advised, whether against the defender or his said brothers, for any share due to him of the sum concluded for in the foresaid action, and to those parties their defences against the same; and found the defender entitled to expenses."

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The pursuer reclaimed.

LORD GILLIES observed, that a discharge granted by three of the pursuers could not, in any degree, compromise the interest of the fourth; and, therefore, no submission entered into by the three could affect the fourth, who was no party to it.

After some difficulty expressed by Lords CRAIGIE and BALGRAY, in respect that all who were parties to the process when it fell asleep were not parties to the wakening, the Court altered the interlocutor of the Lord Ordinary, and remitted to his Lordship to waken the action of damages, reserving all the pleas of parties in that process entire.*

T. B. FERRIS, W.S.—H. MACQUEEN, W.S.—Agents.

No. 126.

MITCHELL'S TRUSTEES, Pursuers.—*Jameson—Pyper.*
PEARSON and OTHERS, Defenders.—*Rutherford—Shaw.*

Bankruptcy—Superior and Vassal—Trust.—A trustee on a sequestrated estate, during a discussion as to the validity of an heritable security over a feu in which the bankrupt had been infeft, entered into possession, drew the rents, and paid the feu-duties, but did not take infeftment, and on the security being found effectual abandoned it—Held that he was entitled so to do, and that he was not liable to the superior for the feu-duty, and other prestations in the feu-contract, in time to come.

Jan. 23, 1834.

2D DIVISION.
Ld. Medwyn.
F.

THE pursuers, trustees of the late William Mitchell, and, as such, infeft in certain property in Leith, entered into a feu-contract, in 1808 with Elphinston and Bourhill, whereby they disposed in feu to them "and their heirs and successors or assignees," an area of this property, "to be holden of the said trustees, their successors, and assignees, in feu-farm and heritage, for ever, for payment of the sum of

* The Lord President was absent till the 4th of February, 1834.

In name of feu-duty." Elphinston and Bourhill, on the other No. 126.
 bound and obliged "themselves, their heirs and successors whom-
 ," to make payment of this feu-duty, and further bound themselves, Jan. 23, 1831.
 Mitchell's
 Trustees v.
 Pearson.
 heirs and successors, that they, "their heirs and successors, and the
 disponees, and assignees in and to the ground" feued, should,
 five years, erect buildings thereon, to the value of £1000.
 Elphinston and Bourhill entered into possession of the feu, but did
 not infestment; and their estates having been sequestrated, it was
 sold to sale in 1809, and purchased by William Galloway, mer-
 chant in Leith, who obtained from the trustee on their sequestrated
 estate, a disposition and assignation not containing any special mention
 of obligation to build, but generally under the conditions, &c. in the
 contract therein referred to. Galloway entered into possession of the
 feu, in August 1814, he took infestment on the precept of sasine
 issued in the feu-contract. Immediately thereafter, he executed, in
 name of John M'Kenzie, merchant in Leith, a disposition of the feu,
 procuratory and precept, ex facie absolute, but qualified by a back-
 declaring that it was granted merely in security of certain advances
 by him made, and of farther advances that might be made, to an extent
 not exceeding £10,000; and on this disposition John M'Kenzie was
 dated of date September 1st. Within sixty days from the date of the
 disposition, Galloway was made bankrupt, and his estates having been
 sequestrated, the late Kincaid M'Kenzie was appointed trustee thereon.
 A general adjudication of all Galloway's property was taken in common
 in favour of the trustee, who resolved to challenge the conveyance
 made by John M'Kenzie. It was thereupon agreed to have the ques-
 tion of the validity and effect of his disposition settled by arbitration, and
 a commission was accordingly entered into, of date 1815, to Lord
 Cranstoun, then Mr Cranstoun. Under this submission, certain pro-
 ceedings were had, and, in December 1819, Mr Cranstoun pronounced
 a decreet-arbitral, finding the disposition effectual as a security to John
 M'Kenzie, to the extent of the sums actually advanced at the time of
 making it, viz. £1812, 2s. 10d., which exceeded the value of the pro-
 perty.
 In the meantime, and pending these proceedings, the trustee had
 received the rents from the tenants in possession; and when, in 1815, one
 tenant gave up his portion, he let it to another. He also paid the feu-
 duty to the pursuers, as superiors, and, in 1816, he took from Galloway
 a full conveyance to the feu, but he never infest himself therein. In
 1815, before the date of the decreet-arbitral, he advertised the property
 for sale, but was interdicted at the instance of John M'Kenzie; and on
 the decreet being pronounced, he gave up the possession to that indivi-
 dual, although he thereafter allowed the property to be again adver-
 tised for sale in his name, and as part of a sequestrated estate. From the
 date of the decree, he ceased to pay the feu-duty; and although it did not
 appear that he specially intimated to the pursuers an abandonment of the

No. 126. *Jan. 23, 1834. Mitchell's Trustees v. Pearson.* feu, yet, when the feu-duties accruing since the date of the decree were, in 1822, demanded of him by the pursuers, he wrote in answer, that it was to John M'Kenzie they had to look for them. No farther demand for the feu-duties was made by the pursuers till 1828, by which time the trust-funds had been distributed in dividends, but they then raised the present action against Kincaid M'Kenzie, the trustee, (since his death carried on against Charles Pearson, his successor in the office of trustee, and against Mackenzie's personal representatives,) concluding for payment of the feu-duties bygone, and to fall due in time to come, and to have the defenders ordained to erect the buildings stipulated for in the feu-contract, or to pay a certain sum as damages for failure.

The Lord Ordinary reported the cause on Cases, and the Court thereafter ordered a hearing by senior counsel.

Pleaded for the Pursuers—

It is in the option of creditors to abandon property of the bankrupt burdened with obligations to third parties, but if they choose to take it up, they must do so, subject to these burdens; and if they adopt his rights or contracts, to the effect of taking benefit thereby, they cannot afterwards throw them up when they find that they have miscalculated their value. This has been found as to leases where possession has been taken by a trustee and as to feus which remained personal in the bankrupt;¹ and in the late case of Kirkland,² the same was held as to a feu which had been feudalized in the person of the bankrupt. It is, no doubt, true that the trustee there had taken infestment; but his infestment was merely bare, so that it did not constitute the relationship of superior and vassal as between the overlord and the trustee; and the principle of the decision was not that there had been the constitution of this feudal relationship, but that the trustee and creditors, by taking possession and reaping benefit from the subject, had substantially adopted the right, and thereby rendered the trust-estate responsible for the conditions which attached to it. Here the trustee took a special disposition from the bankrupt—entered into possession of the subjects—drew the rents—let them to tenants,—paid the feu-duty for several years, and advertised them for sale as part of the bankrupt estate—by which course of acting he adopted the feu-right, and made the trust-estate liable for the obligations attaching thereto, and farther became personally liable, inasmuch as he had paid away the whole trust-funds without retaining any thing to answer the superior's claims.

Pleaded for the defenders—

While a feu-contract remains personal, the trustee of the feuwar, taking

¹ *Balfour v. Cook*, May 20, 1817 (not rep.); *M. of Abercorn v. Marnech's Trustees*, Jan. 26, 1817 (F. C.)

² May 17, 1831 (ante, IX. 596): affirmed in House of Lords, March 4, 1832 (1 S. D. B. Sup. p. 66).

sion, may perhaps be held to adopt the personal contract, and to No. 126.
 as to the personal obligations thereby constituted, into the place of
 bankrupt. In like manner, when, under a lease, a trustee enters to
 sion, he may be held liable in the prestations, because, by posses-
 he completes the right, and becomes tenant in the lease. But in
 ace to a feu on which infeftment has been taken by the bankrupt,
 is no mere personal right to be taken up, or personal obligation to
 ne under. The only rights and obligations are those exclusively
 ; from the relationship of superior and vassal; but these cannot
 asferred to, and vested in the trustee, except by infeftment. While
 sses the subject of the feu, he is, no doubt, as an intromitter,
 to the superior in the feu-duty; but it is exclusively in the cha-
 of intromitter, and, so soon as he ceases to possess, his liability
 e feu-duty ceases. The only remedies competent to a superior
 the feu-right has once been made real by infeftment, are—
 inst the land itself by real poinding and irritancy; 2. against the
 infeft by personal action for payment of the feu-duties; and, 3.
 t a disponee in possession as an intromitter; but he cannot compel
 isponee, by personal action, to take infeftment; nor can he enforce
 ligations of a vassal against him till he become vassal by infeft-
 The trustee here, therefore, not having infeft himself, is only
 for feu-duties so long as he was an intromitter; but these he has
 nd he cannot be subjected to the general and permanent liabilities
 ssal, which he is not. But further, the possession of the trustee
 ily conditional, pending the arbitration, and for behoof of which-
 erty should be held to have the substantial interest in the property.
 ver held it absolutely for the creditors, nor made an election to
 for them; and immediately on the decree-arbitral being pronoun-
 : abandoned it to John M'Kenzie; so that even if infeftment were
 ssary to subject the estate, the conduct of the trustee here could
 er an adoption of the right.

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JUSTICE-CLERK.—After attending to the whole facts of the case, and
 re of the conclusions of the action, and to the defences, I have formed an
 that the action cannot be maintained. The feu-contract was conveyed to
 y, who took infeftment and possession, and became to all intents and pur-
 posed as vassal. His estates were sequestrated; but previously he had
 a disposition to John M'Kenzie, ex facie absolute, though qualified, as a
 , by a back-bond; and infeftment had passed on it. The late Mr Kincaid
 ie was elected trustee, and took, as he was bound to do, a general adjudi-
 x behoof of the creditors, and afterwards took a special disposition to this
 but he was immediately met by John M'Kenzie, saying, I am entitled to
 on the feu to the full extent of my advance. The trustee, before aban-

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of existing leases, putting new tenants in when these fell, and drawing the rents. He also, while drawing the rents, thought it his duty to pay the feu-duties, and did pay them for four and a half years. Then the judgment of Lord Corehouse was pronounced, sustaining the right of John M'Kenzie. This demonstrated that the subject would yield nothing to the estate, and it was therefore abandoned by the trustee. No doubt he had advertised it for sale before the judgment; and he afterwards joined John M'Kenzie in order to facilitate the sale; but he notified, that he had ceased to have any connexion with it after the judgment, and refused then after to pay the feu-duties. That is the general outline of the facts, which it is necessary to keep in view, and under which this action is brought, to have the trustee found liable in all the prestations under the feu-contract, as vassal in time to come. Now, it appears to me that there is no authority to warrant us holding that the trustee became vassal, or thoroughly adopted the feu. He never took infeftment; but it is attempted to be made out, that, *rebus ipsis et factis* he made himself the vassal. I can find no ground for that. The case of Kirkland is the strongest case referred to; but it is only necessary to read the interlocutor Lord Medwyn in that case, to be satisfied that it has no application to the present. There, without the use of the feu, the works could not have gone on for a day. They could not have kept a furnace in; and the judicial trustee took possession of the leasehold property, was infeft in the feu, and carried on the works for behoof of the creditors for a course of years, and there was no notice of surrender after the decree-arbitral; and then, on all this, the Lord Ordinary finds that the trustee had become "the assignee to the lease, and the vassal in the feu rights." All the circumstances are totally different from the present case, in which there is wanting the vital part of it, the taking of infeftment, and connecting himself heritably and irredeemably with the property. In this case there is no such thing and no possession as vassal; and I am therefore of opinion, that the action cannot be sustained.

LORD GLENLEE.—I so entirely concur, that it is scarcely necessary for me to say any thing. The ground of action, as properly stated in the plea of law for the pursuer is not that the trustee is vassal, but that "having adopted the feu of the subject in question—taken possession thereof—paid feu-duties—and otherwise acted as proprietor, &c., so as, for a series of years, to prevent the pursuers from resuming their original right in these subjects—is not now entitled to resile, but is bound to implement all the obligations which the feu-contract imposed on the feu and their heirs, disponees, and assignees in the feu." As to resiling, we don't speak of resiling till there has been an obligation constituted; and the first thing to be made out is, that the trustee adopted the feu. Now, as to this, we must consider what was the conduct suitable and proper in the situation in which the trustee stood. Has he done any thing so contrary to what he was bound to do, and what was proper in the circumstances of the case, as to afford a ground for the action? Certainly not. Galloway had conveyed the feu to John M'Kenzie; and all that remained with him, or passed to the trustee, was the right of redemption unless he could succeed in reducing the conveyance; and that was all he got at the adjudication or disposition, and all he could get. Now, in that situation, what was he to do? Was he to allow the feu-duties to run in arrear, to the prejudice of all concerned? Surely not. He paid them; and on the footing that, if John M'Kenzie should succeed, he would be liable to repeat. In the same way, he properly lifted the rents for behoof of the party who should be found to have sig-

The subject was not to be allowed to lie waste; but by acting as he did, he made no new contract with the superior; and unless we are to throw out of view all the principles of justice and good sense, the pursuer cannot succeed. While in possession he was bound to pay the feu-duty, but not thereby to become liable for ever. **No. 126.**
Jan. 23, 1834.
Farquhar v. Sloane.
 Kirkland's case is totally different—as there the trustee took infestment in the feu, and assignation and possession of the lease, and worked the coal for years. Here, however, there are no grounds for implying that the trustee intended to adopt the feu; and the defences must therefore be sustained.

LORD MEADOWBANK.—I am of the same opinion.

THE COURT accordingly sustained the defences, and assoilzied.

ALEX. BOYD, W.S.—GIBSON—CRAIGS, WARDLAW, and DALZIEL, W.S.—Agents.

WILLIAM FARQUHAR, Suspender.—*Jameson—Maidment.*

WILLIAM SLOANE, Charger.—*Skene—Neaves.*

No. 127.

Bill of Exchange.—Circumstances in which held that a party who, after diligence was raised on a bill against the acceptor, paid it, and took an assignation, and raised diligence thereon against one of the indorsers, was the trustee and agent of the acceptor.

Process—Record.—New record made up, in respect of facts emerging subsequently to the closing of a previous record.

THOMSON granted a promissory note for £23, 16s. 8d. to **FARQUHAR**, *Jan. 23, 1834.*
 from whom it passed, by indorsations, to **ELSMIE** and **RENNIE**. After the
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 note fell due, **RENNIE** raised diligence upon it against **THOMSON**, and gave him a charge, which was nearly expired, when **SLOANE**, a stranger to the bill, paid it, and obtained an assignation from **RENNIE**. **SLOANE** raised diligence in his own name, and gave a charge, not to **THOMSON**, though he was then solvent, but to **FARQUHAR**, who brought a suspension, averring that **SLOANE** was the mere trustee and agent of **THOMSON**, and therefore could not enforce any claim against the suspender. The Lord Ordinary “found it competent to instruct, by the charger's oath only, that he was not an onerous indorsee;” but the Court recalled the interlocutor, and remitted to the Lord Ordinary, “to receive a condescence of the facts offered to be proved, and the manner of proof.”¹

After a record had been made up under the remit, and while the cause was still under discussion before the Lord Ordinary, **THOMSON** failed, and settled privately with his creditors, for a composition of 10s. per pound. **SLOANE** ranked on his estate for a debt of £36, 17s. 7d.; but parties were at issue whether this sum included the bill under discussion. A new record was allowed to be made up, on the motion of the suspender, in regard to these facts which had emerged since the closing of the previous record. When **SLOANE** first gave a charge to **FARQUHAR**, a letter was

¹ Ante, IX. 112.

No. 127. addressed to him by the agents of Farquhar, calling on him to explain in what character he "had thrust himself into this transaction." Sloane
 Jan. 23, 1834. Farquhar v. Sloane. made no answer at the time; and, in making up the record, stated that the letter did not require an answer. The Lord Ordinary pronounced this interlocutor:—"Finds that the promissory note now charged on was granted by George Gilbert Thomson to the suspender, and was indorsed by him to George Elsmie, and by George Elsmie to Charles Murray Rennie: Finds that, upon the bill falling due, it was protested for non-payment by the said Charles Murray Rennie, who charged the grantor, Thomson, on letters of horning, but did not do diligence against the suspender and the other indorser: Finds it admitted by the charger that, after diligence was raised and followed out by Rennie against Thomson, 'payment' was 'offered' by the charger to Rennie, who granted an assignation of the diligence and note to the charger: Finds it admitted by the charger that Thomson was solvent at the time, but that no steps were taken by the charger against him for obtaining payment: Finds that, while it is admitted by the charger that the tender of payment was made by him to Rennie the holder, he does not explicitly deny, on the record, the averment of the suspender, that he, the charger, acted in the transaction as the trustee and agent of Thomson: Finds that, in these circumstances, the charger is not entitled, in a question with the suspender, to the character and privileges of an onerous and bona fide holder of the note; and, therefore, suspends the letters simpliciter, and decerns; and finds the suspender entitled to expenses."

Sloane reclaimed, and contended that the record contained an explicit denial of his being the agent or trustee of Thomson. He admitted that friendship for Thomson had induced him to take up the bill; but pleaded, that, as he had done this with his own money, he was entitled to every privilege of an onerous holder. If Farquhar was to prove that the money was not the charger's, he must refer to his oath.

The Court adhered. Their Lordships were understood not to adopt the view of the Lord Ordinary, that the record contained no denial of the charger's being trustee or agent for Thomson; but to rest mainly on his statements in the record being evasive and unsatisfactory as to points on which he was bound to have been explicit; on his ultroneous interference to take up a bill past due, with marks of dishonour ex facie, and on which a charge against the proper debtor, then solvent, was on the point of expiring; and on the circumstance of being at the expense of an assignation to the diligence, for which expense not even Thomson could be liable to reimburse him, unless the whole proceeding was taken at the request, and on behalf of Thomson. Their Lordships held, in the whole circumstances, that there was real evidence that Sloane was the mere agent or trustee of Thomson.

ROBERT ALLAN and SON, Pursuers.—*Rutherford*. No. 128.
 THOMAS MANSFIELD (Stuart's Trustee), Defender.—*Skene—Whigham*. Jan. 24, 1831

ALLAN v.
 MANSFIELD.

Reparation—Implied Obligation—Bankruptcy.—Although a pursuer libelled, that he was a creditor holding real security, with powers of sale, over a house belonging to a bankrupt; that the trustee obtained his consent to sell it by roup, on condition that the purchaser, within ten days, should, with a sufficient cautioner, grant bond for the price, failing which, to forfeit his interest, and be liable in one-fifth part of the price in name of damages, and that the price, though payable to the trustee, should be delivered to the pursuer, in extinction, pro rata, of his debt; that the trustee sold the house, and allowed the purchaser to enter to possession, but omitted to require a bond or payment, and the purchaser became unable to pay; that the trustee and creditors had a patrimonial interest in carrying through the sale, and obtaining the pursuer's consent, and, therefore, the trustee was liable officially or individually for the price:—held, that as it was not alleged that a disposition had been granted to the purchaser, and as it was admitted that the subject was extant, and as it might still be sold by the pursuer, the trustee was liable neither officially nor individually for the price; reserving to the pursuer to bring a new action for any loss which he could qualify as arising from delay, &c.

In May, 1831, Thomas Allan and Alexander Wight, the partners of the firm of Robert Allan and Son, raised an action against Thomas Mansfield, accountant, the trustee on the sequestrated estate of Stuart of Dunearn. They set forth that Stuart had disposed to them a house in Moray Place, and had assigned to them 86 shares, of £20 each share, in the North British Insurance Company; also £2000 of the capital stock of the Edinburgh and Leith Glass Company; and 268 shares, of £50 each share, of the North British Loan Company; that although the conveyance was ex facie absolute, it was truly in security for a sum of £9500, and that they had granted back-bond to Stuart accordingly; that unless the debt was paid by Martinmas 1828, the full and absolute right of property was to vest in the pursuers with a power of sale by public roup, but under an obligation to account for any surplus price: that Stuart's estate was sequestrated on 1st September, 1828, and Thomas Mansfield, accountant in Edinburgh, having been appointed trustee, the Court, inter alia, adjudged the special subject in Moray Place to belong to him: that he proposed to the pursuers to sell that subject, and they acceded, on condition that the price which he received should be paid over to them towards extinction of their debt; "and on condition also, that they should be consulted, and their consent obtained, in the preparation and adjustment of the articles of roup:" that the commissioners on the bankrupt estate agreed to this, and directed the sale to proceed without delay: that the trustee, after consulting and advising with the pursuers, exposed the house for sale by public roup, at the upset price of £4800, on 3d June, 1829, under certain articles of roup, bearing that the price should be paid to the trustee;

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 S.

No. 128. "and it was also most expressly and specially provided, that the person preferred to the purchase as the highest offerer or bidder should be obliged, within ten days after the day of roup, to grant bond for the price offered by him, with a sufficient cautioner or other security to the satisfaction of the said Thomas Mansfield, the exposor, with a fifth part more of penalty; and it was farther declared, that if the person preferred to the purchase should fail to grant such security within such time, he should not only forfeit his interest in the said purchase, but should be liable to the exposor in one-fifth of the price offered in name of damages:" that the house was bought at £4800 by Hugh Falconer; that the trustee "though acting not only for the creditors, but in an especial manner for the pursuers," to whose debt the price was to be imputed, "did, without obtaining the consent of the pursuers, and without even consulting or advising with them, and in gross malversation and most culpable neglect of duty to the pursuers, and greatly to their injury and prejudice, not only omit to require of the said Hugh Falconer payment of the price, or a bond for the price with proper security, in terms of the said articles of roup, but did further also, without the knowledge and consent of the pursuers, and in gross malversation and neglect of duty, put the said Hugh Falconer actually in possession of the said house and subjects in Moray Place, shortly after the said day of sale, without receiving from the said Hugh Falconer payment of the said price, or a bond for the same, with proper and sufficient security, and has allowed the said Hugh Falconer to remain in possession ever since:" that the trustee had failed to obtain payment of the price, or at least to pay it to the pursuers: "that the pursuers have thus been deprived of the benefit of the said sale, which they had power to make under their own disposition and right in security, but which they permitted the trustee to make under the conditions above stated:" that thus, through the malversation and negligence of the trustee, "the foresaid price has not been obtained, and a favourable opportunity of selling the house has been altogether lost:" that it was for the personal benefit of Mansfield to be allowed to sell, as he had a commission on the sale, and it was for the benefit of the personal creditors of Stuart, as they had an interest in the reversion of the whole subjects (whereof the house was one) conveyed to the pursuers in security of their debt: and "that, in all those circumstances, the said Thomas Mansfield is liable both as trustee and personally to account to the pursuers for the said upset price, which he either has or ought to have recovered from Falconer." The summons concluded for decree against Mr Mansfield both as trustee and personally, or at least in one or other capacity, for the price of £4800.

No disposition was ever granted to Falconer, who, in June, 1831, renounced the purchase, at the defender's request, under an arrangement made by the defender with the pursuers, that this proceeding should not affect any questions as between them in the action.

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Mansfield.

In defence, the defender denied, or explained, many of the statements of the pursuers; but, separately, he contended that the premises of the summons were irrelevant to infer its conclusions: that it was not libelled, nor was it the fact, that he had, through negligence, allowed Falconer to get a disposition to the property, without payment being made, so that the price had been lost: that it was admitted in the summons that the house was regularly sold, and, though it was no doubt alleged that Falconer failed to find caution within ten days thereafter, this was no fault of, or ground of liability against the defender: that the only consequence of such a failure was, that Falconer was to forfeit his interest in the purchase, and become liable in damages: and, therefore, so soon as the ten days were expired, the pursuers might have had recourse to a new sale, had they not preferred trying what they could make of Falconer. Neither did the circumstance of Falconer being allowed to get into possession, affect the pursuers' right to the subject, or to have recourse to a new sale, and, therefore, it could not create any liability for their debt against the defender. Although the defender's name, as trustee, had been allowed to be used, as it saved the auction-duty, &c., yet the true sellers were the pursuers, who had the direct interest, as the whole price was to go to them, and it properly lay with them to direct when the re-sale should take place or be attempted; and if any loss had arisen from the fall in the market value of houses since 1829, that could only be determined under a different summons, and the defender would then be ready to prove that this was in no degree imputable to any fault on his part.

The Lord Ordinary found "that the conclusion of the summons is not regularly and legally deduced from the premises, and therefore dismissed the action, assoilzied the defender, and decerned; found the defender entitled to expenses, reserving to the pursuer his right to bring a new action, as accords." *

* NOTE.—The summons sets forth that the defender, in the capacity of trustee for the creditors of Stuart, and also as employed by the pursuer, undertook to sell certain subjects belonging to Stuart, over which the pursuers held an heritable security; that he sold them to Falconer for £4800, and that he put Falconer into possession; but having neglected to take a bond with caution for the price, in terms of the articles of sale, and Falconer having become bankrupt, the price cannot now be recovered. From these premises the summons concludes, that the defender is liable to the pursuer for £4800, the price which Falconer agreed to pay. This conclusion might have been regularly and legally deduced, if the summons had set forth that the defender had not only neglected to take a bond for the price, but had made over the subjects by a disposition to the purchaser, in consequence of which the security was lost. But that is not set forth, and it is admitted in the condescendence that it is not the fact. The pursuers' security is as valid as it was before the sale, and the subject may be as valuable; perhaps it is more valuable, if, as the defender alleges, Falconer, while in possession, expended considerable sums in altering and improving the house. The pursuer therefore holding his security as valid as it was, can claim from the defender only the loss which he has sustained in conse-

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Mansfield.

No. 128. The pursuers reclaimed.

Jan. 24, 1834.
M'Taggart's
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tives v. Wat-
son.

LORD GILLIES.—I was satisfied by the reasoning contained in the Lord C
nary's note. I am for adhering.

LORD BALGRAY.—If there be no actual loss, the pursuers can have no dem
The subject is not lost, and the price of it does not appear to me to be exigibl
LORD CRAIGIE was for adhering.

THE COURT adhered.

J. WHITE, W.S.—J. and L. DAVIDSON and SYME, W.S.—Agents.

No. 129. M'TAGGART'S REPRESENTATIVES, Pursuers.—*Lord Adv. Jeffrey—
Penney.*
WILLIAM WATSON, Defender.—*Rutherford—Neaves.*

Cautioner—Bankruptcy.—Circumstances in the conduct of commissioners
sequestrated estate with reference to their course of dealing with the trust
which held sufficient to liberate the cautioner of the trustee from liability for
deficiency of funds.

Jan. 24, 1834. THE estates of the Gorbals Spinning Company having been sequest
2D DIVISION. ted in 1815, William Jeffrey, accountant in Glasgow, was appoin
Ld. M'Kenzie. trustee thereon, and the defender, Watson, became cautioner for him
R. the extent of £1000 by bond of caution, whereby he bound himself, c
junctly and severally with Jeffrey, to this effect, viz.—“that I, the s
William Jeffrey, shall and will manage the said estate in all respects c
form to the statute, under which the sequestration is awarded; and the
shall and will hold just count and reckoning, and make payment to
said creditors, according to their several claims ranked upon the seq
trated estate, or the trustee or trustees that may be afterwards name
the creditors to succeed me, for my whole management, receipts

quence of the transaction with Falconer not taking effect; that is, the diff
between the value of the security now, and what it was at the time of the
its value has been diminished) cum omni causa, for example, loss by delay,
of a new sale, and so forth, being together the sum due in name of repar
damage, which may be best assessed by the verdict of a jury. Though a l
is subject to high responsibility, it cannot be maintained that by neglecting
sary step in conducting a sale, he is eo ipso to be held the purchaser, th
perhaps might be inferred if he had sold the subject, and by neglect had
the price to be lost.

“The case of *Leslie v. McDonald*, to which the pursuers refer, does
There the defender's predecessor being a law-agent, neglected to intimate
tion, which was therefore absolutely ineffectual; and after a lapse of thir
was presumable that, by the nullity of the assignation, the sum assigne
It cannot be presumed in this case that by the nullity of the sale the p
for the subject is extant, and may be sold for the same, or a greater pric

intrusions, as trustee foresaid, with the property of the said estates, or any part thereof, of whatever kind or denomination, and wherever situated, which may come into my hands, as trustee foresaid, and that from time to time, when required."

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tives v. Wat-
son.

Sufficient funds having been realized for a dividend before the ordinary statutory period, an application was made and granted to anticipate the payment of it; and, accordingly, a dividend of two shillings in the pound was declared in August, 1816. On this occasion the trustee's accounts were audited and approved of by the commissioners, and a scheme of ranking made up, exhausting the whole realized funds, with the exception of £12; a dividend of £1157, on a large disputed claim by the late Mr M'Taggart, being however retained, till the validity of the claim should be decided. In the meantime, the trustee proceeded with the realization of the estate, gradually selling the heritable property, over the proceeds of which M'Taggart insisted on a preference; but no second audit of the trustee's accounts was made by the commissioners till May, 1820, when a dividend of sixpence in the pound was declared, out of the funds other than the proceeds of the heritable property, which were necessarily locked up till M'Taggart's claim of preference was decided on. The trustee, preparatory to this dividend being declared, laid before the commissioners an account of his intrusions, which was docqueted by them, without their, however, calling for exhibition of his account with the bank, to ascertain if the sum stated as lodged in bank truly was so. This second dividend was paid; but no further audit took place till May, 1826, when the commissioners obtained from the trustee a report of the state of affairs, and an account of his intrusions, whereby, taking credit for the sums stated as deposited in bank, he brought out a balance of £67 in his own favour, with this notandum added—"Interest to be calculated afterwards;" and it subsequently appeared, that had interest been then calculated, it would have shown a considerable balance against the trustee. At this audit the trustee produced bank receipts for £3400, being the sum which, without calculation of interest, it appeared from his account of intrusions, ought to have been in bank; but the commissioners did not call for exhibition of his account with the bank, to ascertain if it was actually in the bank, and had remained constantly deposited. No calculation of interest, nor any further investigation of the trustee's accounts, took place, till the year 1829, when the former commissioners having resigned, and others having been elected, they called upon the trustee to render a state of the affairs, and an account of his intrusions. When this was, after some delay, obtained from him, it appeared that the amount of funds realized, and not paid away in dividends or expenses, was £3125, whereof £2425 was stated to be deposited in the Glasgow Bank, and £700 in the British Linen Company Bank. The commissioners having directed the trustee to lodge the whole in the Royal Bank, he

No. 129. deposited therein, on the 25th May, the £2425, transferred from Glasgow Bank, and exhibited a Royal Bank receipt for that amount another, of date June 9, for £700, which, without any further enquiry the commissioners accepted as sufficient proof of the whole money actually lodged in bank, without requiring him to exhibit the account, although they did not docquet his accounts, being still in the course of investigating their correctness.

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In reality, the trustee had, on the 8th June, drawn out from the Bank, £700 of the £2425 previously deposited there, and for which he held the receipt; and, next day, relodged the same £700, taking in the course, a new receipt therefor, while the £700 in the British Company Bank was withdrawn by him and applied to his own purposes. Thereafter, he drew out a further sum of £195 from the Royal Bank, of which he only applied £25 to the purposes of the estate; and his neglect as to the £700 having been shortly afterwards discovered, he was compelled to resign his office, and James Kerr, accountant in Glasgow, was appointed trustee in his place. On an investigation of his accounts, a balance of £1008 was brought out against Jeffrey by the commissioners; and, from the bank accounts, it appeared that, so early as 1826, he had been in the habit of drawing out sums from the money belonging to the estate, and deposited in bank, and replacing them after a short interval; that this practice had been continued by him during the period of his trusteeship, the sums drawn out by him being at times large, retained for a considerable time, and only replaced preparatory to the audits—that replaced preparatory to the audit in May, 1826, £2500; and it further appeared, that had the commissioners called for and examined the bank accounts, they must from these at once have discovered this course of proceeding, and that the money actually in bank did not correspond with what was set forth in his state of accounts. The payment of the balance due by Jeffrey, who had become bankrupt, an action was raised against him and Watson, his cautioner, by Kerr, the new trustee,—subsequently carried on by M'Taggart's representatives, the creditors substantially interested, and in whose favour Kerr executed an assignment of the action.

In defence, Watson pleaded—

The creditors and commissioners have, by their conduct, liberated the cautioner of the trustee. The commissioners not only neglected to enforce the provisions of the statute as to the periodical audits, but at the audits which they had, they violated the express provisions of the statute (§ 43) which requires them to compare the sums lodged in bank, with the receipts, and ascertain whether the same has been duly and regularly lodged, &c.; whereas, instead of calling for the bank accounts, they would at once have disclosed his irregular proceedings, they were content with the exhibition of bank receipts, which could prove nothing

and in that year the whole funds of the estate were duly cashed, and in bank, £2425 in the Royal Bank, and the remaining £700 in British Linen Company. Any prior negligence, therefore, of the commissioners, is truly irrelevant, because no loss was actually sustained by, the whole funds being at this period, 1829, extant, and lodged in bank.

The deceit practised by the trustee on the commissioners as to the balance, was one which they were not to blame in not having suspected, and the subsequent misappropriation they could not have checked. They were in course of investigating the trustee's accounts, and so soon as they were on grounds of suspicion, they compelled him to resign; but the misappropriation which he had by this time accomplished, they could not reasonably have suspected. And,

The cautioner was taken bound that the trustee should manage the estate "in all respects conform to the statute," and he was therefore bound to exercise some vigilance in preventing his deviation.

The Lord Ordinary sustained Watson's defences, and assoilzied with expenses, adding the subjoined note.*

Mr Taggart's representatives reclaimed.

ORD JUSTICE-CLERK.—Keeping in view the duties imperatively required by statute, which cannot be got rid of by saying the commissioners were merely nominal—for they are not to take office, and then violate their duty with impunity, the creditors who elect them must abide by the consequences of their misconduct—I am clearly of opinion that the interlocutor must be adhered to. In § 43

No. 129. are the most express directions for fulfilling their duty in auditing the trustee's accounts, and calling for vouchers, &c., and bringing his conduct before the creditors, that they may apply for removal or penalties. Now, here the commissioners grossly neglected their duty, and were guilty of a total breach of the provisions of the statute, as to the investigation of the trustee's accounts. If they had called for the Bank accounts, they would have seen all these operations on his part with the money of the estate; and I have no difficulty whatever in applying to this case the principles of former decisions, both in the other and this Division, which go to liberate cautioners, when the duties incumbent on commissioners and creditors have not been performed. The whole loss here has arisen from the misconduct of the Commissioners, and it is our bounden duty to adhere.

Jan. 25, 1834.
Gunn v.
Goodall.

LORD GLENLEE—I cannot say I am of that opinion. There was no loss prior to 1829. The commissioners then thought the money should be in the Royal Bank, and direct the trustee to place it all there. He shows them receipts to the full amount; and while they are in cursu of examining of his accounts, his deceit is discovered. Now, whatever might have been the case if they had sustained his accounts, yet while they were only in cursu of examining them, and could have no suspicion that Jeffery would be guilty of such a trick and deception, I have some doubts if this can be put on the same level with cases where there has been an actual approbation of the accounts by the Commissioners. I can hardly say the Commissioners were to blame in not sending for the Bank accounts, being still in cursu of examining the accounts; and I think they might reasonably wait till they were about to settle. It may be otherwise, but that is the view I take.

LORD MEADOWBANK.—I concur in the opinion delivered from the chair. It appears to me, that the commissioners are bound from time to time to investigate the trustee's accounts, and make comparisons, as directed by § 43. This they neglected to do; and it does appear to me to fall under the principle sanctioned in other cases, and by the opinion of Lord Glenlee himself, in the case of *Mein v. Hardie*. I would apply his Lordship's very words to this case. If the commissioners had done what the statute requires, they would have seen the money lodged as it ought to have been; and, therefore, I am for adhering.

THE COURT accordingly adhered.

J. MOWBRAY and A. HOWDEN, W.S.—CAMPBELL and MACDOWALL, S.S.C.—Agents.

No. 130.

ADAM GUNN, Pursuer.—*Lothian*.

ADAM GOODALL, Defender.—*Robertson—Semple*.

Poor's Roll.—A defender in an action of damages, who was between fifty and sixty years of age, had a family, and possessed an annuity of £24, besides 8s. per week of wages as a shoemaker, held entitled to the benefit of the poor's roll.

Jan. 25, 1834. THE son of Goodall, a shoemaker, was bound apprentice to Gunn, a painter. Gunn raised an action of damages against the son for an alleged breach of indenture, and against the father as cautioner. He concluded for the sum of £200 of damages, besides the penalty of £20 stipulated in

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denture. Goodall was a man between fifty and sixty years of age, No. 130. ; a family, and earning 8s. per week of wages as a shoemaker: he annuity of £24 per annum. He applied for the benefit of the poor's-^{Jan. 25, 1834.} and, at the date of the application, his whole means were arrested ^{Forsyth v. Thomson.} dependence. The application was remitted to the lawyers for the who reported a probabilis causa. Gunn objected that the circum- s of Goodall were not such as to entitle him to the benefit of the -roll; and he offered to withdraw his arrestments. Goodall answer- at his circumstances had been discussed before the lawyers for the and it was incompetent for the Court to review their judgment in spect; but, if competent, as he was a journeyman with a family, s annuity would sell for very little, and as he was forced before the as defender in an action of damages which would end in a jury ie must either receive the benefit of the poor's-roll, or be shut out Court.

air Lordships delayed the application for a day in order to look into es, after which they found Goodall entitled to the poor's-roll.

D BALGRAY.—This is an action of damages, and a jury trial will be the That implies very considerable expense, and the question is, whether this circumstances entitle him to the poor's-roll, to enable him to defend against im of damages. The case is not without difficulty. I see that Lord Gillies d, in a case reported on 7th Feb. 1833,¹ in reference to the market value of nity of a man of seventy years of age, that where the party is a young man, urt may be obliged to consider such annuity as a fund out of which he may money in the market; but where the party cannot be so considered, the r is a circumstance of less weight. I must also notice, that the pursuer need by laying arrestments on all the defender's effects. In the special cir- nces, I would hold Goodall entitled to the benefit of the poor's-roll.

D GILLIES.—Where a case is attended with doubt and difficulty, the lean- the Court must be to extend the benefit of this charitable remedy; and the ble report of the lawyers for the poor, who had the whole circumstances of e before them, should scarcely be disturbed.

D CRAIGIE considered the case to be attended with some difficulty, but derstood to concur.

JOHN FORSYTH, Suspender.—*Cunninghame.*

JOHN THOMSON, Charger.—*Ivory.*

No. 131.

ess—*Bill-Chamber—Juratory Caution.*—Bill on caution having been refused ect sufficient caution not found, incompetent under a reclaiming note to pass tory caution.

¹ Ante, XI. p. 360.

- No. 131.** FORSYTH presented a bill of suspension of a charge on a bill of exchange on caution, but having failed to find sufficient caution, the Lord Ordinary, in respect thereof, refused the bill. Forsyth reclaimed, and offered juratory caution. To this it was objected, that it was incompetent, on a reclaiming note, to have a bill presented on caution passed on juratory caution.¹
- Jan. 25, 1834.
2d Division.
Bill-Chamber.
Ld. Medwyn.
T.
Forsyth v.
Thomson.
- The COURT refused the note.

M'Taggart's
Representatives
v. Robertson.

J. W. MACKENZIE, W.S.—DUNDAS and WILSON, W.S.—Agents.

- No. 132.** M'TAGGART'S REPRESENTATIVES, Pursuers.—*Lord Adv. Jeffrey—Jameson—Penney.*
JAMES W. ROBERTON, Defender.—*Skene—W. Bell.*

Bankruptcy—Pactum Illicitum—Trustee—Partnership.—One of two competing candidates for a trusteeship on a sequestrated estate retired in favour of the other, on an agreement that he was to have half the commission, and he afterwards drew part of the commission; and the trustee elected having resigned without accounting for the funds of the estate, an action against the former, founding on the agreement as constituting a partnership, and concluding for count and reckoning, or at least for repetition of the sums actually received from the trustee, dismissed.

- Jan. 25, 1834. THIS was a branch of the case mentioned ante, p. 332. On the sequestration of the estates of the Gorbals Spinning Company, the defender Robertson, merchant in Glasgow, and William Jeffrey, accountant there, respectively offered themselves as candidates for the office of trustee, and carried on a canvass among the creditors. They, however, privately interchanged letters, addressed to each other, of this tenor:—"If I am elected trustee on the Gorbals Spinning Company, I will communicate to you the one-half of the commission I may receive from the said estate;" and the day before the election, Robertson withdrew in favour of Jeffrey, who was accordingly elected unanimously. Two sums of commission were at separate periods allowed to, and retained out of the funds by, Jeffrey, of which Robertson admitted that he had received from him the half of the first, in terms of their agreement, but he denied that he had received any part of the second. Jeffrey resigned, considerably indebted to the estate, and the succeeding trustee raised an action against Jeffrey's cautioner and Robertson (afterwards carried on by the present pursuers on an assignation from him, they being creditors chiefly interested), concluding for the deficiency against the cautioner, to the extent of his bond, and as to Robertson, setting forth that he had "entered into an agreement with the said William Jeffrey, so far as regarded his office and interest as trustee," or at least had drawn or received from Jeffrey
- Jan. 25, 1834.
2d Division.
Ld. Mackenzie.
R.

¹ Hay v. Jopp's Trustees, June 25, 1831 (ante, IX. 806).

sums, being part of his commission, and concluding that he and No. 132:
 should hold count and reckoning as to Jeffrey's intromissions, and
 payment of the deficiency, or, at all events, repeat the sums actually
 by him from Jeffrey. Jan. 25, 1834.
 M'Taggart's
 Representatives
 v. Robertson.

Lord Ordinary ordered Cases.

ed for the pursuers—

There is nothing in the law of Scotland to preclude partnership in
 in the abstract, and although the Court, in the case of M'Gown

held a transaction to be illegal whereby *creditors* who had been
 es were to participate in the profits of a trusteeship, it does not
 at third parties, not creditors, may not lawfully enter into such
 ct. The circumstances here are sufficient to constitute a liability
 art of Robertson, as a partner in this matter, for all obligations
 arising against Jeffrey. The letters interchanged of themselves
 e a partnership; but, further, participation of profits in a joint
 re, is a clear ground for inferring liability as a partner.

pposing, however, that the agreement between Jeffrey and Ro-
 ere illegal, so that no action would have lain on it as between each
 ill third parties cannot have this objection pleaded against them
 individuals guilty of the illegal compact, founding on their own
 Thus, though parties engaged in a joint adventure for smuggling,
 ue each other for obligations thence arising, they may be sued by
 ties not participant in the illegal acting, with whom they have
 ed to deliver goods, although these goods may in reality have
 ugged, but not so known or contracted for by the third party,
 gglers not being entitled to plead their own wrongful acts against
 ot participant therein. In like manner, Robertson cannot plead
 fraud against the pursuers; and any other rule would hold out
 ragement to fraud, by enabling those guilty of it to found on it
 jury of innocent third parties, directly contrary to the principle
 action is refused to the contractors themselves in a fraudulent
 , viz. that they cannot found on their own fraudulent act to their
 antage.

all events, so far as Robertson actually drew a share of the com-
 allowed to Jeffrey, he received money forming part of the bank-
 ite, which the trustee, and the pursuers as in his right, are enti-
 eclaim.

ed for the defender—

There cannot possibly be a latent partnership in the office of a trus-
 sequestrated estate. It is a statutory office, and can only be
 in the manner prescribed by the statute; and Jeffrey alone being
 hereto, the whole obligations of the office attached exclusively
 and could not by possibility attach to any other.

No. 132.

Jan. 25, 1834.
M'Taggart's
Representatives
v. Robertson.

2. Any private agreement by Jeffrey, as to the disposal of the commission when it should become his, cannot constitute a partnership in this office; and, at all events, such agreement would be *pactum illicitum*, in respect of which, as a thing void in itself, no action could lie, either at the instance of the contracting parties themselves against each other, or of any other parties whatsoever,—the contract on which such action must necessarily be based, being a matter which no court of law could in any shape, or to any effect, recognise. And,

3. The commission had legally become Jeffrey's before he paid any part of it to Robertson. It had ceased to be part of the bankrupt estate, and if the receipt of it does not involve liability for the general obligations of Jeffrey on the ground of the alleged partnership, it is quite out of the question that any action can lie for repetition of the money paid to Jeffrey, and by him given to Robertson, as being still part of the funds of the estate.

The Lord Ordinary reported this branch of the cause to the Court, adding the subjoined note.*

LORD JUSTICE-CLERK.—If the transaction between Jeffrey and Robertson is illegal, from which no fruits could arise to Robertson by raising an action against Jeffrey, or vice versa, none else founding on their rights can raise such action. Then, was this transaction such as can be sanctioned by this Court? I am of the clearest opinion, that it is utterly impossible to give the slightest countenance to such an action. The Court of Session is appointed to review the proceedings, &c. in sequestrations, and they are bound to sanction no election having in it the vitium of corruption. Any thing contrary to morality, principles of law, or justice, is not to be sanctioned. Even in regard to questions of mere expediency, the Court have refused to sanction an election where the party chosen was a trustee on another estate, on the ground of conflicting interests. But where corruption is made apparent, it must cut down the election at once. This case is nearly decided in terminis by that of *M'Gown v. Tod*. In that case, Mr Tod, a young man, an accountant, anxious to get employment, and indifferent about emolument, offered to share the profits with several competitors. Some years after the election, the creditors, learning this, complained against Tod, and the Court held the whole to be *pactum illicitum*, set aside the election, and declared Tod ineligible a second time. No doubt the competitors were small creditors, but that was immaterial. Here Robertson got votes for himself, but gave them to Jeffrey, under agreement with him. If it were necessary, that case would settle the law for ever. But it is plain on

* "In regard to the other defender, on the one hand, it seems novel to say, that a responsibility, as a partner, attached by such a bargain, in reference to an office of this sort; and, on the other hand, there does not appear to be in our law that distinction between partnerships, commercial and non-commercial, which obtains, as the Lord Ordinary believes, in some countries. Then, if a similar bargain had been made about the setting up of a shop or trade in any place, viz. that A, on condition of abstinence from rivalry, should have half the profits of the shop or trade to be carried on by B, and this bargain was acted upon, it seems not to be disputed that A would be liable as a partner."

ple, without any authority. This election was carried by one withdrawing competition for the trusteeship, on receiving half the profits ; and he not only drew, but gave all his votes to the opposite candidate. But what are the consequences of so corrupt procedure ? That if the half of the commission is taken for duty involving labour and responsibility, the party is exposed to the greatest temptation per fas aut nefas to get the largest possible commission, so his own half may save him from starving, or an inadequate allowance. See Jeffrey's conduct illustrates this danger—keeping money out of the bank, &c. there are deficiencies of above £1000 at last. It just shows the effect of the present arrangement. Seeing, therefore, our duty is to review the proceedings, to secure purity of election, if we could hesitate, there would be much need to invoke the bankrupt law. But our former judgments show that we never can do so in such proceedings. I would, therefore, assolve, but I would refuse Roberton his expenses.

No. 132.

Jan. 25, 1834.
M'Taggart's
Representatives
v. Roberton.

MR GLENLEE.—The libel is laid on the express subsumption of Roberton's having entered into an agreement of copartnership with Jeffrey. There is no "at least" implied, he agreed to take a share of the profits, and eo ipso became a partner. Unless, however, the agreement itself, by its own terms, infers copartnership, there is no ground to conclude for the liability of copartnership. But there is no statement that any of the profits above mentioned made a copartnership. That is not the case before us, though the agreement is said to infer a liability as partner. It is necessary to say much more than this, that any liability that can lie on the letter of the claim libelled. If it had been otherwise libelled, I still would have had considerable doubt about adopting the doctrine hinted at in the Lord Ordinary's judgment. I do not think there is any great analogy between this and the case suggested by his Lordship. Not that I dispute there may be copartnership in locatio et conductio, but there is a great distinction where mere wages are concerned, and where it is a share of profits. Even though wages bear reference to profits, yet if, on substantial matters, the party be no more than a paid servant, he is not a partner. But, besides, no party can found on illegal transactions as legal, or infer legal responsibilities. Had Roberton been charged with concealing this transaction, and that thereby the creditors were misled into an improper election, there might, perhaps, have been some ground for holding him liable in damages ; but no claim is made on that ground. By the statute, successive trustees are appointed, but on condition of only one being in office at a time. It is impossible to commit the trust to more than one trustee at a time, and I am for assolving.

MR MEADOWBANK.—I am entirely of the same opinion as that expressed by Mr Glenlee.

THE COURT accordingly sustained the defences, and assolved with expenses of the Cases and subsequent procedure, but no other expenses.

J. MOWBRAY and A. HOWDEN, W.S.—T. JOHNSON, S.&C.—Agents.

No. 133. WILLIAM DRUMMOND (Fife Bank Cashier,) Pursuer.—*H. J. Robertson*
—*Moir*.

an. 28, 1834.
Drummond v.
wayne.

HENRY SWAYNE, Defender.—*Jameson—Marshall*.

Donation.—Circumstances in which advances made by a brother, apparently in good circumstances, for the maintenance of a minor brother during his apprenticeship, were held to be made as a donation, though they had been entered in his ledger.

Bankruptcy.—Opinion by the Court, that, where a party engaged in trade, and apparently solvent, makes advances bona fide for the maintenance of a minor brother, ex pietate, his creditors are not entitled to claim repayment of these by afterwards proving that the party was insolvent at their date.

an. 28, 1834.

1ST DIVISION.
d. Corehouse.
B.

THE late David Swayne died in 1806, leaving seven sons and two daughters. David was the oldest son; James was the third; and Henry the youngest. Mr Swayne had executed a settlement in 1799, conveying, with consent of his wife, his heritable and moveable estate to David, under burden of Mrs Swayne's liferent, so long as she remained a widow. A sum of £190 was excepted from this disposition, being left at Mrs Swayne's disposal, failing which, the sum of £60 was to be paid to Robert, the sixth son, and the rest was to be divided among the other sons there mentioned. The name of Henry was not mentioned, as he was not born at the date of the settlement. David was named executor and universal intromitter; and he was burdened with payment of a sum of £50 to each of the sons already born. Soon after the date of the settlement, Swayne disposed a house, said to be rented at £10, to his son James. At his death, Swayne left a considerable amount of heritage, but it did not appear what moveable estate was left, except the £190, and some furniture. At this time Henry was about 5½ years old, and there existed no written provision of any sort in his favour. Mrs Swayne died in 1808. In September, 1818, a contract of indenture of apprenticeship between Messrs John Ogilvie and Son, writers in Dundee, and Henry Swayne, with consent of his brother James, was entered into. Until this time, Henry had been supported, since his mother's death, by some of his brothers. In that contract James bound himself as cautioner and surety for Henry's faithful performance of his duties as apprentice; "and also to uphold the said Henry Swayne in bed, board, clothes, and washing, during this indenture." Henry was taken bound to relieve James of the cautionary obligation; but not to relieve him as to the expense of bed, board, &c. At this time James was a writer in Kirkaldy, and agent for the Fife Bank, and apparently in good circumstances. He died

it in 1821, owing large arrears to the Fife Bank, said to be £22,074. No. 133. ared that he had made entries in his ledger, of sums paid to, or nry, during his residence as an apprentice at Dundee, amounting £100, 11s. 11d. These entries, under the title Henry Swayne, this tenor:—

18.

10. To paid James Balfour for you, . . . £1 2 0

14. To paid your quarter's board to Mrs Legendre, 8 8 0

14. To paid Storrar for your trunk, . . . 1 10 0

30. To remitted you per coach, . . . 10 0 0

16. To remitted you to pay your board, &c. 15 0 0

25. To do. do. do. . . . 20 0 0

8. To paid him, . . . 10 0 0

9. To paid you, . . . 15 0 0

21. To paid H. Page, tailor, . . . 0 6 9

11. To paid him, . . . 0 15 0

20. To paid you on going to Dundee, . 15 0 0

28. To paid Mr Malcolm's account, . 3 10 2½"

receipts for these items appeared, excepting for the first two, any other but an account of 15s. 3d. The letters written by to his brother, occasionally reminded him when a quarter's board e, and asked for it, or thanked him for having sent it. Henry d to have repeatedly asked the advice and permission of James as classes he should attend, &c.

324, Henry went abroad. He did not return till 1828, after which e Bank cashier, being vested in the estate of James, raised an against Henry for repayment of the £100, 11s. 11d. Parties were : whether James had borne any share in the maintenance of prior to his apprenticeship; whether David and Walter Swayne, r brothers of James, were insolvent at his death; and as to the en the insolvency of James truly commenced.

led by the pursuer—

proper party liable to aliment and maintain the defender, was: est brother David. He had received his father's heritage under the of certain provisions to the brothers then in life, and he was r and universal intromitter. James therefore was not liable, morally lly, to maintain the defender; and the sums sent to him, while a being necessary for his maintenance, were not to be presumed do-, but loans. The regular entries of these sums in the ledger, corro-

No. 133. *borated that presumption, and showed the intention from the first to have been to treat them as debts incurred by the defender. As the pursuer was ready to prove that James was insolvent during the whole period of these advances, so that he possessed no money of his own to give away, it was clear that he had not been actuated animo donandi, and the defender could not effectually plead that he had such animus. As for any right of legitim competent to the defender, where the moveable estate was so small, and there were so many children, it must have been trifling; and the proportion of it claimable against James, in respect of any moveables received by him, was altogether insignificant.¹*

Jan. 28, 1834.
Drummond v.
Swayne.

Pleaded by the defender—

As the father had left no provision for the defender, it was clear, even though he had possessed no claim of legitim at all, that his elder brothers, if able, were under the strongest moral obligation to support him; and, if they received any part of the father's estate, they were also under a legal obligation to do so. Besides, all the circumstances supported the presumption of donation. James was a writer and bank-agent when the advances were made, and apparently in flourishing circumstances, and though the defender was past pupillarity, and capable of contracting, he took no obligation from him, and never demanded payment. In entering into the indenture, James acted as in loco parentis, binding himself as cautioner to ensure his brother's good conduct, and to provide bed, board, &c. ; and while the defender was taken bound to relieve him of the cautionary obligation, he was not so as to the bed and board. The entries in the books were merely made to preserve a regular account of expenditure, and not as evidence of a debt.²

The Lord Ordinary pronounced this interlocutor : *—“ Finds that the late David Swayne, by a mortis causa settlement, conveyed all his property to his eldest son, under burden of certain provisions to his other children, with the exception of the defender, who was not born at the date of the settlement : Finds that the defender, at his father's death, was left without any means of support ; but having a claim for legitim against his brothers and sisters, as representing their father, and succeeding to his funds : Finds that certain advances were made to the defender by his brother, the late James Swayne, then established in business, and apparently in flourishing circumstances, but that they did not exceed a moderate allowance for board, clothing, and education : Finds, that at the date of those advances, the defender was past the age of pupillarity, and that no

¹ 1 St. 8. 2 ; 1 Bankt. 9. 22 ; Spence, Feb. 16, 1681 (11437) ; Steven, May 20, 1791 (11458).

² M'Dougal, Jan. 31, 1804 ; Appx. v. Bankt. p. 381 ; Campbell, Jan. 18, 1827 (ante, V. 219).

* At this time the indenture had not been produced.

er or acknowledgment of debt was taken from him by James Swayne, No. 133.
 at no demand was made for payment during the life of that person : ^{Jan. 28, 1834.}
 it presumable, in the circumstances of the case, that these advances ^{Drummond v.}
 made either ex pietate, or on account of the defender's claim of ^{Swayne.}
 n, and that no action lies for repayment at the instance of the pur-
 as now in right of James Swayne : assoilzies the defender, and
 is; and finds him entitled to expenses."*
 e pursuer reclaimed, and the indenture having been produced, and
 se remitted to the Lord Ordinary, his Lordship adhered.†
 e pursuer reclaimed.

LD BALGRAY.—I am for adhering to the interlocutor ; and if this case were
 end on a careful balancing of legal authorities, I should incline to attach
 weight to the observations of Lord Elchies. But I do not think the diffi-
 s to discover on what principles this case should be decided ; every such
 depends on its own circumstances, and it requires merely the correct
 tion of principles which are well established. Looking to all the facts of the
 lo they afford room to presume that the advances were made animo donandi ?
 dgment must be formed from a complex view of the whole circumstances,
 is unnecessary to recapitulate these. I may mention as one of them, how-
 hat the brother who made the advances, and who then seemed to be in good
 stances, never took any document of debt, or made any demand of payment,
 his life, or gave any intimation whatever to Henry Swayne, that he consi-
 the advances as a loan to be repaid. And I have no hesitation in holding,
 they were advances made ex pietate, and animo donandi, the creditors of

NOTE.—Stair, and after him Erskine, says, that advances to persons under
 ithout tutors or curators, are to be held as loans, without making a distinc-
 tween pupils and minors. As applied to minors, the doctrine is contrary to
 le ; it is not supported by the authorities to which these authors refer, and
 irect opposition to some of them. Lord Elchies has clearly pointed out the
 n his Notes, p. 48. Laying these authorities out of view, the present case is
 ed with no difficulty. The defender's brother lay under a moral and legal
 ion to aliment him ; he had the means of doing so, and he did so. Every
 option, therefore, is in favour of donation. The circumstance that he en-
 he advances in his books, is quite immaterial, as has been found in a variety
 is."

NOTE.—By the indenture, James Swayne undertook two distinct obligations ;
 e became cautioner for his brother, Henry Swayne's performance of the ob-
 ns incumbent upon him by the indenture, under the penalties specified ;
 lly, he became bound directly to Ogilvie and Son to uphold Henry Swayne
 , board, clothes, and washing, during the subsistence of the indenture. On
 er hand, Henry Swayne became bound to relieve James of his ' cautionary
 ion, and of all damages and expenses which he might sustain and incur
 h the same.' As the obligation of relief, therefore, is expressly confined to
 utionary obligation, it follows that Henry was not bound to relieve his bro-
 f the obligation for aliment, undertaken not by Henry, but by James alone, to
 e and Son, evidently ex pietate. This document, therefore, confirms the view
 usly taken of the case."

No. 133. Mr James Swayne cannot, after his death, alter their character, and convert them into a debt which is to be repaid. It was within James Swayne's powers to make a donation of these advances, and it was most natural for him to do so; I hold the presumptive evidence sufficient to infer that he actually did so; and this being the case, his creditors cannot afterwards recal all this, and oblige Henry Swayne to pay for what he never borrowed, but received and consumed as a gift.

an. 28, 1834.
Drummond v.
wayne.

LORD GILLIES.—I am also for adhering. I was a good deal struck at first by the intimation in the Lord Ordinary's note, that the interlocutor was opposed to the express doctrine of Erskine and Stair. If I had thought it to be so, I believe I should scarcely have felt myself warranted by any thing short of a decision of this Court, in going in the face of these authorities. But I conceive that the interlocutor is not opposed to them. The case is one which must be decided on its special circumstances; and, on considering the whole of these, I find it impossible to doubt that the advances were made *ex pietate*. The contract of indenture alone is enough to show this. There is a distinction made in it between the two obligations which James Swayne undertook for his brother. On the one hand, in so far as James Swayne became bound as cautioner for Henry's fulfilling the duties incumbent on a faithful apprentice, under the penalties specified in the indenture, Henry was taken bound to relieve James, because any advances made under that cautionary obligation would have been regarded as inferring a proper debt incurred by Henry. But on the other hand, so far as regarded James's obligation to maintain his brother at bed, board, &c., though these advances were certainly to be incurred, no obligation of relief whatever was taken. The distinction is a very marked one, and deserves much weight in a question as to the evidence of the presumed intention of the parties. In addition to this, as the contract stipulated that Henry should receive no remuneration for his services as an apprentice, and James Swayne acted for Henry in making that contract, I think it would be difficult for him to claim payment for advances made for Henry's maintenance during his apprenticeship. I would only add, in reference to the concluding remark of Lord Balgray, that, in a commercial country like this, if a man *bona fide* makes advances to a minor brother for the purpose of necessary and moderate maintenance, and does this *animo donandi*, it would be a very serious matter if his creditors, on expiscating his affairs some years afterwards, and tracing back the origin of his insolvency to an earlier date than these advances, could thereby be permitted to change their character from a gift into a loan, and force repayment from the donee, as if he had truly been a debtor.

LORD CRAIGIE.—I concur with both your Lordships. If the creditors could make out a case of fraudulent donation, they might claim repetition; but *bona fide* advances, of a moderate amount, and made *animo donandi*, cannot be turned by them into a claim of debt.

THE COURT adhered.

J. SHAND, W.S.—A. SCOTT, W.S.—Agents.

1834
JAN 10 1834

A., Pursuer.—*Dunbar.*

No. 134.

B., Defender.—*A. McNeill.*

Jan. 28, 1834.

A. v. B.

—*Diligence.*—An execution of citation, under a summons, bearing that the pursuer, not having personally found the defender, had left a copy for him in the hands of a woman within his dwelling-house, sustained (on a verbal report by the Lord Ordinary, to the Inner House), although it did not specify her to be either a wife, or servant of the defender.

The execution of citation of a summons bore that a copy was left by the pursuer in the hands of a woman within the defender's dwelling-house, the defender himself not being personally found. The defender alleged that it was essential, in such a case, that the execution should bear that the copy to have been left either with the wife or servant of the party : the pursuer was bound to enquire and satisfy himself that the person with whom the copy was left, stood in one or other of these relations to the party ; and that any thing which appeared in the execution, the woman might, in fact, have been a mere stranger, accidentally within the house when the pursuer called, and who would take no farther care in the matter. The Lord Ordinary farther alleged that, by invariable practice, in similar cases, the Court's decisions bore that the copy was left in the hands either of a wife or

Jan. 28, 1834.
1st Division.
Ld. Corehouse.

The pursuer answered, that the words of the act 1540, c. 75, required the pursuers " shall show their letters or precept before the servants of the house, or other famous witnesses, and shall execute their offices as messengers, and thereafter shall offer the copy of the said letters or precept to the servants ;" that Erskine (II. 5. 55) says the copy should be left with the defender's " wife, or any of his children, or servant ;" that, in this case, as the copy had been left in the hands of an old woman of the house, she acted as servant of the defender in taking it on from the messenger ; and that every substantial requisite had been complied with.

The Lord Ordinary reported the case. His Lordship observed, that the case seemed of a rather critical nature ; that this was not the case of execution of letters of diligence, and that Erskine observes there is no objection shown, in modern times, in considering objections to the citation of a summons.

Objections were heard in support of the objection ; but the Court, without counsel in reply, unanimously directed the Lord Ordinary to sustain the objection, and sustain the execution.

REPLIES.—If the messenger says he left a copy for the defender in the hands of a woman within the defender's house, it is substantially the same as saying he left it with a servant of the defender. She acts for the defender, and the copy is for him ; that is just acting as his servant in this matter.

CRAIGIE and BALGRAY concurred.

The objection were sustained, a course of prescription had run upon the claim.

No. 135.

WILLIAM M'LEAN, Suspender.—*Pyper*.JOHN DOUGLAS, Charger.—*Patton*.

Jan. 28, 1834.

M'Lean v.

Douglas.

Jurisdiction—Sheriff's Small Debt Act.—A bill of suspension of a decree under the Sheriff's Small Debt Act, presented on the allegation that part of the defender's name in the summons was written on an erasure, refused as incompetent.

Jan. 28, 1834.

2d Division.

Bill-Chamber.

Ld. Medwyn.

F.

IN February, 1828, the charger Douglas raised an action before the Sheriff of Perth, under the then Sheriff's Small Debt Act (6th Geo. IV. c. 24), the summons in which set forth, that "William M'Lean, at Gilmore Toll," was owing him the sum of £8 of rent, and concluded that the said "William M'Lean, defender," should be decerned to make payment of the same. This summons was, on the 20th of the same month, served upon the suspender M'Lean personally, and a regular execution returned, written upon the summons, bearing that the officer "summoned the above-designed William M'Lean personally," to compare, &c. in common form. No appearance was made for M'Lean, and decree was pronounced against him by the Sheriff on the 27th. For some time Douglas did not enforce this decree, but in December, 1833, he incarcerated him thereon.

M'Lean then presented a bill of suspension, resting exclusively on the allegation that in the summons the letters "ean" of his name were, in both the places where it was mentioned, written on an erasure.

To the competency of this bill it was objected, that the decree was final and conclusive under the statute, not subject in any case to suspension, and not even liable to reduction, on the only grounds of reduction allowed by the statute, after the lapse of a year from the date of the decree.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—"In respect the complainer has not shown that in pronouncing the decree in the Small Debt Court, upon which he is now imprisoned, the Sheriff has not proceeded according to the forms and regulations of the act 6th Geo. IV. c. 24, refuses the bill as incompetent, finds expenses due, allows an account thereof to be given in, and remits to the auditor to tax the same, and to report."

THE COURT adhered.

J. NAIRN, S.S.C.—BOWIE and CAMPBELL, W.S.—Agents.

* "When a bill is refused as incompetent, it is always satisfactory when there are no grounds for suspension on the merits. In the present case, the complainer does not allege that he was not personally cited; he does not say that he was not cited as the 'within designed William M'Lean;' he does not state that the debt is not due, nor attempt to object to the justice of the decerniture against him."

ROBERT HAMILTON, Pursuer.—*Skene—Cunninghame.*
 v MARY MONTGOMERY and HUSBAND, Defenders.—*Anderson.*

No. 136.

Jan. 28, 1834.
 Hamilton v.
 Montgomery.

warrandice—Assignment—Prescription.—A party who held lands, with the teinds, had been originally conveyed with a warrandice right over other lands in return for augmentation of stipend, qualified by a power of redemption on certain lands, granted a feu disposition of part of the lands with the teinds, and the assignment to writs, but without any conveyance of the warrandice right; and the assignors, in renewing the investitures of the principal lands, omitted the qualification of a power to redeem originally attached thereto, and possession was entered of the principal lands under the titles, omitting this qualification, for more than forty years, but without any claim having arisen under the warrandice; and finally an augmentation was imposed on the vassal—Held, in an action of relief, the assignation of the vassal against the proprietor of the warrandice lands, 1. That the assignation to writs in the feu disposition, did not convey any right to the warrandice; and, 2. That the qualification of that right as to the power of redemption had been worked off by the infeftments which omitted it standing for forty years.

The barony of Glassford, which formerly belonged to the family of Jan. 28, 1834.
 11, consisted of two parts, respectively termed the Dales of Glassford, 2d Division.
 12 Muirs of Glassford. In 1693, Lord Sempill disposed to Alexander 1st Division.
 13 of Torrance the Dales of Glassford, with the teinds, as principal, 1st Division.
 14 retain parts of the Muirs of Glassford in warrandice, to the following T.
 15 as set forth in the clause of warrandice: “ That in case any part
 16 teinds being evicted or burdened, the said Alexander Stewart and
 17 esays are hereby to have free regress, ingress, and access, in and
 18 foresaid lands, teinds, and others above disposed, in warrandice,
 19 is, at the least, or sua meikle of the same as in quantity, quality,
 20 arly rent, shall be answerable and correspondent to the said evic-
 21 burden, and that aye and while we and our foresaids, either peace-
 22 ally or legally repossess them, to the undoubted right to the said teinds,
 23 of the said eviction, and all burdens whatsoever, or then to make
 24 rent to him or his foresaids, of the price and value of the said teinds
 25 be evicted and burdened, as said is, at the rate of sixteen years’
 26 use, counting the victual at £100 the chalder, and of the haill charges
 27 expenses he or his foresaids shall happen to disburse and impend
 28 the defence of the said teinds, and of the actions to be commenced
 29 against them thereanent.” Of the same date with the disposition con-
 30 taining this clause, Lord Sempill granted to Stewart two relative charters
 31 of the same lands, in principal and warrandice respectively, the one con-
 32 taining an “ a me,” and the other a “ de me,” holding, and both repeat-
 33 ing the clause of warrandice in the terms above quoted. Under these
 34 charters Stewart was infeft, the instruments of sasine referring to the war-
 35 rant right in these terms: “ Saltem et tantundem dictorum censuum

No. 137. et divoriarum in quantitate et qualitate annuatim ad dictas evictiones et onera si quæ fuerunt congruen. et corresponden. cum omnibus impensis et sumptibus a præfato Alexandro et ejus prædict. quatenus expendendis vel evincendis quæquidem sumptus et expensæ liquidandæ sint juramento dicti Alexandri et aliter in dict. literis et cartis specialiter content. prout in iisdem literis hereditariæ dispositionis et cartis antedict. de datis infra script. latius exprimitur." In 1694, Stewart further took a decree of adjudication of the lands and teinds, principal and warrandice, above mentioned; and in 1701 he obtained a crown charter of adjudication and resignation—the clause of warrandice being inserted in the decret and charter at full length, and exactly in the terms of the disposition in 1693. On this charter Stewart was infeft in May, 1701, the reference to the terms of the warrandice right being as follows: "Et hoc in specialem securitatem et warrantum decimarum rectoriarum et vicariarum terrarum aliorumque principaliter supra disposit. cum pertinen. quod dictæ decimæ nunc sunt et omni tempore futuro salvæ secure et liberæ erunt dicto Alexandro Stewart de Torrance ejusque antedict. ab omnibus oneribus periculis damnis evictionibus encumberantijs et inconvenientiis quibuscunque in modo forma et effectu ut in dicta carta continetur." The Stewart family continued to make up their titles under, and with express reference to the charter 1701, till 1745, when Archibald Stewart, then of Torrance, exped a new crown charter, wherein that part of the conveyance in warrandice which declared it redeemable by purchase of the teind taken for augmentation, at £100 Scots per chalder, was omitted; and he was infeft thereon. Thereafter the titles of the successive heirs were made up, in terms of this charter, according to which they are now held by Miss Stewart of Torrance, who is the personal representative of the original disponee in the disposition of 1693.

In 1714, Alexander Stewart of Torrance granted to one Cullen a feu-disposition of the lands of Whitehill, part of the Dales of Glassford, with the teinds, to be holden under him, for the yearly payment of £10, 4s. 4d. feu-duty; "as also, paying yearly to the minister of the said parish of Glassford for the time, or to me and my foresaids, at our option, the sum of £5, 2s. 2d., in name of teind-duty, at the said two terms in the year, and beginning the first term's payment thereof at the said term of Martinmas next to come, for the half-year preceding. And it is hereby declared and agreed unto, that, in case of augmentation or eviction of the said teind-duties, then and in that case, the said John Cullen and his foresaids shall be allowed to retain in their own hands as much of the said feu-farm duty as shall answer and correspond to the said augmentation or eviction."

In the clause of warrandice, in this feu-disposition, there was no mention of augmentations of stipend; but, after the usual warrandice against wards' evictions, it bore as follows:—"And, lastly, I bind and oblige me to warrant, free, relieve, and skaithless keep the said John Cullen, and

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lands, of all bygone cesses, rents, taxations, outrigs of horse or
 litia, teinds, teind-duties, ministers' stipends, schoolmasters' fees,
 ons of kirk or kirkyard dykes, ministers' manses, and other public
 whatsomever, due and payable furth of the lands, teinds, and
 above disposed, at and preceding the term of Whitsunday last,
 the said John Cullen and his foresaids being, by their accepta-
 eof, expressly bound and obliged to free and relieve me and my
 : of the said public burdens in all time coming, from and after the
 n of Whitsunday last."

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feu-disposition farther contained a clause of assignation to writs
 lents, in these terms:—"And, in like manner, I, by these pre-
 sign, transfer, and dispo, to and in favour of the said John
 and his foresaids, the hail writes, rights, evidents, and securities,
 ranted, and conceived, or that may any ways be interpret in fa-
 f me or my predecessors or authors, of and concerning the lands
 ers above disposed." Infestment was taken under this disposition,
 lands of Whitehill afterwards came to be vested in the pursuer,
 n, by singular titles.

ie meanwhile, the Muirs of Glassford, including the warrandice
 ontained in the conveyance to Stewart in 1693, had been ac-
 ry Alexander, ninth Earl of Eglinton, predecessor of the defender,
 lary Montgomery, by decree of adjudication, in 1704, followed
 xition from Lord Sempill in 1716, on which infestment passed,
 ence being made to the previous warrandice right in favour of
 of Torrance.

r these several titles, the different parties above mentioned con-
 o possess their respective properties without the claim of warran-
 ng called into operation; for, though the minister of Glassford
 l augmentations in 1769 and 1797, no part thereof was allocated
 lands forming the Dales of Glassford. Two farther augmenta-
 re, however, obtained in 1807 and 1822, in the localities in which
 n portion of the augmented stipend having been laid on these
 ady Montgomery offered, by minute, to redeem the warrandice
 nveyed by the disposition 1693 in terms thereof, by purchase of
 id evicted for augmentation, at the specified rate of £100 Scots
 lder. To this, Miss Stewart made no objection; and, in the
 heme, an amount of augmented stipend having been allocated
 ands of Whitehill, exceeding the feu-duty allowed to be retained
 original feu-disposition in the event of such eviction, Hamilton
 n action of declarator and relief against Lady Montgomery, con-
 to be relieved, out of the warrandice lands belonging to her
 s, of the augmented stipend laid upon Whitehill.

sfence, Lady Montgomery pleaded—

amilton has no title to found on the warrandice right contained in
 osition from Lord Sempill in 1693. There is no conveyance of

No. 137. that right by Stewart of Torrance in the feu-disposition of Whitehill; and, on the contrary, the vassal is bound to free the superior of all augmentations of stipend, with relief, specially limited to the right to retain the feu-duty. Neither can the assignation of writs and evidents be of any other force than to make the writs belonging to the disponent available to the disponent for the defence of rights actually conveyed, but it can never in itself operate as a conveyance of rights, as was found in much more favourable circumstances in the case of *Graham v. Don*.*

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2. Even if an assignation to the right of warrandice itself could be implied from that to the writs and evidents, it is subject to the power of redemption, which has been admitted by Miss Stewart in the locality. There is no room to plead that, by the omission in the titles of the Torrance family since 1745, of the qualification of the warrandice right contained in the disposition of 1693, giving the proprietor of the warrandice land a power to redeem, a prescriptive right has been acquired to the warrandice right, disburdened of the qualification. To effect this, there must have been possession under the warrandice right, exclusive of the power of redemption, whereas no possession was ever had of it at all till the last locality, when the power of redemption was at once admitted by Miss Stewart; while, on the other hand, the warrandice lands have been freely and absolutely possessed in property by Lady Montgomery and her predecessors, under titles containing no mention of the warrandice right. And,

3. At all events, Hamilton can only found on the warrandice right as in place of, and subject to the same exceptions with Miss Stewart, who, as representative of the disponent in the original disposition of 1693, would be liable to be met with the plea, that the right was qualified by the power of redemption on the part of the proprietor of the warrandice lands.

To this it was answered—

1. The feu-disposition to Whitehill being with the teinds, the assignation to writs and evidents must be effectual to entitle the vassal to found on all rights of his superior, capable of protecting the right so conveyed; and the warrandice, from augmentation, therefore, in the original conveyance of the lands, must be held as assigned to the vassal, to the effect of enabling him to protect his teinds conveyed in the feu-disposition.

2. and 3. The pursuer is a singular successor entitled to trust to the infestments of the Torrance family, which, since 1745, contained a right of warrandice unqualified by any power of redemption, and the possession of the Dales of Glassford by the Stewarts, under infestments containing a warrandice right unqualified for so long a period, is sufficient to have

disburdened the right of the qualification on the principle of the decision No. 137. in the case of *Monro*.¹

The Lord Ordinary, on advising Cases, assolizied Lady Montgomery with expenses.

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Hamilton reclaimed.

LORD GLENLEE.—I thought the interlocutor right. I should scarcely, however, have considered it necessary to have gone farther than the first finding, as it is clear that the pursuer has no right whatever under the assignation to the writs, farther than to have them made forthcoming, in order to maintain those rights which were really conveyed; and, after the decision in the case of *Graham v. Don*, I could never have imagined that such an assignation could be founded on to a greater extent. That was a much stronger case than the present, as there was there something like a special, general assignation; and the Court held, that though the right in question was a tack of teinds, which may be carried by assignation, yet the assignation to writs could only be used to support the right actually conveyed, but could not convey the tack itself. Now here, where the subject is heritable, are we to suppose a less formal conveyance to be effectual? I have no conception of it. The only benefit that the pursuer can get by the assignation of writs is to defend by them what was conveyed to him by Stewart, but not to get something further. Now, what was given? There was no warrandice against further augmentations, except under the clause allowing him to retain the feu-duty, and to the extent of maintaining that right if disputed, he might found on the writs signed; but to the effect claimed, he has no right whatever. And, even if I thought otherwise, I would have agreed with the Lord Ordinary, that though this party is a singular successor, yet it is in merely a personal right to warrandice lands, and that he would be liable to have every objection pleaded against him that was competent against his author; and he is not entitled to say that his infeftment over all such objections—quite the reverse.

LORD MEADOWBANK.—I am for adhering on the first ground.

LORD JUSTICE-CLERK.—I am also for adhering, and particularly on the first ground. The pursuer has no right to found on the assignation of writs, farther than to maintain what was given, and in that he is already secured. This is a much stronger case than that of *Graham*. On the other point, I also agree, that this party is not in a better situation than Miss Stewart, and she could not have insisted in the obligation of warrandice without going back to the original right, and submitting to the qualification contained in it.

THE COURT accordingly adhered.

W. WADDILL, W.S.—TOD and HILL, W.S.—Agents.

¹ May 19, 1812 (F. C.)

No. 138.

LORD ELIBANK, Pursuer.—*A. Wood.*

an. 29, 1834.

Elibank v.
Campbell.PATRICK CAMPBELL and WILLIAM PURVES, Defenders.—*H. Bruce.*

Expenses.—The pursuer of a reduction, who was found not entitled to expenses in an incidental discussion with a third party's law-agent relative to production of title-deeds, held to have no claim for these expenses against the defender, although the defender was found liable generally in expenses.

an. 29, 1834.

1st Division.

AN heir-substitute of entail raised an action against a purchaser to reduce a sale in contravention of the entail, in which it was necessary for him to produce the titles of the estate. They were in the hands of Roy, the law-agent of the heir of entail in possession, and Roy pleaded that they were under hypothec for his account, and refused to produce them. A judicial discussion took place, in which the heir-substitute prevailed, but Roy was not subjected in the expenses of it. The heir-substitute, having been successful in the process of reduction, was found entitled to expenses; and he insisted before the auditor that he should be allowed those relating to the discussion with Roy, as being incurred in following out the reduction. The auditor having allowed that expense, the defenders objected to his report, and contended—

That the incidental expense in which the pursuer had been involved by Roy's refusal to produce documents, was not a matter for which they should suffer. If Roy's conduct had been blamable, the Court would have subjected him in expenses to the pursuer: if it was not blamable, still the expense must fall on the pursuer, as the defenders were not fairly liable for the existence of the discussion at all. It was not a direct or necessary consequence of the prosecution of the reduction, but merely contingent.

To this it was answered—

As Roy had not been subjected in expenses, the Court must have considered the discussion raised by him not to have been rash or unreasonable, though it proved unsuccessful on his part: the pursuer, therefore, was subjected to the loss of the expenses disbursed by him; and as the defenders had rendered the reduction necessary, this loss should fall on them.

LORD BALGRAY.—I think the expense of the discussion with Roy cannot be laid on the defenders. If Roy chose to maintain unfounded pleas, why should the defenders pay for this?

LORD CRAIGIE concurred.

LORD GILLIES was understood to dissent.

Objection sustained.

A. and J. ROLLAND, W.S.—J. YOUNG, S.S.C.—Agents.

S MACLEAN, or WHITESIDE, and Others, Petitioners.—Cowan. No. 139.

r—Tutor and Curator.—Where part of the family of a deceased were mi-
 st pupillarity, some being abroad, and some at home; and part of the
 were pupils, the Court appointed a factor loco absentis to the minors abroad
 o tutoris to the pupils; but refused to appoint a curator bonis to the minors
 , reserving to them to choose a curator for themselves in common form.

Jan. 29, 1834.

Maclean &
 Others.

Sands v. Lady
 Brisbane, &c.

S MACLEAN, or Whiteside, the mother of John Allan Maclean and Jan. 29, 1834.
 presented a petition to the Court, along with two of the nearest in
 her deceased husband, stating that he had left property, which
 d some person to take charge of; that two of her sons were abroad;
 her two were minors, past pupillarity, and that the rest of the chil-
 were pupils. The petition prayed for the appointment of Dr
 aide as factor loco absentis, to the children abroad; curator bonis,
 minors past pupillarity; and factor loco tutoris to the pupils. The
 concurred in the prayer of the petition. No opposition was

1st Division.

D BALGRAY.—The children past pupillarity must choose a curator for
 lives in the usual manner. The interposition of this Court is not necessary
 mem.

DS CRAIGIE and GILLIES concurred.

LORD PRESIDENT was absent, but his Lordship, at first moving the peti-
 id made an observation to the same effect with Lord Balgray.

HUNTER, CAMPBELL, and CATHCART, W.S.—Agents.

WARREN HASTINGS SANDS, Raiser.—D. F. Hope—Baillie. No. 140.
BY MAKDOUGALL BRISBANE and HUSBAND, Claimants.—Keay—
Shaw Stewart.
OMAS AUSTRALIA BRISBANE and TUTOR, Claimants.—Sandford.

isions to Children—Testament—Trust—Clause.—Construction of a holograph
 , bequeathing a special fund, under burden of the testator's "debts due by
 bill, or account-current, and funeral expenses," by which it was held that the
 as not burdened with provisions previously constituted by bond of the tes-
 n favour of younger children.

20th July, 1811, the late Sir Henry Hay Makdougall, who had Jan. 29, 1834.
 daughters, executed a bond for payment of £4600, to the two
 ger daughters; at the first term after his decease, on the narrative
 he was bound by his marriage-contract to provide them in £3000,
 ad resolved to make a larger provision. He also became bound to

1st Division.
 Ed. Corehouse
 D.

No. 140. pay them an annuity of £200 each, commencing after his death. The provisions were declared to be in full of legitim, &c. The bond declared to be revocable at pleasure.

Jan. 29, 1834.
Sands v. Lady
Brisbane.

On 20th August, 1823, Sir Henry executed a trust-settlement in favour of Warren Hastings Sands, W.S. It proceeded on the narrative that he had executed an entail, in 1812, of the lands of Makerston; that there was a reserved power of alteration in the deed; that, since then, he had made considerable improvements on his mansion-house at Makerston, thereby contracted various debts, and, therefore, "in order the better to secure my creditors, and for answering the other purposes herein mentioned, I hereby declare, that, in so far as my separate means and estate, hereafter disposed, may fall short of answering my purposes hereafter specified, then, and in that case, all and each of my heirs and assigns, as they shall succeed to my entailed estate, shall be bound and obliged to make good any deficiency that may arise of my separate means and estate, and to implement and fulfil all the purposes hereafter mentioned, in so far as the same may remain unsettled, out of the trust hereafter granted." The deed conveyed to Sands "all debts and sums of money which shall be due and addebt to me, by whatever person at the time of my death, by bonds, heritable or moveable, bills, decrees, accounts, or any other manner of way, together with the said bonds, bills, and other writs, and all action, diligence, and execution following, competent to follow thereon, and all bygone rents, mails, and duties on my lands, due or exigible by me or my heirs or executors, with the corn, cattle, and all other goods and effects whatsoever, that shall belong to me at my death; excepting herefrom all my household-furniture," and silver plate, linens, wines, &c. left to the first heir of entail: "And farther I do hereby assign, alienate, and dispone, to the said Warren Hastings Sands, but in trust always, as aforesaid, all and whole what may remain undivided and unpaid of my fourth share of the real and personal estate of the deceased John, Duke of Roxburghe, which his Grace was pleased to leave to me." Sands was also named executor.

The trust-purposes were, 1st, "in so far as the produce of my means and estate before conveyed will admit, to pay all my just and lawful debts, with my servants' wages and funeral expenses, and the trust expenses in executing this trust;" 2d, to pay all legacies, gifts, or donations already made, or afterwards to be bequeathed "by any codicil hereto, or by any writing or memorandum clearly expressive of my will, though not formerly executed;" and lastly, if the said means and estate sufficed, to relieve the entailed estate, by paying the provisions granted to the two younger daughters of Sir Henry. The deed declared that so far as the said means and estate "fell short of answering any of the said purposes," the same were to be held real burdens on the entailed estate; and in so far as any surplus might arise after satisfying the

it was to be conveyed to the heir of entail in possession for the Power of revocation was reserved. No. 140.

8th October, 1823, Sir Henry executed a holograph codicil, pro-
 on the narrative of his having executed the entail, and having
 d his estate with sufficient provisions for his younger daugh-
 rd having conveyed, by trust, his heritage and moveables in
 of his eldest and other daughters according to the entail, but
 the burden of such legacies, annuities, and donations, as I might
 er, at any time of my life, think proper to leave and bequeath by
 rate deed, missive, letter, or other writing under my hand." He
 hed legacies to the amount of £1605, besides three annuities to
 , amounting in all to £76. The deed then proceeded—"With
 o what I may succeed to by the will of John third Duke of Rox-
 I declare my intention to be as follows: That out of this sum my
 ie by bond, bill, or account-current, and my funeral expenses, shall
 making the estate free; and the residue, if any, to go to Lady
 e, burdened as I may afterwards direct, when the amount is ascer-
 and I hereby declare this holograph writing as relative to my
 tlements; and that the legacies, annuities, and donations herein
 me, shall be payable by, and a burden on, those succeeding in
 f said entail and settlements."

Jan. 20, 1834.
 Sands v. Lady
 Brisbane.

Sir Henry's death, in 1825, Sands entered on the execution
 rust. It afterwards turned out that a considerable sum of money
 to the trust-estate under the Roxburghe bequest, so that a surplus
 £10,000 would probably remain, if it was not required to be ap-
 absolutely freeing the entailed estate, by payment of the provi-
 anted to the Misses Makdougall. Prior to this, part of the rents
 Makerston estate had been applied for several years to meet these
 ns, as the trust-estate had not afforded the means of otherwise
 hem. When the amount of this fund appeared, Lady Brisbane,
 ence to the codicil, contended that it should be paid over to her
 any deduction, on account of the provisions in favour of the
 Makdougall, which should be left a burden on the entailed estate.
 um was opposed by Thomas Australia Brisbane, son of Lady
 e, and next heir of entail; and Sands raised a multiplepinding.
 ed by Lady Brisbane—

e codicil, the Roxburghe fund was bequeathed, as a special legacy,
 Brisbane, under burden of "the debts due by bond, bill, or ac-
 current, and funeral expenses." The declaration, "making the
 ee," could only be read relatively to these words, and, of course,
 making it free to the extent specified in the codicil. But the
 us in favour of the Misses Makdougall did not fall within that de-
 . They were not debts, in the most proper sense, being provi-
 children, payable only after death; and Sir Henry could not be
 include them under the name of debts, they being contained in

No. 140. a revocable deed. Besides, he always described their rights under name of provisions, and not under the name of debts. In addition, this, the codicil would lose all meaning and effect, if the Roxburghe were to remain burdened with these provisions, for it stood precise burdened under the previous trust-settlement. Lady Brisbane was therefore entitled to insist that the entailed estate must be charged with provisions of the Misses Makdougall, and the surplus of the Roxburghe fund paid over to her.

Jan. 29, 1834.
Sands v. Lady
Brisbane.

Pleaded by Thomas Australia Brisbane—

The leading object of Sir Henry was to free his entailed estate of all burdens, and this was the primary purpose for which the trust constituted. In a question of intention, this must be the guide for the Court, whenever a doubt arose. But the codicil had expressly given effect to this object, as it was only after the debts and funeral expenses were paid, "making the estate free," that the residue was to go to Lady Brisbane. These words must be interpreted to mean, at least, that the residue could arise, until the entailed estate was free of all debts of every sort. But the bonds of provision in favour of the Misses Makdougall were truly debts, as contradistinguished from either legacies or donations, and they were debts by bond. At least, they were debts, in the proper sense, to the extent of £3000, that being precise implement of obligation in Sir Henry's contract of marriage. There was an obvious purpose in executing the codicil, though such provisions were to remain burdens on the Roxburghe fund. By the previous trust-settlement, the residue of the trust-estate, including that fund, was to be paid, in event of a surplus, to the heir in possession for the time. But as the trust might exist for a considerable time, so that neither Lady Brisbane nor any of her issue might be living when the trust was wound up, Sir Henry had chosen to put it in her power to dispose of the eventual residue, whether she should survive the duration of the trust or not.

The Lord Ordinary ordered minutes of debate, and reported the cause observing, in a note, that he did this, as it was "an amicable suit between a mother and her son, a pupil, which should receive the judgment of the Court."

LORD BALGRAY.—I think the words used in the codicil are of so precise nature, "debts due by bond, bill, or account-current, and funeral expenses," that provisions to the Misses Makdougall cannot be held to fall within it. I can think they were within the grantor's intention, when he used words which are so specific, and apparently selected with a degree of anxious accuracy.

LORD GILLIES.—I am of the same opinion. Indeed, I scarcely see any satisfactory object of the codicil, if its meaning were to be interpreted as the heir intends. Besides, a man makes a distinction, in common parlance, between debts and his provisions to his family, payable after his death. The codicil is a holograph of Sir Henry, and I think it was not his intention to burden the legacy to Lady Brisbane with these provisions.

CRAIGIE was understood to concur.

No. 140.

THE COURT preferred Lady Brisbane.

Jan. 29, 1834.
Adamson v.
Adamson.

W. H. SANDS, W.S.—A. SCOT, W.S.—W. PATRICK, W.S.—Agents.

JOHN ADAMSON, Advocate.—*Skene—Outram.*

No. 141.

WALTER ADAMSON, Respondent.—*Jumeson—Christison.*

—Arrestment—Jurisdiction—Proof.—The titles to an heritable property were same of A, and the property was afterwards sold, and the price received o paid part of it to B, after a creditor of B had arrested in his hands on iption that the property truly belonged to B—1. Held competent to try B's be price in a forthcoming before the Sheriff, at the instance of the arrester, ny declarator of trust against A; 2. Admissions sufficient to establish B's hout the necessity of referring to the writ or oath of A; and, 3. Payment art of the price to B, held proof that that amount was due, and a demand counting as between them refused.

108, Robert Goodfellow, mason in St Andrews, entered into an Jan. 29, 1834.

ent for the purchase of a house at the price of £175, but being 2^d Division.
to pay the whole sum, he applied to the advocator, John Adam- Ld. Mackenzie.
l one Robertson, for assistance. Part of the price, (said by T.

low to have been £100,) was paid by the advocator, and the
the property were taken in name of him and Robertson.
low, however, alone entered to possession, which he retained till
hen, of date 22d May, one Braid addressed jointly to him and
ocator, a missive offering to purchase the house at a price
ixed by four tradesmen mutually chosen. To this offer the
g acceptance was given by Goodfellow and the advocator:—
hereby accept of your offer, as before written. In witness
, I have subscribed this acceptance, written by the before-de-
John Buchan at St Andrews, the said 22d day of May, 1828,
hese witnesses, the before-designed James Edie and John Buchan.
) ROBERT GOODFELLOW. GEO. MITCHELL, for Mr JOHN
ON."

nute appointing the four tradesmen was subscribed in the same
this acceptance, and the price was afterwards fixed by them at
is. This price was paid by Braid to the advocator in two sums,
the 25th August, and £167 on the 20th October, 1828, of which
te a disposition in his favour was executed by the advocator and
on. In the meanwhile, the respondent, Walter Adamson, on the
nce of an action at his instance against Goodfellow for £19, 5s.,
l arrestments in the hands of the advocator on the 18th June, and
l, the purchaser, on the 25th August, notwithstanding which the
thereafter paid £40 to Goodfellow. Having obtained decrea

No. 141.
 Jan. 29, 1834.
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 Adamson.

against Goodfellow for the amount sued for, with £4, 8s. 9d. of expenses, the respondent brought an action of forthcoming against Braid and the advocator on his arrestments in their hands. In defence, Braid alleged that he had only dealt with the advocator and Robertson, and so owed nothing to Goodfellow; and the advocator pleaded, that so far from being indebted to Goodfellow at the date of the arrestment, the latter was his debtor to a considerable amount; and he made the following statement as to his transactions with Goodfellow:—

“ The history of the defender’s transactions with the common debtor, Goodfellow, is simply this:—

“ Many years ago Goodfellow purchased a small property in St Andrews; but being unable to pay the price, and having occasion for assistance otherwise, he applied for assistance from the defender and a Mr Thomas Robertson, flesher in St Andrews, since dead, who agreed to render him the necessary assistance; and for their security, it was arranged that an absolute disposition to the property should be granted by the seller in their favour, on the understanding that Goodfellow should be entitled to a conveyance to the property, on relieving them of any advances or obligations they might come under on his account. Robertson made no advances; but the defender Mr Adamson advanced £100 to Goodfellow.

“ By a subsequent arrangement, a sum of £100 was borrowed on the security of the property to replace the above advance, and this bond was afterwards paid off by the defender Mr Adamson. Goodfellow was thus in reality the proprietor of the property, and the defender and Robertson were merely heritable creditors on it, for any advances which they might be under on his account. Accordingly, when Mr Goodfellow became desirous to get rid of the property by a sale, it was he who transacted the sale, and acted as true proprietor,—the defender and Robertson merely consenting.

“ Of this date, Goodfellow sold this same property to the present pursuer, Walter Adamson, at the price of £287, and to account of the price the pursuer paid £19, 16s. 6d. The pursuer, however, failed to complete his part of the bargain, and in consequence, the defender understands, of some omission on the part of Goodfellow, the pursuer obtained a decret for repetition of this sum, on which decret the present arrestments were laid.

“ This bargain being broken off, the common debtor Goodfellow, with the defender’s consent, again sold the property of this date, to the other defender Mr Braid, at the price of £227, 5s. sterling, payable at Martinmas last. In the meantime the present pursuer thought fit to lay the present arrestments in the hands of the defender, although he was not, nor never was, in possession of any funds belonging to the common debtor,—the relation in which the defender stood towards Goodfellow, as has been shown, being that of an heritable creditor holding an heritable note.

or a debt due to him, and constituted in the usual way by absolute No. 141.
 sition and back-bond, which security he was ready and bound to
 nce on receiving payment of his debt. Accordingly, when the pur- Jan. 29, 1834.
 r came to settle the price with Goodfellow in the beginning of the Adamson v.
 nt year, for it was after the term of payment ere a settlement took Adamson.
 , the defender received payment of his debt, amounting to £177
 exclusive of the expense of discharging an inhibition and some other
 es, and the balance of the price was received by Mr Goodfellow,
 urchaser, in lieu, obtaining from the defender and Mr Robertson,
 se representatives, by the way, ought to have been made parties to
 ction,) a conveyance to the property, or in other words, a renuncia-
 of the security which they held by their absolute disposition.

Such being the state of the facts, it must be abundantly plain that
 pursuer's arrestments do not apply. The defender held no funds be-
 ing to the common debtor; but, on the contrary, held a large claim
 st him, for which he and Robertson held an heritable security, con-
 ed by absolute disposition and back-bond. On payment of their
 ices either by Goodfellow or any one for him, they were bound to
 nce their security in their favour, and they did so. They were not
 led at their own hands to sell the property without Goodfellow's
 nt, because they were not the bona fide proprietors of the property;
 even had the defender, on the authority of Goodfellow, been the
 ible seller of the property, he could only have done so as his factor,
 t the time the arrestments were used he had no funds in his hands.
 s been already noticed that the representatives of Robertson, the
 der's co-dispensee, have not been made parties to this action, which
 plain ought to have been done, as they were both jointly connected
 the property; and more especially as it appears from the execu-
 produced, arrestments were used in his hands also. It is submitted,
 fore, that this ought, before further procedure, to be ordained to be
 .

ie Sheriff having appointed a judicial examination, the advocator
 ed a declaration in these terms:—"That the common debtor, about
 teen years ago, purchased a house in the South Street of St An-
 s, from the late David Carnagie, horse-dealer in Cupar, but does not
 lect the price, but being shown the disposition by Carnagie in the
 rant's favour, it appears that the price was £175. That Goodfellow
 ; unable to pay the price, applied to the declarant and Thomas Ro-
 on, flesher in St Andrews, for assistance: that the declarant gave
 ssistance accordingly, but of the particular amount he does not now
 lect: that for the declarant's security the disposition to the property
 aken from Carnagie in the declarant's and Robertson's name abso-
 y, but they granted Goodfellow a back-letter, binding themselves to
 y the property to him, on being relieved of their advances and en-

No. 141. gagements at any time within five years from that date : that at the time
 Jan. 29, 1834. of the purchase Goodfellow was in possession of the property, and continued in it down to the period of James Braid's purchase or entry to the
 Adamson v. property : that the declarant being anxious to recover his money, he
 Adamson. spoke to Mr George Mitchell, St Andrews, about getting a purchaser, when he said he had somebody in view : that he understood Goodfellow had no objections to the property being sold, as he knew the advance the declarant was under, and that he was anxious to recover it : that he authorized Mr Mitchell to act for him in concluding a bargain with Braid, and to subscribe any missive that might be necessary : that he is not in possession of the missives of sale, and never saw them : that the declarant and Thomas Robertson executed a disposition in favour of James Braid, and delivered it, with the title-deeds, to Mr Charles Grace, St Andrews, who paid the declarant the whole price of the property. Interrogated, if he had any conversation with Robert Goodfellow regarding the selling of the property, before it was sold to Braid ? Depones, that he had none : that he daresays he has had conversations with Goodfellow after the sale of the property, and Goodfellow seemed satisfied that the declarant was to get payment of his money. Interrogated, if he paid any money, either to Robert Goodfellow, his wife, or any other person connected with him, since the property was sold ? Declares, that he paid some money to Goodfellow, but the exact amount he does not recollect ; but he thinks it exceeded forty pounds : that he did not consider himself bound to pay Goodfellow this money, but gave him it in a present, considering the property as his own, as Goodfellow had not redeemed it within five years, in terms of the back-letter above referred to, and that the declarant had run all the risk ; and but for Mr Braid requiring the property for a particular purpose, he might have lost very considerably. Interrogated for Mr Braid, depones, that the five years within which the common debtor had a right to redeem the property in question, expired in 1814, after which the declarant considered the property his own, in consequence of Goodfellow having failed to redeem it : that the declarant did not draw any rent from Goodfellow ; but as there was a bond for £100 over the property, it was understood between the declarant and him that Goodfellow was to pay the interest of this bond, instead of paying the declarant's rent, but which Goodfellow omitted to do for the last five years : that after 1814, the declarant considered Goodfellow his tenant. Interrogated by his own agent, declares, that in giving Goodfellow a present of the money above mentioned, he did so from a feeling towards him and his family, who were very poor, and because the property had turned better out than he had ever expected." Braid also, in his declaration, contrary to the statement in his defences, admitted that he had purchased the house in question from Goodfellow. On advising these declarations, the Sheriff pronounced this interlocutor : " Find it to be

by the productions in process, that the subjects in question were No. 141.
 trust by John Adamson and Thomas Robertson, for behoof of
 Goodfellow, the common debtor: finds that these subjects were Jan. 29, 1834.
 Adamson v.
 Adamson.
 ed by James Braid, one of the arrestees, from the common debtor,
 nsent of John Adamson, the other arrestee, on the 22d day of
 328, conform to missives and reference entered into betwixt the
 of that date, and produced in process, at the price of £227, as
 ned by the valuation of the persons to whom it was referred by
 sives and reference: finds that the pursuer used arrestments in the
 f the said John Adamson, upon the 18th day of June, and in the
 f the said James Braid, upon the 25th day of August, both in the
 28: finds that the said James Braid paid £60 of the said price to
 damson, upon the 25th of August, 1828, and the balance thereof,
 £169, upon the 20th day of October thereafter; and that upon
 date the other defender, John Adamson, admits that he had made
 it of a sum exceeding £40 to the common debtor: finds, there-
 at in respect the defenders made these payments after the date,
 he knowledge of this said arrestment, repels their defences, and
 against them and the common debtor for his interest in the furth-
 as libelled, reserving relief at the instance of the said James
 against the other defender, John Adamson." The advocator
 on brought an advocacy, in which he pleaded—
 he action truly and in substance amounts to a declarator of trust
 ritable property, which is neither competent to be tried before the
 nor in the shape of a process of furthcoming.
 he titles to the house being ex facie absolute, in favour of the
 or and Robertson, the qualification of its being held in trust for
 low can only be proved by their writ or oath, and cannot be in-
 rom circumstances.¹
 ven if they were trustees, they would be entitled to have an
 ing with Goodfellow, to ascertain whether any balance were truly
 , before they could be made liable to arrestees.
 is it was answered—
 he action does not involve a declarator of trust, inasmuch as the
 s at an end by the sale of the property; and the only existing
 Goodfellow was a personal claim to account for the price, which
 en be attached by arrestment.
 he true state of matters is admitted by the advocator, and there
 no necessity for recurring to proof at all, whether by writ or refe-
 , oath.²
 y paying £40 to Goodfellow after the arrestment, the advocator
 l that a balance was due him, and is not now entitled to insist for

¹ Ross v. M'Kay, June 4, 1829 (ante, VII. 699).
² Leach, March 8, 1832 (ante, X. 445).

No. 141. an accounting, having paid away this sum, which exceeds the debt due the respondent, in the face of the arrestment.

Jan. 29, 1834.
Adamson v.
Adamson.

The Lord Ordinary remitted simpliciter, with expenses, adding the subjoined note.*

* "The title pleaded by the advocator to have been in him, is not *ex facie* a title of that kind simply. It is a title in him and Robertson jointly, and there is nothing in it to make it more in favour of one than the other. Then it is admitted by the advocator that his title was obtained upon a purchase by Goodfellow; that the price was £175, which was wholly paid to the seller; that Goodfellow applied to him and Robertson for assistance; that Robertson did not advance any sum to Goodfellow; that he himself advanced a sum, of which he pretends he cannot recollect the amount (a thing not credible), but which he does not pretend was equal to the whole price; that in security of this sum (being part only of the price) Goodfellow agreed that the disposition to the party should be taken, not to the advocator alone, but to the advocator and Robertson jointly. He says that they granted a back-letter, binding them to convey the subject to Goodfellow, on repayment of their advances within five years, which he alleges was given up by Goodfellow, but that is denied; and of that there is no evidence, the title produced not being probative in his favour, and the letter implying advances by Robertson of the balance of the price of £175, over and above what the advocator advanced; whereas he admits that Robertson in fact advanced nothing. He admits that Goodfellow obtained and continued in possession, paying no rent, though he alleges he paid for some years the interest of a bond of £100 affecting the subject. He admits that he proposed to sell the property, because he was anxious 'to recover his money;' and that he understood Goodfellow had no objections to the sale in that view. He admits that after the sale he had a conversation with Goodfellow about it, and that 'Goodfellow seemed satisfied that the declarant was to get payment of his money.' He does not say that he ever told Goodfellow that he was to keep the price to himself, or that he had right to the whole. He admits that he paid to Goodfellow a sum of £40, or upwards, of the price. In these circumstances, even supposing him entitled to retract the defence pleaded in the Sheriff Court, on the ground of non copia periturum, and even abstracting from the missives of sale granted by his authorized agent, yet it seems to the Lord Ordinary certain that the subject was held by him and Robertson, not as proprietors for themselves, but as trustees, to secure payment of the advocator's advance only; and farther, that as against Goodfellow he has not pretended any thing else, but has got up his present statements only to baffle the respondent's forthcoming. But this cannot be allowed. The arrestment seems to have been perfectly competent, and the only apt form of diligence after the sale, in order to attach Goodfellow's claim to the price, or part of it. There seems no need of a declarator of trust, not only because the trust is ended, and Goodfellow's right under it converted into a claim of accounting for the price, but because it seems plain that between the advocator and Goodfellow the trust was not denied, and that the denial of it now is collusive to defeat the forthcoming. It does not seem necessary, therefore, to sist process for a declarator of trust, which would only cause useless expense. The trust is not proved by parole, but by the admissions of the advocator on record, or in his judicial declaration, to which he makes no objection. And though these are strongly confirmed by the missives and his defences, yet that confirmation seems not necessary. Farther still, this is not strictly a case under the statute 1696, since the title to the subject was not in the advocator alone, but in him and Robertson, showing on the face of it that in some way the title was in

advocator reclaimed.

No. 141.

D JUSTICE-CLERK.—It is clear the interlocutor should be adhered to. Jan. 29, 1834. Forbes's Trustees v. Glasgow Union Canal Company. It is no declarator of trust here, but merely a process of furthcoming as to the hands of the advocator as due to Goodfellow. Then look at the facts. It is admitted that the advocator had a surplus fund. He does not say it was his own property, and he gave it over to Goodfellow; but he attempts to draw a veil over it, that he gave it as a present. Looking, however, at the facts and the advocator's declaration, we must be satisfied that there is no ground for this pretence, but that he held it as belonging to Goodfellow, and that the creation of trust is just to get over his admission in his own defences. Other Judges concurring,

THE COURT adhered.

D. M. ADAMSON,—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

FORBES'S TRUSTEES, Pursuers.—Keay—Alison.
EDINBURGH and GLASGOW UNION CANAL COMPANY, Defenders.—
Shene—Walker.

No. 142.

1st Account—Repetition—Process.—Where an arithmetical error had been committed in consigning a sum in 1818—held competent to rectify this, under an action of account raised in 1831, notwithstanding that there was an intermediate adjustment of accounts, and that no reduction was brought.

7th August, 1818, the clerk of the Edinburgh and Glasgow Union Company addressed a letter to the trustees of the late Mr Forbes Callendar, offering, 1st, a sum of £1599, 4s. 10d., as the price of the land to be occupied, and permanent damage to be done to the estates of Callendar and Almond, (of which £855, 14s. 6d. effeired to Callendar,) cutting of the canal; 2d, A sum of £21, 1s. 3d., for some disputed ground, west of the tunnel; and, 3d, A sum of £70, 14s. 6d., as the value of trees to be cut, on the line of the canal. He also enclosed a valuation of the land, trees, and damage, made up by George Tait, and referred to as the basis of the offer. In that state, there were six columns; the first four gave, in separate items, the quantity of ground taken, the damage to the farm, &c.; the fifth column gave the value of the wood; and the sixth column, which was headed with the word

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1st DIVISION.
Ed. Corehouse.
S.

but in it was qualified; and he himself does and must state that Robertson's was merely a trust. The advocator, it will be observed, may have right to part of the price, but his statement cannot be held to run it so near as not to be enough to remain for the respondent's claim; and indeed the positive statement in his original defences cannot be held to be retracted by the non-objection in his judicial declaration, or his subsequent statement, manifestly false, when he advanced the whole price of the subject, when bought by Goodfellow."

No. 142. "total," gave a summation of the prices specified in the preceding columns, excepting only the value of the wood, which was omitted. The sum-total at the bottom of this column was £1620, 6s. 1d.; had the value of the trees been included, it should have been £1691, 0s. 7d.

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Forbes's Trustees
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Company.

In reference to the value of the wood, it was stated in the letter to Forbes's trustees, that "by the act of Parliament, it is optional for you to take either the price or the trees." On 22d September, the agent of the trustees wrote, accepting the offer, both as to the land, and as to the trees, which were expressly mentioned; and on the 30th, the Canal Company consigned £743, 10s. 4d.; and on January 13, 1818, they also consigned £855, 14s. 6d., (making £1599, 4s. 10d.,) and separately, the sum of £21, 1s. 3d. These were the precise sums stated in the letter of the company, if the price of the trees was omitted. At consigning the sum of £855, 14s. 6d., the receipt granted by the bank was taken in terms purporting that this "included not only the value of the land, but also all permanent damage done by intersecting the fields; also the sum of £70, 14s. 6d., as the value of growing timber on the line of the canal and its banks; and the said sum is now deposited, in terms of the statute, until the necessary disposition shall be delivered to the company, when the above sum is to be accounted for, on the joint receipt" of the agents for the company and the trustees.

In subsequent years, several claims having arisen between the trustees and the company, an adjustment took place in 1827, when the company paid £81, 3s. 5d., and the trustees' factor gave a receipt for it, as the "balance on an account of said trustees' claims on said company hereto annexed." In the account annexed, nothing was said as to the £70, 14s. 6d., for the trees. The company having required farther land, the price was fixed by arbiters at £359, 2s. 10d., and was consigned, with interest, amounting in all to £505, 5s. on 6th July, 1827. A joint petition was then presented by the company and trustees, stating, *inter alia*, that the sum of £855, 14s. 6d., was the price of the land occupied on the estate of Callendar, and craving the Court to approve of the consignations which had been made, and to ordain the trustees to execute a disposition of the lands to the company. The Court granted the prayer.

In October, 1831, the trustees raised an action against the company, concluding for payment of £70, 14s. 6d., as the price of the trees, now alleged to have been never paid or consigned. Before this, the party who acted for the company in the transaction had died.

Pleaded by the pursuers—

The bank receipts prove that the sum consigned was merely the value of the land and permanent damage, without the price of the trees. The narrative in the receipt purporting that this sum also included the price of the trees, was thus demonstrated to be an error; and the origin of it probably was, that Tait, in his valuation, had drawn out a sum-total, omitting the column containing the price of the trees. Whether this was

cause it was not then known how the trustees should exercise No. 142.
 tion of taking the trees or the price; or whether it proceeded from
 it, was immaterial, as the fact of the mistake was evident. The
 ent transactions between the parties had all occurred at a time
 e mistake was undiscovered.

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ed by the defenders—

bank receipt, which was prepared at sight of both agents, expressly
 at the sum consigned included the price of the trees. It is true
 amount consigned is exactly the same as that which was pre-
 fixed as the value of the land and permanent damage, but there
 ave been transactions of various sorts between the parties, in con-
 e of which a sum, equal to the cost of the trees, was paid or
 for, independently of the consignment. At the distance of thir-
 ars, and especially as the party who acted for the Canal Com-
 as dead, the company were entitled to object to any accounting
 ace of the terms of the receipt. At least it was necessary that a
 reducing that receipt should have been obtained before an account-
 k place, on the footing that it was to be set aside. After the
 ent of accounts, which took place in 1827, and the joint petition
 Court, which implied that the consignations had been complete, it
 late to open up matters anew.

Lord Ordinary found, "that the Canal Company agreed to pay
 4s. 10d., as the price of the ground occupied by them, on the
 of Callendar and Almond, and £21, 1s. 3d, as the price of the
 occupied by them on the muir west of the Tunnel, exclusive of £70,
 ., as the price of the growing trees in the line of the Canal; finds
 se sums, amounting to £1620, 6s. 1d., exclusive of £70, 14s. 6d.,
 price of the trees, were consigned by the pursuers in the Bank of
 d, in the year 1818 and 1819; finds that in 1827, £359, 2s. 10½d.,
 he price of additional ground subsequently occupied on the said
 with interest at the rate of 5 per cent, amounting to £505, 5s. 0½d.,
 so consigned in the said bank, which sums were afterwards uplifted
 pursuers, by virtue of a warrant from this Court; finds it proved
 documents produced, that the sum of £70, 14s. 6d., being the price
 trees, made no part of the consigned money above mentioned, and
 ere is no evidence that it has been paid to the pursuers; and there-
 ecerns for payment in terms of the libel, but finds no expenses due,
 equence of the delay of the pursuers in making the present claim,
 rectifying the error in the consignment receipt of the 13th January,
 which has given rise to this process." *

NOTE.—The receipt of the 13th January, 1819, states, that £355, 14s. 6d. was
 ed as the price both of the ground occupied on the estate of Callendar, and
 the trees in the line of the Canal.—A document, deliberately prepared and
 ed under the eye of the agents for both parties, and remaining so many years

No. 142.

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Forbes's Trustees v. Glasgow
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Company.

The defenders having reclaimed, the Court recalled the interlocutor, and before answer, remitted to the Lord Ordinary to order an examination into the books of Mr Forbes's trustees, and those of the Canal Company. Under the remit, diligence was granted to both parties, and a report of the proof was returned, after which the Lord Ordinary repeated his previous interlocutor, and added the subjoined note.*

The defenders reclaimed on the merits, and now pleaded that there was no evidence of the trees having ever been delivered to them.

The pursuers reclaimed on the point of expenses.

LORD BALGRAY.—The whole question is, whether a mistake was committed at the consignment. Did the sum consigned actually comprehend the price of the wood, as the terms of the receipt purport? I think it is made as clear as day, that there was a short consignment. A sum composed of the price of the land and the amount of the permanent damage was consigned; the price of the trees was not. Yet the receipt expressly bears that the price of the trees was consigned, and it is, in so far, erroneous. It is plain that by the original bargain the trees were sold; the offered price was accepted; and it appears, on examining the statement, in reference to which the offer was made, that this statement, after enumerating all the different items valued, and among others the trees, adds up a sum-total which leaves out the price of the trees. That state being extant, the origin of the error is quite evident. As to the new argument, that there is no proof of the Canal Company having ever received delivery of the trees, I conceive it lies with them to prove that they never got the trees, if they mean to found on that. They offered a price for the trees, the offer was accepted, and the trees were certainly cut down, for they grew on the line of the canal. If the Company allege, that, notwithstanding all this, and a statement in the receipt that the price of these trees was consigned by them, they, nevertheless, received no trees, and so are liable for

unaltered, might have occasioned great difficulty; for although £855, 14s. 6d. was precisely the sum at which the ground was valued, and which, by the agreement, was accepted as the price of it, exclusive of the trees, yet circumstances might have occurred between the date of the agreement and the consignment, to induce the pursuers to accept a less sum than had originally been stipulated, and the difference might possibly have amounted (though it was not a probable case) to exactly £70, 14s. 6d., the price of the trees. But all doubt with regard to any departure from the agreement, or innovation of its terms, is precluded by the petition to the Court, dated the 9th of July, 1827, lodged in the name and for behoof of both parties, which expressly states, that the sum consigned, viz. £855, 14s. 6d., was the price of the land occupied on Callendar, while it refers to the original agreement to that effect, as still subsisting. This is satisfactory evidence that there was an error in the consignment receipt, to the conviction of both parties, at the date of the petition, eight years after the date of the consignment."

* "The Lord Ordinary conceives, that the pursuers have not only proved that the mistake was committed, which they allege, but that they have also pointed out the cause from which it probably originated. The documents which have been recovered under the diligence lately granted, have not thrown any additional light on the subject, &c. The Lord Ordinary, therefore, does not see any reason for altering the views taken in the interlocutor of the 12th December, 1832."

and it will be requisite for them to prove this. No such proof is offered, and the mistake as to the consignment is demonstrated. But as there has been no want of procedure on both sides, I do not incline to award expenses. No. 142.
Jan. 31, 1834.
Moffat v. Robertson.

D GILLIES.—I feel it to be difficult to arrive at any other conclusion than that Lord Balgray; yet I do not see so solid and satisfactory grounds for the result as it is always desirable to discover in disposing finally of a cause. It is clear there has been a mistake somewhere, but it does not appear so certain which side it lies, or wherein it precisely consists. I feel this to be a very difficult case. It is a strong thing to allow matters to be opened up at this stage, wholly without any reduction of the previous settlement; but I do not feel warranted to alter the judgment of the Lord Ordinary. I think neither party allowed expenses where both have been to blame.

D CRAIGIE was understood to observe, that as the sellers had an option to buy the trees, they should have adduced some proof of actual delivery to the buyers; and that, considering the lapse of time, the confusion hinc inde, and the option of a bona fide settlement at the first, it was now too late to open up accounts.

THE COURT adhered, but allowed no expenses to either party.

W. FORBES, W.S.—J. and L. DAVIDSON and SYME, W.S.—Agents.

LIAM MOFFAT, and Others, Pursuers.—*D. F. Hope—J. Anderson.* No. 143.
ALEXANDER L. ROBERTSON, Defenders.—*Skene—Jameson—Miller.*

1.—*Reparation.*—Circumstances in which one of two family trustees was held jointly liable for a debt due by the other trustee (who became bankrupt), notwithstanding a clause of protection from liability, except for intromissions.

2.—*Trust and Curator.*—Question, whether any person but a father, when bequeathed an estate to minors, and naming tutors and curators, can exempt them from all claims, except each for his own actual intromission.

3.—*Trust.*—Late Mr Gordon of Craig executed a trust-disposition of his whole Jan. 31, 1834.
moveable and immoveable estate in favour of Messrs Robert Robertson, 1st Division.
John Wishart, W.S. (his agent), and Alexander Robertson, W.S. (then Ld. Corehouse.
agent of Mr Wishart), “excluding every other person from the said B.
estate and from any interference with the said trustees.”

4.—*Trust.*—The purposes were, after paying debts and trust expenses, &c., “that the said trustees may, as they are hereby appointed, sell and dispose of the said lands and other heritable subjects hereby conveyed, and that at such times and in such manner, as they may think proper; and that they may uplift and receive the said several debts and sums of money, and any others which may be due to me. And my said subjects being converted into money, I appoint my said trustees, after executing the foregoing-mentioned intentions of this trust, and as soon as the term of payment of the price of the said lands and of the said bonds shall arrive,

No. 143. and not sooner; and at least not till one full year after my death, to divide the free residue of my means and estate, among Mary Gordon, Jean Gordon, and Gordon, my cousins-german,—declaring that the shares of the said residue shall be paid at the term before stated, to such of my said relations or their children as are married or of age; but that the shares of such of them as are in minority shall be secured to the satisfaction of my trustees till the majority or marriage of such minors. And I hereby declare, that my said trustees shall have power to judge of the time when my said estate shall be brought to sale, and sell the same by public roup or private bargain, and at such prices as they shall think reasonable, or to retain the same, or any part thereof, unsold, if they shall think the doing so more for the interest of my residuary disponees: And farther declaring, that my said trustees shall have full power to appoint, from time to time, any one of their own number, or any other person whom they shall think fit, to be factor under them or him, for the more easy management of my said estate and effects, or the proceeds thereof, with such powers, and such salaries or allowance for trouble, as shall seem proper. And I hereby nominate and appoint my said trustees, or trustee, to be tutors and curators to such of my relations as may be in minority, with the usual powers competent to tutors and curators by the law of Scotland; declaring, that my said trustees, whether as such, or as tutors and curators, shall be noways liable for neglects or omissions, nor for not doing diligence, nor in solidum, but each only for his own actual intrusions, and that they shall noways be liable for the said factors, further than that they were habit and repute solvent at the time of their appointment; and that, in accounting with my said residuary legatees, they shall only be liable for the said residue, according to an account thereof, to be exhibited by the said trustees or trustee, upon their or his honest word only.”

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By a subsequent deed of alteration (which bore to be executed by the advice of Wishart), Gordon altered the distribution of the free residue of his estate, directing one-half to be paid to the family of Mary Gordon or Moffat, but to be burdened with an annuity of £50 to her; the other half to be paid to the family of the deceased Jean Gordon or Grant, but to be burdened with two annuities, amounting together to £50; and it was declared that the payment of the annuities should begin “at the first term at which, by my said deed of settlement, the provisions are made payable;”—“and that the shares falling to the children of my said relations shall be payable at the terms, and in the manner specified in the said disposition and deed of settlement; but that the shares of such of them as are in minority shall remain secured in the hands of my said trustees till the majority or marriage of such minors. And farther, declaring that it shall be in the power of my said trustees, either to see the said annuities secured in the manner they may think most fit and proper, or to retain in their hands a sum sufficient to answer

the said annuities during the lives of the annuitants; the said trustees being accountable always to my said relations only in manner mentioned in the said disposition and deed of settlement."

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Gordon died in January, 1818, and in February following, Wishart and Alexander Robertson, who were brothers-in-law, accepted, but Robert Robertson declined. An inventory of the personal estate, as on 1st December, 1818, was immediately given up; but no tutorial inventories were made up until 7th July, 1819. The trustees did not appoint a factor, but Wishart took the active management of the trust. Robertson was present at every meeting excepting one, and he granted a letter of concurrence to Wishart as to the proceedings of that meeting. Several of their minutes set forth that they were acting as guardians or tutors for the minor legatees.

The trust embraced the estate of Craig (to which the titles were not in a complete state); an heritable bond by David Clark, for £3000, and a personal bond for £2000 by Wishart, both payable at Whitsunday, 1818; besides some other moveable estate. Clark's bond was, after some opposition, paid, with £733 of interest, in July, 1819; and both Robertson and Wishart signed the discharge, acknowledging the receipt of the money; but Wishart's bond remained unpaid.

In the same year the trustees employed an accountant to draw up a state of the trust-affairs, and a report was laid before a meeting held on 15th June of that year, bearing, *inter alia*, "that although Mr Wishart is charged with the debt of £2000, contained in his bond to Mr Gordon, yet he is, on the other hand, discharged with it as a debt still outstanding;" that there was a debt of £1372, due by the trust-estate to Wishart, and therefore, that to hold the bond for £2000, as a recovered debt, would be in some respects in favour of Wishart, as to interest, &c., but the accountant "was induced to state this account in this respect as he has done, in relation to the annuities secured on the trust-funds." He further stated, that although the annuities might be secured by purchase, yet there was a mode "suggested by the trust-deed itself, viz. the trustees retaining in their hands a sum sufficient to answer the said annuities, during the lives of the annuitants, a capital sum effeiring to the amount of these annuities (and which, in the present case, the annuities being £100, would be £2000, the precise sum in Mr Wishart's bond,) would require to be set aside for answering them. It appears evident that these annuities must be provided for, in the first place."

After mentioning that this report had been considered, the minutes of the trustees bore, that, "agreeably to the suggestion of the accountant, and having regard to the security of the annuitants and of the trustees, they resolve that the £2000, due by Mr Wishart's bond, shall remain as it is, to answer the payments to the annuitants, till the trustees shall resolve upon future arrangements." The state did not show any tangible

No. 143. and realized fund as then in the hands of the trustees, if Wishart's debt of £2000 were laid aside to meet the annuities.

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In 1823, the trustees borrowed a sum of £1000 over the lands of Craig, although Wishart should have had ample trust-funds in his hands, even after providing for the annuities. The minute authorizing the loan, bore that Wishart had become cautioner for two of the legatees, and had been called on to make advances for them, "which had been attended with considerable inconvenience to him;" that he had obtained from these legatees* an assignment of their interest in the trust, in security of his advances; and that a sale of the land was then inexpedient, and it was therefore proper to borrow. Both Robertson and Wishart signed the disposition in security; but the transaction was effected through the agency of Wishart.

In July, 1825, the lands were sold at the price of £4690. Robertson, along with Wishart, signed the disposition, acknowledging the receipt of the money.

The state of the trust-affairs had been submitted a second time to a professional accountant in 1820, after Clark's heritable bond for £3000 was recovered, to draw up a scheme of the free divisible fund, and apportion it, according to the respective interests of parties. The trust-affairs were a third time submitted to an accountant in 1826. As considerable payments had been repeatedly made to the legatees, the accountant reported the free outstanding funds, on 15th May, 1826, to be £2310, subject to the annuities. In this sum he included Wishart's bond for £2000, which was stated as still remaining undischarged.

The annuities were regularly paid till 1827, when Wishart became insolvent; whereupon the annuitants, and other beneficiaries under the trust, raised an action against Wishart and Robertson, concluding for count and reckoning as to their intromissions; for payment of any free residue in their hands; and for paying over the sum which had been set apart to answer the annuities, to any factor who might be appointed to carry on the purposes of the trust. Wishart lodged no defences. Robertson stated, that he had not personally uplifted or intromitted with any portion whatever of the trust-funds, and that the clause exempting him from all liability, except for actual intromission, was sufficient to protect him, especially as he acted bona fide, and had no ground to suspect Wishart's solvency until the eve of his failure becoming public.

The Lord Ordinary ordered Cases.

* These legatees belonged to the family of Mrs Jean Gordon or Grant, but there were several other members of that family. It was stated in a minute by the trustees in 1824, that £450 of the loan had been paid to the legatees of the Moffat family, and the rest had been applied in relief of Wishart's advances for the other two legatees.

Pleaded by the Pursuers—

1. As Robertson attended or sanctioned all the meetings of the trustees, and concurred in every act of importance, especially in signing discharges, or dispositions and receipts, he must be liable, as an intromitter,¹ equally with Wishart. No factor had been appointed, and Wishart, though the more active party, was in reality the mere agent or hand of the trustees in all his proceedings, so that his act was theirs. Any sum uplifted or held by him, was therefore a sum truly uplifted or held by them.²

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2. The trust enjoined the trustees to uplift the bonds at the term when they fell due. They had truly realized the bond for £2000, for the trust-estate, as appeared from the states and correspondence connected with the trust, and therefore they must account for it. But if they could plead on it as not realized, and still outstanding, then the minute of 15th June, 1819, signed by Robertson as well as Wishart, which sanctioned its remaining outstanding, was a direct act of commission, and not of omission, so that both parties were still liable in solidum. The trust-deed enjoined either a loan upon a security, or retention upon the joint security of both. The minute was in the face of that injunction.³

3. As Robertson was the brother-in-law of Wishart, and had access to the sederunt-book and correspondence, and attended the meetings of trustees, he must be held to have known the whole affairs of the trust. In these circumstances, the unnecessary loan of £1000, effected in 1823 upon the estate of Craig, was an act which he ought not to have sanctioned, and he should have felt it his duty instantly to have got the £2000 in Wishart's personal bond placed in a state of security. His conduct as to this was not merely marked by gross negligence, but amounted to positive breach of duty to the trust.⁴

4. As there were no tutorial inventories given up for a year and a half after the truster's death, this deprived the trustees of the protecting clause. Besides, none but a father in liege poustie could confer its privi-

¹ Donaldson, June 11, 1711 (11511); Guthrie, Feb. 11, 1680 (14640 and 506); Scurfield, 3 B. C. c. 90; Bradwell, 3 Swan. 78.

² Paley's Law of Princ. and Agent, c. 3, Pt. 3, § 1, and c. 4, Pt. 3, § 4; Cary, Strange, 480.

³ Richardson, Feb. 26, 1760 (Brown's Cases in Parl. 318); Carstairs, Jan. 20, 1776 (Halles); Lord Lynedoch, Jan. 15, 1827 (ante, V. 358); McClymont, Feb. 14, 1827 (ante, V. 346); Bell's Princ. § 226; Kennedy, June 28, 1827 (ante, V. 852); Carfray, Nov. 28, 1801 (6 Vesey, 495); Sym, May 13, 1830 (ante, VIII. 741); Keble, July 7, 1790 (3 Brown's Chancery Cases, 111); Langston, April 21, 1807 (1 Cowper's Chancery Cases); Underwood, July 16, 1816 (1 Mer. 712); Bell's Princ. § 2000; 1 Bankt. 18. 8; Paisley, Jan. 18, 1779 (8492 and 8228); French (9 Vesey, 103).

⁴ 1672, c. 2; 1 Ersk. 7. 21, and 27; Watson, July 16, 1773 (16369); Halles, 595; 1698, c. 8; 1 Bankt. 7. 38; Ranken, Feb. 1, 1710 (16327); Mathie, July 30, 1775 (5 Brown Supp. 631); Henderson, July 10, 1788 (16375); Lothian, Jan. 25, 1724 (16387); McWhirter, Dec. 4, 1739 (16343); Thomson, June 16, 1812 (F. C.)

No. 143. leges upon tutors; and as the trustees had acted as tutors, they must be liable as if no such clause existed.

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tson.

Pleaded by the Defender—

1. He had not personally uplifted the smallest portion of the trust-funds. His signature at deeds of discharge or receipts, &c. was necessary, and therefore he adhibited it. But Wishart alone received the funds. The defender therefore was covered by the protecting clause,¹ which should be the more liberally interpreted, as he was only a clerk in Wishart's office when the trust-deed was executed, and the truster had certainly looked to Wishart as the party to undertake the active execution of the trust.

2. The trust gave a discretionary power to the trustees as to the time of uplifting the bonds, by making it subsidiary to the sale of the estate, the period of which was entirely in their power. Although Wishart's personal bond for £2000 never had been realized, and remained undischarged in the hands of the trustees at the failure, it was an act of fair administration, or at least not implying gross negligence, to allow that sum to remain invested in the same manner in which the truster had invested it. This proceeding did not violate any injunction of the trust. And if Wishart had been named factor, and if the money had been realized and paid into his hands, being habit and repute solvent, the practical result would just have been the same, as the defender was not liable for the factor.

3. The defender did not suspect Wishart's solvency, until the eve of his failure becoming public. At the time of effecting the heritable loan, he believed it to be required for the trust. The legatees received part of the loan, and the rest was accounted for to the trust. The loan caused no loss to the trust.

4. The truster, gratuitously bequeathing an estate, had a right to name managers of it with what conditions and privileges he chose;² though they were called tutors and curators, they were not properly so in reality.

The Lord Ordinary pronounced this interlocutor: " Finds, that the defender accepted the office of trustee under the trust-deed of Robert Gordon of Craig, and also of tutor and curator to certain minors having an interest under that deed, and that he acted in these capacities: finds it proved by the documents produced, that the defender, along with the late Mr Patrick Wishart, the only other accepting trustee, acknowledged the receipt of the principal sum and interest contained in an heritable bond, due to the trust-estate by David Clerk; as also of the price of the lands of Craig, and certain other small sums mentioned in the sederunt-book, in respect of which acknowledgment, he must be held to have in-

¹ Graham, March 4, 1831 (ante, IX. 543).

² 1 Ersk. 7. 2; Kilpatrick, Jan. 25, 1793 (16361).

tromitted with that money, and is accountable for the same: finds, that the sum of £2000 was due to the trust-estate by the said Patrick Wishart, on a personal bond granted by him to the truster, and which was payable at Whitsunday, 1818, some months after the truster's death: finds that it was the duty of the trustees, under the express directions of the trust, and in terms of the report of the accountant employed by them, to have realized this sum, either for distribution after payment of expenses, or to provide for the annuities bequeathed by the truster; and if realized for the last purpose, it was their duty, if they did not purchase annuities, to have retained it in their own hands, and on their mutual security, or to have lent it out on proper security to a responsible debtor: finds, that without following either of these courses, the trustees resolved that this sum should remain in the hands of the said Patrick Wishart, one of their number, on his personal bond alone, without security either heritable or personal, and that the defender subscribed the resolution, and thereby sanctioned the retention of the money: finds, that this act is not to be held as a neglect or omission, for which, by the trust-deed, the trustees were declared not to be liable, but an intermeddling with, and disposal of part of the trust-property, for which he is accountable: finds, that his liability for the loss occasioned by Mr Wishart's bankruptcy, is established by various other acts mentioned in the pleadings, and in particular, by his concurrence in the transaction, by which money was borrowed by the trustees on the security of heritable property belonging to the trust, apparently with no view, but to enable Mr Wishart to retain the contents of the personal bond for £2000; and therefore repels the first, second, and third defences, and decerns; and in the question of accounting, appoints parties to be farther heard."

The defender reclaimed.

LORD PRESIDENT.—The Lord Ordinary has decided on the footing, that the defender might plead on the bond for £2000 as an unrealized and outstanding debt. The liability said to arise from leaving it in that state is one point in the case, but there is another point which has been pressed by the pursuers, that the bond was truly realized, or at least that the actings of the trustees bar them from pleading otherwise. I should like to have the whole circumstances of the case before the Court at once; and the interlocutor under review narrows the grounds of judgment, by not deciding the second point.

LORD GILLIES.—I have the same desire to have all the circumstances at once before us. Suppose that your Lordship thought the ground taken by the Lord Ordinary was too narrow to support the judgment, and yet that the other ground alluded to would suffice to support it, this would be awkward, as the Court do not usually decide a matter upon which the Lord Ordinary has not given judgment. I think the whole cause should be remitted to the Lord Ordinary, directing his Lordship's attention particularly to the points now adverted to.

The other Judges concurred, and the Court remitted the cause before answer to his Lordship. Supplementary cases were then ordered, after

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No. 143. which the Lord Ordinary made avizandum with these to the Inner House; issuing at the same time the subjoined note.*

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* "NOTE.—In this case, there are two questions for consideration: 1st, Whether the defender obeyed the injunctions of the trust-deed and deed of alteration? 2d, If he did not, whether he is protected by the clause declaring that the trustees shall not be liable for neglects or omissions?

"By the deed of alteration, annuities to the amount of £100 are provided to certain persons; and it is declared that 'it shall be in the power of my said trustees, either to see the said annuities secured in the manner they may think most fit and proper, or to retain in their hands a sum sufficient to answer the said annuities during the lives of the annuitants, the said trustees being accountable always to my said relations only in manner mentioned in the said disposition and deed of settlement.' With regard to the last of these alternatives, the defender maintains that it was not adopted by the trustees. It was necessary for his defence that he should do so; for, if it be held that he, as well as Mr Wishart, intromitted with the sum in question, it follows necessarily that he must be liable for it. Then, did the trustees, in terms of the other alternative, see that sum secured? The Lord Ordinary is of opinion that they did not. It may be granted that a quorum of trustees are entitled to lend the trust-funds to another trustee, on his finding heritable security for repayment; because, in that case, the land is properly the debtor, and with ordinary care the money may be placed out of risk. Perhaps it may be granted also that they are entitled to lend to one of their own number, on his finding personal security by cautioners reputed solvent at the time. It is unnecessary to enquire whether the quorum may lend to one of the trustees, on his personal security, without caution. On that point, the Lord Ordinary entertains considerable doubt. But he has no doubt at all that when there are only two accepting trustees, the one not having power to act without the consent, express or implied, of the other, they are not entitled to lend the trust-funds to one of themselves, on his personal security, without any co-obligant, more especially when the borrower is the factor of the trustees to whom the ordinary management of the trust affairs is committed. This is evident, 1st, because he would become auctor in rem suam. 2d, Because the money lent could not be called up without his consent, however expedient it might be to do so. 3d, Because he would thus disqualify himself from executing, in a proper manner, the duty either of trustee or factor to the trust. Personal security, without caution, is of no value, unless there is one whose duty and interest it is to keep a constant and vigilant eye on the circumstances of the debtor. In the case supposed, the interest of the trustee and factor is placed in direct opposition to that of the trust-estate. He has or may have a motive to conceal and misrepresent facts which his co-trustee ought accurately to know, and to omit or delay measures necessary for the safety of the trust-funds. But if the trustees were not entitled to lend the sum to Mr Wishart solely on his own responsibility, they were not entitled to authorize him to retain it upon his own responsibility, for the one is exactly equivalent to the other.

"The main defence seems to be rested on the circumstance, that Mr Gordon, the truster, some years before his death had lent the money to Mr Wishart on a personal bond, without caution, and that the trustees only continued this fund in the same situation in which Mr Gordon had placed it. This is no apology for their conduct. While Mr Gordon was alive, the rights and interests of creditor and debtor were vested in separate persons; and, with ordinary care and prudence on his part, there was little danger of the debt being lost. The case was entirely changed when, by the death of Mr Gordon, the trust taking effect, and Mr Wishart becoming the

ORD BALGRAY.—At the first view of this case, I considered it to be one of No. 148.
 t hardship for the defender, and that there would be much difficulty in sub-
 ing him. The office of trustee is gratuitous, and the actings of a trustee and
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or, the only person to look after the debtor was the debtor himself. It follows
 the trustees disobeyed the directions given to them, because they neither
 ording to the defender's plea) retained this fund in their own hands, nor did
 y see it secured.

It remains to be considered if the defender is protected by the clause, declaring
 the trustees shall not be liable for neglects or omissions. If the defender had
 acted at all in reference to the sum in question, or had done nothing which could
 r upon the circumstance from which the loss originated, that defence might have
 a tenable. But it is proved that he did act on various occasions as trustee; that
 attended all the meetings to which the trustees were called, except in one in-
 stance, and in that instance he authorized Mr Wishart to act for him; that he ac-
 ceded, *rebus ipsis et factis*, in the appointment of Mr Wishart as factor and
 nager for the trust; and, in particular, that he expressly concurred in the minute
 the 15th June, 1819, by which the trustees resolved that this sum should remain
 it is, that is, in Mr Wishart's hands, to answer the payment of the annuities, till
 trustees should resolve upon future arrangements. There it remained for eight
 years, and until Mr Wishart became bankrupt: although, during the interval, funds
 as into the hands of the factor, which might have been secured to answer the
 annuities, but which, with the defender's sanction, were applied to other purposes.
 These were not acts of omission or neglect; they constituted a direct interference
 reference to the sum in question. If it had not been for the minute of the 15th
 June, this Court, on the application of any of the residuary legatees, would have
 compelled the trustees either to have placed out the fund on good security, or to
 have retained it on their joint responsibility. The minute seems to have been
 framed for the purpose of defeating such an application, as it bore that the trustees
 jointly directed their factor to retain the money; the natural, and, it is thought,
 sound construction was, that they had adopted the alternative of retaining it on
 their own responsibility. If that was not the construction they intended it should
 bear, it was a document calculated to mislead the residuary legatees, and prevent
 them from taking competent measures to secure the residuary fund. Combining
 this with the appointment of an improper factor, that is, a factor who had an inter-
 est to conceal his own circumstances, being the chief debtor to the trust-estate,
 and not to call up the debt when it was expedient to do so, the defender's active
 and prejudicial interference seems established.

The Court remitted to the Lord Ordinary to hear parties on the whole cause,
 well upon those points on which he has not founded his interlocutor, as upon
 those referred to. As explained to him, the point to which he did not refer, and
 which the Court had in view, is the question argued both in the original and supple-
 mentary cases, namely, Whether Mr Wishart's bond was or was not realized? It
 appears to him that this is a dispute about words. In strict and technical lan-
 guage, it was not realized, because Mr Wishart did not pay over the money to the
 trustees, and procure a discharge from them as debtor to the trust-estate; but if
 the trustees sanctioned its continuance in his hands, on their joint responsibility,
 which is the Lord Ordinary's view of the case, the bond was virtually or in effect
 realized.

* It is said that trustees in family settlements are entitled to favour from the
 court, and they are so; for, in general, it is an unprofitable, troublesome, and
 thankless office. But this case appears in peculiar circumstances. Mr Wishart,

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his liabilities should be favourably construed by the Court. The origin of the defender's remissness appears pretty evidently to have been an excess of confidence reposed by him in his brother-in-law and co-trustee. In this way he neglected the trust in a manner which would not have occurred under any other circumstances. I concur in almost every word of the Lord Ordinary's note. I think it results in a mere dispute about words whether the bond for £2000 was, or was not realized. The bond was not strictly and literally uplifted; but when Mr Robertson put his name to the minute of June, 1819, authorizing his co-trustee to keep the money, he became liable and accountable as if the bond had been uplifted, and its contents lent out by his sanction. Looking to the effect of that minute, and to the manner in which the money was borrowed on the estate of Craig afterwards, I think there is a combination of circumstances such as to warrant the Court in finding the defender liable as the Lord Ordinary has done.

LORD GILLIES.—This is a case of hardship, but I concur in the opinion now expressed. I am not prepared to say that the mere act of allowing the money to remain so long invested where the truster had himself invested it, would have sufficed to subject the defender. And there are some points of the Lord Ordinary's note in which I think his Lordship goes too far. But, in all the circumstances of the case, which embrace many acts of commission by the defender, such as the borrowing money unnecessarily on the estate of Craig, &c., I think the liability of the defender is established notwithstanding the clause of protection.

LORD CRAIGIE concurred.

THE COURT adhered, and gave interim decree for £2000, and remitted to the Lord Ordinary to proceed quoad ultra.

W. LORIMER,

—A. ROBERTSON, W.S.—Agents.

who framed the trust-settlement, was the law-agent of the truster. In that deed, he himself and two of his brothers-in-law were named trustees; one of whom, the defender, was Mr Wishart's clerk or apprentice. Mr Wishart also framed the deed of alteration, which was executed, as it bears, by his own advice; the same nomination of trustees was continued, and the defender was not only a disponent, but one of the two instrumentary witnesses. The third trustee did not accept; and, on that occasion, Mr Wishart and the defender, instead of following the suggestion, if not the positive injunction given by the truster, to fill up the vacancy by the assumption of another trustee, suffered the trust to go on for eight years under their own management. Mr Wishart was appointed factor, not to act gratuitously, but with a salary; and the defender appears to have done nothing, except to sanction Mr Wishart's actings, and to authorize him to retain a large balance of the trust-estate in his hands. He is driven to the alternative, therefore, either, on the one hand, of being responsible for the sum, or, on the other, of having disobeyed the directions of the trust-deed, and of being guilty of gross negligence, which no clause of exemption, such as that he founds on, can excuse, and which leaves no room for plea of favour. The defender's case may be hard; his character is not impeached, and he may have acted bona fide; but to sustain the defence would, in the Lord Ordinary's opinion, be to extend the indulgence shown to trustees farther than is consistent either with expediency or equity."

WILLIAM ORR, Pursuer.—*Greenshields—Jameson.*

WILLIAM PATERSON, Defender.—*Rutherford.*

PATERSON'S TRUSTEES, Defenders.—*Cuninghame.*

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—*Clause—Trust.*—Clause in a will directing the proceeds of the testator's vested in two separate estates of equal value, to be conveyed to A. and B., at a certain period, with a provision for the intermediate maintenance which held to lay that burden not on his own share, but on the general

William Paterson, by his latter will, conveyed all his property to trustees for executing the purposes of his will, one of which was named—“Item, I will and ordain, that my funeral charges, and lawful debts, be fully paid and satisfied, and that my natural son, William Paterson, born of the body of Agnes Howie, on or about the 1st of December, which was in the year of our Lord, 1813, shall be maintained, educated and supported, out of my estate, in a suitable manner at such yearly rate of expense, not exceeding £500 or £600, as my said trustees and executors shall, in their discretion, until he shall attain the age of twenty-five years; and when he attains that age, I will and ordain, that my said trustees and executors shall pay unto him, at and after the rate of £1000 sterling per annum until he shall attain the possession and enjoyment of the lands to be purchased, and called the Paterson Estate, as hereinafter

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In the subsequent clause, he provided, as follows:—“Item, I will and ordain, that my said trustees and executors for the time being, or any five of them, at any time or times, when eligible and convenient opportunities shall offer, shall make such suitable purchases of lands in Scotland as they shall think fit, but before my said son, William Paterson, shall attain the age of twenty-five years, shall invest two sums of £50,000 sterling each, in the purchase of several estates in Scotland, or of such parcels of land in Scotland as can be got, for being formed into two estates. And I will and ordain, that one of the said estates, or parcels of land, shall, at all times from and after the purchase thereof, be called or known by the name of the Paterson Estate; and I will and ordain, that the other of the said estates, or parcels of land, shall, at all times from and after the purchase thereof, be called or known by the name of the Montgomerie Estate. And I will and ordain, that my said trustees and executors shall remain seized and possessed of the said two estates, and in the interim of the rents and profits thereof, until my said son shall attain the age of twenty-five years, and thereafter, until by means, and out of the said property, estate, and effects, together with the accumulated rents and profits of the said two estates, called the

No. 144. Paterson Estate, and the Montgomerie Estate, adequate provision can and shall be made for the payment of such of my legacies, as shall then remain existent and unextinguished."

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don.

He further directed, that, on these events, the trustees should execute entails of the Paterson Estate in favour of the defender Paterson, his natural son, and of the Montgomerie Estate in favour of the pursuer Orr, his nephew.

While Paterson was still in minority, and before the trustees had purchased the estates, Orr raised an action of declarator, containing various conclusions as to the rights of the parties interested under the will, of which it is only necessary here to advert to one, which was to the effect of having it declared that the provisions for the maintenance of Paterson till he should obtain possession of the Paterson Estate, should form a charge exclusively upon, and be payable out of the portion to be employed in the purchase of the estate for him, and not out of the general funds.

The Lord Ordinary reported the cause on Cases, in which the various points included in the summons were pleaded. The Court, however, considering it premature to decide any of them except that relating to Paterson's maintenance, the other questions not truly arising till he should attain twenty-five, and the estates be purchased, and being agreed that, under the will, the provisions to Paterson for his intermediate maintenance were burdens on the general fund, they found accordingly that these were payable out of the general fund, and quoad ultra, that it was unnecessary, *hoc statu*, to decide on the other points, and dismissed the action, reserving to the parties to bring all competent actions, as accord, and allowed the expenses of all parties to be paid out of the trust-funds.

C. J. F. ORR, W.S.—GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—WM. WADDELL, W.S.
—Agents.

No. 145. J. J. FRASER, W.S., Suspender.—*Robertson—Maidment.*
LIEUT.-COLONEL GORDON, Charger.—*Jameson—Cunninghame.*

Process—Bill. Chamber.—Bill of suspension and interdict, on which an interlocutor had been pronounced, allowing it to be seen, and granting interim interdict, not having been intimated till after the lapse of fourteen days—held to have fallen.

Jan. 31, 1834. COLONEL GORDON obtained a process caption against Fraser, W.S., on the 7th January last. Fraser thereupon presented a bill of suspension and interdict, on which an interlocutor was pronounced on the 18th, allowing it to be seen, and granting interim interdict. No intimation was made, however, till the 9th of February. Colonel Gordon having put in answers, in which, besides a statement on the merits, he contended that the bill had fallen by the lapse of fourteen days, without intimation, the Lord Ordinary pronounced this interlocutor.

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T.

ed this bill, with the answers thereto, and productions, in respect No. 145.
and interdict was not intimated within fourteen days from the
its being presented, and the interdict granted, so that the bill had
efore it was presented to the messenger, on the 9th instant; finds
ecessary to pronounce any interlocutor disposing of this bill; finds
s due; allows an account thereof to be given in, and remits to the
to tax the same and to report."

Jan. 31, 1834.
Fraser v. Gordon.

COURT refused a reclaiming note for Fraser.

J. J. FRASER, W.S.—J. BENNETT, W.S.—Agents.

J. J. FRASER, Pursuer.—*Robertson—Maidment.*
G.-COL. GORDON, Compearer.—*Jameson—Cunninghame—Russell.*

No. 146.

2.—An assignee of the pursuer of an action having taken decree in his
gainst the defender without notice to the pursuer, the decree recalled, and
made to hear the pursuer, who alleged that the assignation did not cover
decerned for.

IER, W.S., having raised an action against Lord Fife, Colonel Jan. 31, 1834.
obtained himself sisted as Fraser's assignee; and a judgment for
n sum, within the amount pursued for, was pronounced in favour
nel Gordon, on the 4th July. In December, a minute was adjust-
reen Lord Fife and Colonel Gordon as to the remaining sum, for
decree was to be given against his Lordship; and, on the 9th, the
ig notice was sent by Colonel Gordon's agent to Fraser:—"The
, Gordon, assignee of Fraser, against Lord Fife, has been enrolled
l Medwyn's roll of motions, to be called on Wednesday, for the
of lodging a minute, craving decree for the additional sums admit-
e due by the minute of agreement between his Lordship's trustee
Fraser. A copy of the minute will be sent Mr Fraser to-mor-

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he 14th, no appearance being made for Fraser, Colonel Gordon
ecree against Lord Fife for the sum as arranged between them.
then reclaimed, contending that he was entitled to have been
n the point, whether the assignation covered this additional sum,
t as no notice of the intention to ask decree was given, but only
ute to be lodged, he was entitled to be reponed against a decree
ularly obtained in his absence.

HE COURT recalled the interlocutor, and remitted to the Lord
Ordinary to hear parties, reserving all questions of expenses.

J. J. FRASER, W.S.—J. BENNETT, W.S.—Agents.

No. 147.

Feb. 1, 1834.
Fadheuille v.
His Creditors.
Campbell's
Trustees v.
Campbell.

— FADHEUILLE, Pursuer.—*Robertson*.
HIS CREDITORS, Defenders.—*Moir*.

Cessio—Process.—Observed, that where a foreigner and his mandatory rec decree against a party in this country, and the party afterwards raises a processio, it is not enough to call the foreigner edictally, but his mandatory should be called.

Feb 1, 1834.
1st DIVISION.

SOME merchants in Paris who dealt with Fadheuille of Edinburgh raised an action against him for payment of goods delivered. The mandataries were Gordon and Burnett, W.S. Decree was recovered against Fadheuille, who raised a process of cessio, in which he called foreign merchants, by edictal citation, but did not call the mandataries.

Moir, for the creditors, objected that it was necessary to cite the mandatory *Robertson*, for pursuer.—The mandataries are not creditors. The parties, who are the true creditors, have been cited, and it rests with them to defences in this action by mandataries, if they see cause to do so. The mandataries who formerly recovered decree against Fadheuille, do not remain mandataries in any subsequent action like this, or, if they do, it is their business to assist themselves.

LORD GILLIES.—I incline to think the mandataries ought to have been cited. Through them the foreign creditors recovered decree against Fadheuille, and the object of the cessio is to limit the effect of that decree, as a ground of diligence on some most important points. Considering the implied power which the mandataries of the foreign creditor have, as to the regulation of the diligence to follow the decree which they were employed to recover, I think they ought to have been called.

The other Judges were understood to concur.

The case stood over; but opposition was afterwards withdrawn.

GORDON and BURNETT, W.S.—Agents.

No. 148.

CAMPBELL'S TRUSTEES, Raisers.—*Tait*.
JOHN CAMPBELL, Claimant.—*G. G. Bell*.

Proof—Presumption of Death.—Circumstances in which the Court held the presumption of the death of a party abroad to be so strong, that the next heir was entitled to uplift a fund in medio without caution.

Proof.—Where the raiser of a multiplepoinding has no patrimonial interest in the issue of the questions raised by the claimants—held that he may be competent to be called as a witness, by a claimant on the fund in medio.

Feb. 1, 1834.
1st DIVISION.

THE late Archibald Campbell of Ardmarnoch disposed of his estate to Messrs John Campbell of Ormidale, J. Lamont and others, as trustees. They sold the estate, and a free residue of £1560 remained, which was destined by the trust-settlement of Ardmarnoch "to George Campbell."

is eldest son, in liferent, for his liferent use allenary, and to the heirs-
 sale of his body in fee; whom failing, to John Campbell, the disponer's
 econd son, and the heirs-male of his body." George Campbell had gone
 broad, unmarried, to the West Indies, in 1802. Ardmarnoch died a
 few years afterwards. John Campbell, the second son, being dead, his
 son, John Campbell, obtained himself served heir of provision under
 Ardmarnoch's settlement in 1823. The witnesses who spoke to the
 death of George Campbell, stated the lapse of time as the sole ground of
 their belief. A multiplepinding was raised in name of the trustees, in
 which John Campbell claimed the fund in medio. The trustees objected
 that they were not in safety to pay unless caution was found to repeat in
 the event of the re-appearance of George Campbell, or an heir-male of
 his body. The claimant was unable to find caution, and the Court, after
 advising informations, found the claimant, "in respect of his service, in
 the meantime, entitled to the interest of the bequest and the fund in
 medio," but refused to ordain payment of the principal sum.¹

No. 148.
 Feb. 1, 1834.
 Campbell's
 Trustees v.
 Campbell.

After a lapse of nine years, the claimant was allowed to lead farther
 proof in support of the presumption that George Campbell was dead.
 In adducing it, he tendered John Campbell of Ormidale, now the sole
 surviving trustee, as a witness. On the part of the trustees, it was ob-
 jected, that though Campbell had no pecuniary interest in the issue of the
 cause, yet he had an interest to obtain an effectual exoneration, and as he
 was a party, on the record, to this process, he should not be called on to
 give evidence on which the decree of exoneration in his own favour
 might ultimately rest. The claimant answered, that as the witness had
 no patrimonial interest in the issue of the cause, he was not disqualified
 by the circumstance of appearing on the record as raiser of the multiple-
 pinding; that he possessed this character solely as trustee of the deceased
 Ardmarnoch; that there were several decisions which established his
 admissibility; and that the claimant had a right to obtain his evidence.

The commissioner reported the objection.

LORD BALGRAY.—It is admitted, on all hands, that Mr Campbell has no patri-
 monial interest whatever, either the one way or the other. I see nothing in the
 objection.

LORD GILLIES.—Had there been a patrimonial interest, the witness would
 have been disqualified; but where there is confessedly none, I see no ground of
 disqualification stated.

LORD CRAIGIE was understood to concur.

The LORD PRESIDENT was absent.

THE COURT repelled the objection.

The import of the proof was as follows:—Above thirty years ago, George

¹ 17th June, 1824 (ante, III. No. 108, p. 145).

No. 148.

Feb. 1, 1834.
Campbell's
Trustees v.
Campbell.

Campbell, then about twenty-five years of age, and unmarried, went abroad as a sailor, to the West Indies, and soon after took service in a privateer. Within a few years after his departure, news arrived in this country that a boat had been swamped, off a port in Jamaica, and that George Campbell had been drowned. His father, Ardmarnoch, then made enquiries of the subject, in consequence of which he called on a person named M'Ivor who had been in the West Indies at the same time with George Campbell, and, for part of that period, was in the same vessel with him. M'Ivor was a Highlander, and had been intimate with George Campbell on that account. Both Ardmarnoch and M'Ivor were since dead, but an old servant of the Ardmarnoch family deponed that Ardmarnoch told him he had got the manner of his son's death circumstantially detailed by M'Ivor, who had it from the crew of the vessel to which the swamped boat belonged. It appeared also that the deceased husband of a witness who felt an interest in the family had had the same report confirmed at Greenock by other sailors, apparently soon after the time when it occurred. The swamping of a boat, with George Campbell in it, had also been stated by a deceased sailor, to a witness who was adduced; the sailor having been in the vessel to which the swamped boat belonged. The family of Ardmarnoch, in consequence of their enquiries at the time, had been thoroughly convinced that George Campbell was dead. They went into mournings for him, and several witnesses recollected the grief which was evinced by the different members of the family, especially Mrs Campbell, who had been much attached to her son, and who was confined to bed in consequence of the intelligence. From that time downwards, George Campbell had been habit and repute dead, by the family and neighbourhood, and the second son, John, while he lived, had been looked on as the heir; so that after the death of Ardmarnoch, his trustees, in their minute of sederunt in 1808, had entered John Campbell, who was present, as "eldest son now in life of the deceased Archibald Campbell."

The claimant therefore pleaded, in reference to this proof, that there was sufficient evidence to produce complete conviction that George Campbell was dead. Considering the distance of time from the date when the event occurred, the best evidence had been adduced which was possible in the circumstances; and unless the Court were, contrary to previous precedents, to exact direct evidence from eye-witnesses, or to delay until after the lapse of the longest possible term of human life, they could not have stronger proof of death than existed in this case.

LORD BALGRAY expressed some hesitation whether the evidence of George Campbell's death was so strong as to justify the Court in paying over the fund in medio to the claimant without his finding caution.

LORD GILLIES.—I have no doubt that George Campbell is dead. The evidence produces full conviction on my mind. He has been habit and repute dead for a long term of years, and that, after his family had made enquiries, and received special information as to the event of his death. If the evidence in

[think the Court must always hereafter exact direct evidence, or refuse claim till after the lapse of the longest possible term of human life. No. 148.]

RAIGIE concurred.

Feb. 1, 1834.
Ramsay.

COURT pronounced this interlocutor: "Find, that the proof now led is sufficient to establish the death of George Campbell without issue: find, that the trustee is entitled to retain the expenses incurred by him in this session out of the fund in medio; and, quoad ultra, remit to the Lord ordinary to proceed," &c. Grant v. Coltart.

LAMONT and NEWTON, W.S.—MILLER and FORBES, W.S.—Agents.

JOHN RAMSAY, Petitioner.—*Robison.*

No. 149.

ation—Bankrupt—Diligence.—After the death of a bankrupt, the Court, on by the trustee, adjudged from the bankrupt's heirs, an heritable subject which the bankrupt had been infest at the date of the sequestration, but which was known to the trustee.

RAY, trustee on the sequestrated estate of William Tosh, presented Feb. 1, 1834. 1, stating, that at the date of the sequestration, Tosh was a proprietor of one-half of certain heritable subjects, disposed to others in security of a loan of £550; that the petitioner had only in fact since the date of his confirmation, and that the bankrupt meantime had died: he craved the Court to adjudge the subjects, fully described, "from the heirs of William Tosh, to and in favour of the petitioner," in real security, to the extent of Tosh's pro indiviso 1st Division. B.

The petition founded on the 29th and 31st sections of the bank-

As the petition was moved, the petitioner specially called the attention of the Court to the circumstance of the bankrupt's death, and farther on § 68 of the statute, authorizing all proceedings to be followed under their conclusion, as if the bankrupt were still in life. No party appeared to oppose the petition. The Court granted as craved.

G. GORDON, S.S.C. Agent.

UDOVICK GRANT, Pursuer.—*Sol.-Gen. Cockburn—Maitland.*
Rev. JAMES COLTART, Defender.—*D. F. Hope—Whigham.*

No. 150.

r Privileged—Clergyman—Process.—Circumstances in which the pursuer's action of damages against a minister on account of statements made by him as pastor and elder of the parish, the employer of the pursuer, regarding the minister's conduct, was held bound to take an issue, whether the statements had been made by the defender "in violation of his duty as a clergyman," and not on the simple issue, whether they were "false and calumnious."

No. 150. On the 16th August, 1832, the defender, the Rev. Mr Coltart, minister of the parish of Fintry, wrote to Mr Speirs of Culcreuch, who was one of his elders, the principal heritor of the parish, and proprietor of certain cotton-works situated therein, a letter containing, inter alia, this passage:—"Some of the new comers, and I regret to find not they alone, have been guilty of some daring outrages, which loudly call for the interference of the magistrate, and more especially when that magistrate is their employer." To this letter, Mr Speirs returned an answer, of date the 20th, bearing, inter alia, as follows:—"As you mention that 'some daring outrages' have been committed, I, as a magistrate, shall certainly do my duty whenever a proper application is made to me, but at present am ignorant of what you allude to. It would indeed be more agreeable to me, if any one in my employ have violated the law, that he or they were cited before some one else, as I do not wish to judge in a cause where I may be supposed interested." On the same day, the defender wrote, in reply, a letter, containing this passage:—(1.) "It is to you only that I can look for the correction of any outrages or irregularities that may take place in the parish, and more especially among your own workers, and I certainly did think that the least hint from me that such had taken place, would have attracted your instant attention. What I have to complain of is, that the heads of your mill outrage all decency, annoy the well-disposed, and disgrace themselves by openly bathing in the river on the forenoon of the Lord's day, running races, singing songs, drinking, rioting, and fighting. If such things are not put a stop to, (and I don't know by whom they can be stopt, unless by the proprietor of the work,) there is an end to every thing like decency and good order in the country, and even our worldly prosperity will soon be injured." Mr Speirs, in return, with reference to this point, observed—"As to the conduct of the 'heads of the mill,' I never heard of the circumstances; and except you are more explicit, and can give names, &c., I can do nothing." The defender replied in these terms:—(2.) "I am astonished that you have not heard of the irregularities that have lately been committed in the parish. They have made noise enough; but they are becoming so common, that I fear they will soon cease to be observed as any thing particular. Complaints have been made to me, among other things, of the shameless way in which the manager of your mill, with his regardless companions, spent Sunday fortnight—viz. in bathing publicly in the river, and travelling through the country with their coats off, like men running races. Indeed I was told that they did run races. On the same day your carding-master, and, I believe, the sizer, were marching about, singing 'March to the Battle Field,' and other choice songs. Sunday week was spent by the same carding-master and sizer, and some others, in drinking, rioting, and fighting. It is only a very short time since I read, at your request, a letter from you from the pulpit, intimating your determination to prevent all such indecencies and disorders."

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am perfectly convinced of your sincerity, and that you will do so without No. 157.
any instigation from me." To this Mr Speirs answered, of date Sep-
tember 4th :—" I considered myself bound to afford Mr Grant an oppor-
tunity of replying to the accusation affecting him. It gives me much

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pleasure to have ascertained, by private enquiries, that there is no truth in the story you wrote me as regards Mr Grant; and I hold that you have been most grossly imposed on, both as regards him and myself. In justice I might consider you bound to give up the name of your 'respectable informant' who slandered me, but I despise the matter too much to take farther notice of it. In reference to the carding-master's conduct, I believe a very exaggerated report has been made to you, and still more untrue as relates to Morrison." In consequence of the communication by Mr Speirs to the pursuer, Grant, who was the manager of the works alluded to in the defender's letters, he, of the same date, wrote to the defender in these terms :—" I was certainly much surprised upon hearing from Mr Speirs the accusation (in writing) you have brought against me, viz., of bathing in the river Endrick, and running races on the Sabbath-day, (along with my regardless companions, as you have thought proper to term them, and whom, I may venture to say, will reply to you upon that score in the way it merits.) Allow me, in the most respectful manner, to deny your accusation as false and untrue, and it now lies with you to establish that charge with as little delay as possible; and I request you give up the name of your backbiting informer to me within twenty-four hours hence, or a very satisfactory apology; otherwise I shall take such steps as shall vindicate my character without one hour's delay thereafter, and bring those slandering crew to the knowledge of the public."

Next day, the defender wrote to Mr Speirs a letter, containing the following passage: "Your letter, with the one accompanying it, received last night, not a little surprised me. I should not have expected, after what had previously been written on the subject to which it refers, that a letter from you, if any further was necessary, would have contained the spirit manifested, and been couched in the language it contains. And as to Mr Grant's letter, if it did not meet your eye before my receipt of it, I can only say, that it is not such as (addressed to a clergyman) can receive the approval of any well-regulated mind. If there is on your part, or that of Mr Grant, an intention or wish to intimidate me, I can truly assure you that you have mistaken my character, if you suppose that by such language or threats I am to be borne down. Since I came into this parish, it has been my earnest wish and endeavour to promote the religious and moral interests of its inhabitants, to remonstrate against every thing that was disorderly, and to check vice, whether open or secret, whatever shape and character it might assume. In this I thought that I would have been seconded, and had my hands strengthened, by every well-inclined person in the parish. It is well known that in every parish there are delinquents who require not merely the efforts of the clergy-

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man, but of the community at large, to check them, who, setting put opinion at defiance, not merely ruin themselves, but become dangerous in the circle in which they move. I do conceive that I was warranted hope for the support of the pious and well-educated of those whose station in society was influential, and of the members of my kirk-session who are bound by their very office, and by their ordination-vows, to stand by their minister, in his endeavours to do good. I say, I did conceive I was warranted to expect that all such, by their example, their authority and their influence, would on every occasion have supported me, when it was known that I had nothing else in view but the general weal;" and also this: (3.) "When I wrote to you, I had heard of several outrages and irregularities said to be committed in the parish, and by some individuals under your employment. You were the natural person to check these; and I did think, without arrogating too much to myself, that a hint from me, as the minister of the parish, would have been sufficient for you to have turned your eyes upon, and to investigate the matter prudently; and that you would have been the last person to have sought for names, and thus, seeking for names, to bring me thus prominently forward. Instead of joining with the minister, the natural and legitimate guardian of the morals and religion of the parish—one who has now been in the parish for ten years—who has lived on the most intimate and friendly terms with the Culcreuch family—you have thought proper to join issue with one who is comparatively a stranger to you, to espouse his quarrel, and listen to his tale, rather than to my statement. I think you have known enough of me to be satisfied that I could not be mean or unprincipled enough to originate any thing tending to calumniate the meanest person in the parish; but if reports come to me from what regard respectable sources, it is my duty not to overlook and disregard them; and I must say, in what regard the religion and morals of the community, I neither can nor will overlook them.

"With regard to Mr Grant, I have only to say, that my first impressions of him were most favourable. I called at his house, and was inclined to show him all the countenance that I conceived he merited; and it was not till I found that he was a habitual absentee from the house of God, that I learned that his conversation amongst the workers, young and old, was marked by daring and gross profanity, and that he was in the habit of receiving visitors from Glasgow or elsewhere, on the Lord's day, and spending it in a manner that neither became a Christian nor the head of a large establishment, that I was led to change my opinion of him. I have no wish to injure Mr Grant; but if he will act in this manner, I put it to your conscience—I put it to his—if I am to be silent, and act to him as I would otherwise have felt inclined to do.

"Mr Grant's letter is of that nature that I will not deign to answer it. There is a threat held out in it, which he may think proper to carry into execution. If he does, let him do so. I don't feel myself called on to

say any thing in the way of apology, nor will I give up the names of my No. 150.
informants. His letter, however, I shall hold in retentis.

"I have, in conclusion, to say, that you have done what you can to give
a stab to my usefulness in the parish, for be assured that this subject is
already to a greater or less extent known, and, I doubt not, is hailed by
the licentious; and whatever your views of the matter may be, allow me
to say, that if the hands of a minister are weakened in the discharge of
his duties, the worst of evils—evils that cannot be contemplated without
horror—will flow from it. I shall, however, proceed in the discharge of
what I conceive to be duty, fearing God, and having no other fear."
After an intervening letter from Mr Speirs, the defender returned one
of date September 6, containing this passage:

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(4.) "With regard to Mr Grant, I have stated my first impressions
respecting him, and what it was that led me to a change of opinion. The
irregularities of which I complained, were not confined to him; but, as
one placed at the head of such an establishment, he was bound by his
influence, and by his example in all that was religious, and moral, and
praiseworthy, to promote the interests of his employer—to strengthen
good habits in the young that were under his inspection, and to check
every thing in the thoughtless, regardless, and dissipated, too many of
whom, I grieve to say, are to be found in such a community as he pre-
sides over; and if I had reason to suspect that Mr Grant did not act as
he ought—did not, by example or authority, follow out the duties of that
station in which he was placed, was I to keep my lips shut? And let him
say if I propagated scandal—if I was the slanderer that he alleges, if the
only person to whom I mentioned my suspicions was one of my own
elders, the proprietor of the works, and in no small degree interested in
the moral conduct of all who are employed in the establishment? How is
a minister or elder to get at a knowledge of the irregularities in his pa-
rish? Is he to wait till these take place under his own eye, or come to
his own personal knowledge? If this is to be the case, then vice and pro-
fligacy must go forth with still bolder front than they are (blessed be God)
permitted to do. He is not to listen to every tale-bearer, but he is not
to disregard the fama that is notour, or the report of those who are re-
spectable; and allow me to say that you, in your various official situations,
are bound to do so as much as myself.

"My conduct in this business is magnified into the vile desire to calum-
niate you,—to calumniate Mr Grant, as if from rancour and vile passion
I sought to injure. I cast the imputation away from me with the '*mens
conscia recti*,' and that my whole life repels the insinuation. It is not my
duty, my interest, or inclination, to malign either. With regard to your-
self, there is not the shadow of a ground for the allegation; and it is only
to yourself what I stated of the reports relative to Mr Grant. I am pre-
pared to meet the accusations he may be pleased to bring against me per-
sonally; but I repeat that I have no apology to make for the course I have

No. 150. pursued in addressing you regarding him and others, and I will not mean enough to mention the names of those individuals who have spoken to me of the affair."

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Founding on the passages in the defender's correspondence with I Speirs, which in the above recital are numbered, and also on certain conversations alleged to have taken place between the defender and other individuals on the subject, Grant raised an action of damages for defamation, in which he libelled that the defender, "having conceived groundless malice, hatred, and ill-will" against him, had of late "taken every opportunity of defaming his character, and attempting to ruin his respectability and prospects in life," and with this view had "most falsely, maliciously, calumniously, and injuriously" written the passages, and made the statements in question.

The defender pleaded, in defence, that he was only acting in the discharge of his duty as a clergyman, in the communications made to Mr Speirs, an elder and heritor in the parish, and the employer of the persons complained of.

After a discussion on the relevancy of the libel, which was sustained, issues were framed and approved by the Lord Ordinary, which, after setting forth the statements libelled, severally enquired, "Whether the whole, or any part of the said words are of and concerning the pursuer and are false and calumnious, and to the loss, injury, and damage of the pursuer," with a counter issue in these terms:—"Whether, in writing and transmitting or communicating the contents of all or any of the said letters, as set forth in the 1st, 2d, 3d, 4th, and 5th issues, the defender acted in the discharge of his duty as minister of the parish of Fintry?"

Against the interlocutor approving of these issues, the defender reclaimed, and contended, that the pursuer was bound to take his issues, whether the statements were made "maliciously," so as to bring them within the libel, and that the defender was also entitled to this on the general ground that the communications libelled between a minister and a member of his session and heritor of the parish, as to persons in his employment, were privileged and protected, so that malice must be substantively proved by any party suing for damages in respect thereof.

In the course of the pleading, the Court having intimated an opinion contrary to allowing the issues as framed to stand, the pursuer's counsel stated his willingness to insert in his issues the words used in those in the case of *Dudgeon v. Forbes* (ante, XI. 1014), namely, whether the statements had been made by the defender, "in violation of his duty as a clergyman." The defender's counsel accepted this as sufficient, and the pursuer's issues were altered accordingly, and the counter issue in consequence struck out.

No. 151.

* **PETER RUTHERFORD**, Suspender.—*Skene—Brodie.*
THOMAS ROBERTSON, Charger.—*Jameson.*

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 Rutherford v.
 Robertson.

f—Reference to Oath.—Circumstances under which the Court held that though er, under a reference to oath, had refused to answer several questions as due date of a bill charged on, which was different from the apparent date, was negative of the reference.

ss—Acquiescence.—A commission to take the charger's oath was dated, by a error, 21st October, in place of 21st November; the suspender used the sion, and examined the charger under it, without objection—not entitled er to plead that the proceedings under the commission were inept, in conse ce of the erroneous date.

11th November, 1833, Rutherford presented a bill of suspension Feb. 4, 1834.
 charge on a bill of exchange for £56, 11s., at two months, dated 1st Division.
 August, 1833. He alleged that the bill was granted on 1st Novem- Bill-Chamber.
 hat there was an agreement that it should not be payable until two Ld. Moncreiff
 after that date, viz. on 1st-4th January, 1834; but that the charger, D.
 each of agreement, had inserted the false date of 24th August, and
 otested the bill and raised diligence on it immediately after it was
 . The suspender offered a reference to oath. The charger an-
 l, that the bill was granted for a true debt; that it was not granted,
 ged, on 1st November, though it was granted "some short time
 4th August, the date it bears;" but that it bore the said date when
 accepted by the suspender.

Lord Ordinary "sustained the reference to the charger's oath, to
 ect of the complainer proving thereby that the bill was granted on
 : November last, and that there was an understanding or agreement
 should be made payable two months after that date, or on the 4th
 y next, and that the date of 24th August was inserted in it by the
 r, in breach of the said agreement; and granted commission," &c.
 sterlocutor was dated 21st November, 1833. In extracting the
 ssion, the clerk set forth its date as being 21st October. In the
 ple of the report of the act and commission, it was accordingly sta-
 at it had been granted on 21st October. The suspender appear-
 re the commissioner, and examined the charger, without taking
 jection to the erroneous date of the commission produced. The
 r deponed, "That he did not get from the suspender a bill for
 ls. on 1st November current; that the said bill charged for was
 ritten out and subscribed of date the 24th August last: that the
 hich the bill bears is the date agreed upon between the parties at
 ie it was granted or accepted; and in so far as the said bill was not

his case was decided on 29th November, 1833, but accidentally omitted.

No. 151. accepted on the said 24th of August, it was erroneous in point of
 Feb. 4, 1834. that the said bill was not drawn out, dated, and subscribed on the
 Rutherford v. November current. Interrogated, since the bill charged for does not
 Robertson. a just and true date, and was not written out or subscribed on the
 of August, on what day was it dated and subscribed by the suspen-
 Depones, that the said bill was accepted on some day subsequent to
 said 24th day of August, but not upon the foresaid 1st November;
 the particular day he declines to condescend upon; and although he
 just returned after examining his ledger and bill-book, he cannot
 from them the particular day on which the said bill was accepted.]
 rogated, if he can, from his recollection, state if the bill in question
 accepted between the 1st and 6th of November, and if he can conde-
 how long he retained that bill in his custody after being accepted to
 sending for horning on it? depones, and declines answering this in-
 gatory, as he conceives it not to be contained in the suspender's refer-
 Interrogated, if, on the day the suspender accepted the bill in ques-
 he, the deponent, made him aware that the bill was then at maturity
 that he was immediately to raise horning and caption on it? dep-
 that he made the suspender aware that the said bill was to be us-
 order to prevent preferences: that the deponent, at the time that the
 was laid before the suspender, told him that it was drawn at two mo-
 date from the date it bore; and he cannot say whether the suspender
 the bill before signing it or not, although he had an opportunity of
 ing it after receiving the above explanation; and the deponent here-
 that there was no agreement betwixt him and the suspender by which
 bill in question was to fall due on the 4th of January next."

The oath being reported, it was pleaded by the suspender—

1. The commission being dated 21st October, which was anterior
 the date of the bill of suspension itself, no lawful commission had
 issued. The proceedings under it were therefore null.

2. As the charger refused to answer questions which were clearly
 tinent to the subject under reference, the oath must be construed as al-
 tive of the reference, or the charger must be ordained to be re-
 mined.

To this it was answered—

1. There being a mere clerical error in the date of the commissio-
 could not now be regarded, after the suspender had used the commis-
 without objection, by appearing before the commissioner and exami-
 the charger. The object of doing diligence was to cut down a dispositio-
 Rutherford, on which sixty days were nearly expired, and they wou-
 fully expired before the charger could be re-examined, if the pr-
 report of the commission was set aside.

2. The charger had deponed that the bill was not granted on 1st
 vember; that there was no agreement that it should be made payabl-
 4th January; and that the date of 24th August was not inserted in b-

any agreement. This exhausted the reference as allowed by the Lord Ordinary, which was of a limited nature; and if the suspender had thought too limited, he should have objected to it when pronounced, in place of signing it and acting on it.

No. 151.
Feb. 4, 1834.
Rutherford v.
Robertson.

The Lord Ordinary "reported the bill and answers," and the oath.*

LORD PRESIDENT.—The reference allowed by the Lord Ordinary was of a limited character. His Lordship sustained the reference to the effect of the commissioner proving that the bill was granted on 1st November, and that parties agreed to make it payable on 4th November, and that the date of 24th August as inserted in breach of the agreement. The oath negatives all these points, and therefore I think the bill of suspension ought to be refused.

LORD GILLIES.—The charger depones, "that the date which the bill bears is a date agreed upon between the parties at the time it was granted or accepted;" and "that there was no agreement betwixt him and the suspender by which the bill in question was to fall due on the 4th of January next." I think that is negative of the reference. The bill of suspension should be refused.

LORDS CRAIGIE and BALGRAY concurred in thinking that the bill should be refused.

THE COURT accordingly refused the bill, but found no expenses due by the suspender, except those of the minute-book.

J. J. DARLING, W.S.—W. MURRAY, W.S.—Agents.

* **NOTE.**—If the charger is entitled to complete his diligence, to the effect of exposing the security, said to have been granted on the 1st October, to challenge the act 1696, the above order is the only one by which it is at all likely that he can accomplish that object. But the Lord Ordinary must confess, that after reading the deposition, he has doubts on the merits of the diligence. It may be right to set down preferences. But it is not so clear that this may be lawfully done by inducing the debtor, under circumstances which the creditor declines to explain, to date a bill weeks or months with reference to the actual time of signing it. If things were all fair and straightforward, why does the charger, on pretence of adhering rigidly to the very words of the Lord Ordinary's interlocutor, refuse to answer plain questions evidently pertinent to the substance of the matter referred? If he has marred his own purpose by a foolish pertinacity, there is no help for it. But where confessedly there was something indirect in the proceeding, such shyness to explain all the facts inevitably raises suspicion that something material is concealed. It is so left, that the bill may have been signed any day from the 24th August to the 6th November, with an understanding that it should not be payable for two months thereafter.

"The error of the clerk in writing the commission is unfortunate. But it is so plainly a clerical error, that it is probably of no consequence."

No. 152.

CALEDONIAN DAIRY COMPANY, Pursuers.—*Jameson—A. McNeill.*MAJOR ROBERT CAMPBELL, Defender.—*D. F. Hope—Keay.*

Feb. 4, 1834.

Caledonian
Dairy Co. v.
Campbell.

Partnership.—In the prospectus of a joint-stock company, it was set forth that the capital stock was proposed to be £50,000, divided into shares of £25 each; the company was formed, and operations commenced, without this amount having been subscribed for; and thereafter a contract was signed, containing a provision, that the capital stock should be £50,000, but declaring the copartnership to have commenced at a period previous to the date thereof; and the amount of stock actually subscribed for did not exceed £20,000. Held, in an action by the Company against a party who had subscribed the contract, and paid several instalments of his subscribed stock, 1. That the stipulation as to the amount of stock was not a condition precedent of the existence of the Company, but that he was liable as a partner to pay up the whole of his stock subscribed; and, 2. That alleged mismanagement by the directors was no defence in a question between him and his copartners.

Feb. 4, 1834.

2d Division.
Ld. Mackenzie.
F.

IN January, 1825, a prospectus was circulated, for the establishment of a joint-stock company for supplying Edinburgh with dairy produce, bearing, inter alia, "The capital of the Company is proposed to be £50,000, divided into shares of £25 each." A large number of subscribers having been obtained, a meeting was held on the 2d February, at which the Company was constituted, and office-bearers appointed, who were authorized to proceed with all the arrangements necessary for establishing the concern. These office-bearers accordingly purchased ground for a dairy, &c., and commenced operations as a dairy company; and a contract of copartnership having been framed and approved of, was submitted for signature in the course of the month of April following. By virtue of a special mandate from the defender, Major Campbell, of date 28th May, it was subscribed on his behalf for fifty shares, and at the same time, the first instalment thereon was paid by him. By one of the clauses of the contract, it was declared, "that the capital stock of the Company shall be £50,000 sterling, divided into 2000 shares of £25 each." By another clause, the 28th day of January preceding was declared to have been the commencement of the copartnership, while the fact of the Company having been in operation prior to the framing of the contract, was also alluded to in several other clauses. It was further stipulated, "That although it is hereinbefore provided that this Company shall subsist for a period of nineteen years, it shall be lawful to and in the power of the partners, holding not less than one-third of the actually subscribed for capital stock of the Company, or not fewer than five of the directors, to require a meeting to be called of the proprietors, by circular cards, expressly notifying the intention, subscribed by the secretary, for considering any proposition for the dissolution of the said Company at an earlier period, or at any time of its endurance, after the last Monday of May, 1844." The amount of stock held by parties subscribing the contract was

exceed £20,000, but the business of the Company was continued under it, and five calls were paid up by the defender without objection, although it appeared that he had been informed in July, 1825, by a letter from the agents, that they calculated that about £21,000 was invested in the concern, "which," they stated, "is just about our bona fide subscribed capital." The affairs of the Company having, in 1828, become very much embarrassed, it was thereafter resolved to wind up the concern; for which purpose, it was necessary to call up the whole of the subscribed capital stock. The defender had not paid the sixth call, and he now also refused to pay the seventh, which exhausted the amount subscribed for. The Company thereupon raised an action against him, concluding for payment. No objection was stated to the regularity of the calls, but it was pleaded in defence—

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1. The defender only agreed to become a partner of a company whereof the capital stock should be £50,000, and that amount not having been subscribed, he cannot be bound by the contract containing in gremio this condition, which was never fulfilled; and,

2. The loss which these calls are required to make up arose from the mismanagement of the directors.

To this it was answered—

1. It is obvious, from the terms of the contract, and the fact that the Company was in operation before it was signed, that the provision as to the amount of stock was not a condition precedent, without which the Company was not to exist; and, besides, the defender was personally in the knowledge, that the full amount had not been subscribed, and yet continued to act as a partner, paying up his instalments, and thereby entitling himself to a share of profits had there any been; and,

2. Whatever claim the alleged mismanagement of the directors, if such took place, may give the defender, and the other partners, for relief against them personally, it can never free him from his obligations to the Company, in a question with the other partners, who, as to this matter, are in *pari casu* with him.

The Lord Ordinary repelled the defences, and decerned in terms of the libel, with expenses, adding the subjoined note.*

* "The defender, Major Campbell, does not say that the mode in which the instalments have been called for is not formal and regular in itself, so as to bind those who are truly and fully bound as partners of the actual Dairy Company. But his main plea substantially comes to this, that he is not a partner of that Company, or liable in the obligations of a partner of that Company, at least in reference to those persons who are properly partners thereof. He does not deny that, to the public, he may be liable as a partner; but as *inter socios*, he alleges that he is not bound for any thing, but entitled to a total relief from all social burdens and obligations. The ground on which this plea is rested is, that he agreed to be a partner only on condition that the Company stock should be £50,000, the whole of which (under some small exception) should be subscribed for, which was not done, so as to purify the condition, and actually bind him as partner. The Lord Ordinary is not satisfied

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THE COURT adhered.

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Campbell.

LOCKHART, HUNTER, and WHITEHEAD, W.S.—A. DOUGLAS, W.S.—Agents.

that he ever did understand or intend that such condition was or should be as to his original accession to the Company; or that, if it had been so, he did here to the Company as a partner, after he knew that it had been put into operation, without a capital stock to that extent. The contract which was signed does not say that the Company is not to commence operations till £50,000 or be raised, or be effectively subscribed for, or even subscribed for at all. Contrary, though that contract is dated 16th January, 1826, yet, in the verbatim section, it provides,—‘That the copartnership hereby entered into shall be denominated and known by the name and designation of the Caledonian Dairy Company for the purposes above mentioned, and upon the terms and conditions hereinafter expressed and contained, and shall commence from and after the 28th day of January 1825, which is hereby declared to have been the commencement of this copartnership notwithstanding the dates of the several subscriptions hereto,’—evidently alluding to the fact, which was notorious, and is most distinctly alluded to in other parts (vide sections 5th, 8th, 23rd, and 31st), that the Company had already been in operation; and the provisions in sections 31st and 32d are,—‘That although hereinbefore provided that this Company shall subsist for a period of nineteen years, it shall be lawful to and in the power of the partners holding not less than one-third of the actually subscribed for capital stock of the Company, or not fewer than five of the directors, to require a meeting to be called of the proprietors, by circular cards, expressly notifying the intention, subscribed by the secretary, for considering any proposition for the dissolution of the said Company at an early period, or at any time of its endurance, after the last Monday of May, 1827.’—in like manner, it shall be lawful to and in the power of the partners to assemble at any general meeting, called by advertisement in the Edinburgh newspaper each week for three months at least before such meeting, in which advertisement the purpose of such meeting shall be expressly notified, to prorogue and extend the endurance of the Company to any number of years, providing that such extension shall not exceed another period of nineteen years; and if two-thirds of the shareholders, represented as aforesaid, shall agree to such prorogation or extension of the contract, their determination shall be binding on the whole Company, or otherwise.’ These clauses seem very plainly to contemplate, that the Company might be constituted, and, as such, be dissolved and extended, while there was an actual subscription of stock different from the full subscription of stock mentioned in the contract. Then the Company does go on after the contract is signed, and the defender never makes any objection, but pays his instalments, and continues his right to a share of the profits, if the concern turned out well. Can he be said to say, that the form of the contract gave him so absolute an assurance that the Company was not to be put in operation till the capital was £50,000—that he was entitled to do all this on that positive assumption, without any enquiry as to what had been the ‘actual’ state of the subscription? He admits, in argument, that he was not so entitled in reference to the public; and the Lord Ordinary thinks that under such a contract, and in such circumstances, he was not so entitled in reference to the other partners. But farther, the Lord Ordinary is satisfied, from the receipt of Messrs Lockhart and Swan to the defender, dated 15th July, 1825, the receipt is not denied, that the defender knew the true account (to a nearness at least) of the subscribed capital of the Dairy Company at that date, if he was ignorant of it, and yet it is certain that he made no declaration that he was wronged by the Company.

Poor PETER CORSTORPHINE, Advocate.—*D. F. Hope—Forbes.*
INCORPORATED TRADES OF CALTON, Respondents.—*Keay—More.*

No. 153.

Feb. 4, 1834.
Corstorphine
v. Incorporated
Trades of
Calton.

Society—Incorporation.—Circumstances in which the member of an incorporation established mainly for support of its poor members, was held not entitled to a particular rate of superannuated allowance under a set of regulations to which he had consented, but which had been rescinded, and another scheme substituted in their place.

IN 1631, Lord Balmerino, baron of the Barony of Restalrig, granted the Trades of Calton, (which formed part of the burgh of the barony,) a charter incorporating them into a society, with power to exact fees for admission, which, with other contributions, were directed to be put into a fund for the supply of the poor and decayed persons within the barony, and otherwise to be employed to such good uses as should be meet and expedient at the sight of the bailie of the barony. In 1725, the barony was purchased by the City of Edinburgh, and, in 1727, a set of regulations for the Trades was issued under sanction of the Baron bailie, whereby the funds of the incorporation were directed to be employed towards the relieving, maintaining, and supporting such of their members as are, or shall be reduced to poverty, and of their widows and orphans, and towards such uses as shall be agreed to by the said bailie, and his successors in office, tending to the benefit of the said society.”

Feb. 4, 1834.
2D DIVISION.
Ld. McDwynn.
F.

In 1769, these regulations were rescinded by the magistrates of Edinburgh, upon petition from the incorporation, and a new set enacted. This set continued in force till 1801, when they were superseded by another, authorized by act of Council, which again was superseded by another set established by the same authority in 1813, and which it was declared should subsist till altered by the Magistrates and Council. Prior to these last regulations, the rate of contribution for members had been 4d. per quarter, but by them the rate for new entrants was raised to 2s. 6d. per

having been put in action on that capital without his knowledge, or any disclaimers of his having been or being a partner in time past or future; and he continued to act in all respects as a partner, particularly paying instalments, and fully retaining his right to a share of the profits, if the concern had turned out profitable. He therefore was a partner, notwithstanding the actual amount of stock was less than £50,000; and thus the chief defence is not availing. The other defences are founded on alleged irregularities in the management of the Company, committed by the directors, in violation of the rules laid down in the contract. But if the defender was a partner of the Company, it seems impossible to him to free himself from liability for calls along with the other partners, because the directors managed ill or regularly by his own sufferance or neglect, as well as that of other partners; for he does not say that he opposed these acts, or pretended to be free from his share, they were gone into. Whether he and the other partners may have any personal claim against the directors for their misconduct is not the question; but, in the first instance, he must pay in his share of stock, when called upon, like the other partners.”

No. 153. quarter, with liberty to old members to conform to the new scheme within six months, by agreeing to pay at that rate; while, on the other hand, it was provided that the then annuitants should continue to receive £5 per annum, being the average rate of the last five years; and as to members entering under, or conforming to the new scheme, that widows should be entitled to an annuity of £10 after the expiry of five years from the date of confirmation of the new rules, and with reference to themselves, "that every member, whether by distress in himself, or superannuacy, who shall stand in need of relief, shall, by making his case known to the office-bearers for the time being, be entitled to an allowance equal to that received by a widow, providing that he has paid to the society quarterly accounts from the date of such confirmation, until the expiry of five years as aforesaid, and failing so to do, that a discretionary power shall be reserved to the managers to supply such person (according to existing circumstances) as to them shall seem proper."

Feb. 4, 1834.
Corstorphine
v. Incorporated
Trades of
Calton.

The advocator, Corstorphine, who had entered the incorporation in 1784, conformed to the new scheme, and thereafter paid the increased rate. In 1821, it being found that the annuities provided in the regulations of 1813, were calculated on too high a scale, an application was made to the Magistrates of Edinburgh by the Incorporation, without dissent on the part of the advocator, or any other member, to have the regulations rescinded, and others substituted in their place. This application was granted by the magistrates, who, by act of Council, rescinded the regulations of 1813, and established a new set, whereby, while the same rate of payment was continued, instead of the provisions in the regulations rescinded, as to the allowances to decayed or superannuated members, was enacted, "that any member, who, from indisposition or superannuation, may stand in need of relief, shall present a petition to the managers, requesting such aid as they may deem proper, reserving always to the said member a right to appeal to a general meeting of the incorporation, the decision of which shall be final. It being hereby declared, that the decision of the managers or of the said general meeting, both as to the amount of allowance to be granted, and as to the right of the applicant to demand any allowance, shall be the only footing on which such claim can be maintained, on the treasurer, or on the incorporation; and declaring also, that if the managers shall sustain the claim of any person, making such a declaration, it shall be competent for any member of the incorporation to bring the matter under the review of the next general meeting, upon giving notice to the party concerned, and to the managers, of his intention of so doing; and the decision of a majority of said general meeting, both as to the right of the party to receive any allowance, and as to the amount thereof, shall be final and conclusive."

In 1826, the advocator, who had till then regularly paid his contribution of 2s. 6d. per quarter, being near seventy years of age, applied for an allowance from the funds, and, in January, 1827, he was elected

the managers as a pensioner at 2s. 6d. per week, or £6, 10s. per annum. No. 153.
 Against their judgment, the advocator appealed to a general meeting, on
 the ground that he was entitled, as a contributor under the scheme of Feb. 4. 1834.
 1813, to the allowance of £10 per annum there stipulated for. At this Henderson's
 meeting, it was moved by the convener, and unanimously agreed to, Trustees v.
 "that although the incorporation should not admit any legal right in Mr Tulloch.
 Corstorphine to the pension of £10 claimed by him, that they should
 nevertheless, in the particular circumstances of the case, grant an allow-
 ance to him of 4s. per week," &c. "during the pleasure of the managers."

This allowance, amounting to £10, 8s. per annum, was paid till May,
 1829, when the managers reduced it to the former rate of £6, 10s. The
 advocator again appealed to a general meeting, who, by the casting vote
 of the convener, affirmed the determination of the managers. The advo-
 cator thereupon raised an action before the Sheriff of Edinburgh,
 concluding to have the incorporation ordained to enrol him as a pensioner
 at the rate of 4s. per week, on the ground that under the scheme of 1813,
 he had, by conforming thereto, acquired a vested right to the annuity
 thereby stipulated. The Sheriff pronounced the following interlocutor:—
 "Finds that the rules and regulations of the Incorporated Trades of
 Calton, enacted and confirmed by the magistrates on the 8th May, 1821,
 superseded and rescinded all former rules and regulations, in so far as
 respected both the existing members, and any new members who might
 be subsequently admitted, and must be held as the existing rules and
 regulations of the said incorporated trades, until they are altered by the
 Magistrates of Edinburgh, or set aside by other competent authority;
 finds, therefore, that the pursuer is not entitled to found on the previous
 regulations, 1813; finds, that the claim of the pursuer for aliment, and
 the amount of the allowance of aliment to be granted to the pursuer, falls
 to be decided, in terms of the 25th and 28th articles of the rules and
 regulations, 1821; therefore assoilzies the defenders, finds them not en-
 titled to expenses, and decerns."

In an advocacy, the Lord Ordinary remitted simpliciter, and the
 Court adhered.

WM. MUIR, S.S.C.—SCOTT and RYMER,—Agents.

Mrs HENDERSON'S TRUSTEES, Pursuers.—*Cuninghame*.
 J. TULLOCH and D. ROSS, Defenders.—*Skene*.

No. 154.

Expenses—Trust.—Under an agreement, given effect to by judgment of Court,
 the expenses on both sides in a litigation regarding certain trust funds, should
 be paid out of the funds—held that the account of the losing party fell to be taxed
 as between agent and client, not as between party and party.

PREVIOUS to the advising of the cause mentioned ante, 133, the defen- Feb. 4, 1834.
 ders wrote to the pursuers, proposing that whatever might be the result, 2d Division.
 R.

No. 154.
Feb. 4, 1834.
Henderson's
Trustees v.
Tulloch.

the "whole expenses" in trying the question should be paid out of the trust-fund. This was acceded to, and when judgment was pronounced in favour of the defenders, they allowed the Court to find that the "expenses on both sides" should be paid out of the fund, and the "accounts" were at the same time remitted to the auditor to be taxed. The auditor having taxed the pursuers' account, as between agent and client the defenders objected, and contended, that unless this were specially ordered, they necessarily fell to be taxed as between party and party, and referred to the practice in Chancery in similar cases in support of their plea. To this it was answered, that the present was truly a question of agreement, and that the meaning of parties in stipulating that the whole expenses in trying the question should be paid out of the fund, must be held to have been, that they should go out of Court free of any part of the expense of trying the cause.

LORD MEADOWBANK.—In interpreting the agreement, we must take the words, "the expenses on both sides." Now, surely, the meaning is, that the expenses of both parties are to be paid out of the fund alike—the expense incurred by the party—just as if there were a common fund, and both were to be paid out of it on the same footing. I think the meaning of such a finding is, that the party is to go out of Court indemnified. No doubt, it is the expenses of process. But what is that? As between party and party, when settled by strict rule; but it is totally different when a party is to be sent indemnified out of Court, and every thing really incurred in the process should be allowed, though it would not as between party and party, as, for instance, a charge for employing three counsel instead of two.

LORD JUSTICE-CLERK.—I am a good deal moved by what has been said by Lord Meadowbank, as to the agreement. Our interlocutor is in respect of no opposition, &c., and we remitted the "accounts," not "the account of the losing party," to be taxed, and this is just carrying into effect the agreement that the accounts on both sides were to be on the same footing. Without, therefore, raising the question, as if it were simply a decree of Court, not under an agreement, I think they should be allowed.

THE COURT repelled the objection.



The pursuers then objected to the report of the auditor, in so far as it disallowed a particular item, originating thus:—A diligence had been granted them in the process to recover certain papers out of the hands of the late Mr Clyne, S.S.C. He resisted, and caused some expense, as to which a submission was made to an arbiter, who awarded £23 against Clyne. In consequence of his threats of further procedure, however, they next attempted to put the award in force against him, but they claimed the amount in their account in this process as beneficially expended.

LORD MEADOWBANK.—They should have done diligence against Clyne; and not having done so, the charge cannot be allowed here.

The other Judges concurring,

THE COURT repelled this objection.

JOSEPH GORDON, W.S.—J. and L. DAVIDSON and SYME, W.S.—Agents.

No. 154.

Feb. 6, 1854
Gordon v. his
Creditors.

——— GORDON, Pursuer.—*Thomson*.
HIS CREDITORS, Defenders.—*Dunbar*.

No. 155.

Cessio—Process.—In consequence of an agreement at the bar, that a creditor should withdraw opposition, and be named trustee in the disposition to a process of cessio, the Court signed an interlocutor, finding the pursuer entitled to the benefit of the cessio; he having refused to implement the agreement, but offered to consent to the interlocutor being cancelled, and the case pleaded of new, the Court expressed a doubt as to the competency of recalling the interlocutor, and superseded the case.

Advocate.—Question as to the extent of a counsel's power, without a special mandate, to bind his client, the pursuer of a cessio, to execute the disposition omnium bonorum, in favour of a particular creditor (the incarcerator) as trustee.

At pleading a cessio, a creditor withdrew his opposition in consequence of an agreement entered into at the bar, that the defender, who was the incarcerating creditor, should be the trustee under the disposition omnium bonorum. The pursuer, on learning the agreement, refused to ratify it, and changed his agent and counsel. In the meantime, the interlocutor, finding him entitled to the benefit of the cessio, had been signed. The pursuer now stated his readiness to consent to that interlocutor being recalled, so that both parties might be restored to the position they occupied prior to the agreement; and he explained that he objected to the defender being named his trustee, as his claim was rested on a forged bill, which would be the trustee's duty to reduce for behoof of the estate.

Feb. 6, 1854.
1st Division.

LORD BALGRAY inclined to recall the interlocutor of consent, and allow the cessio to be pleaded still.

LORD GILLIES.—I doubt whether the interlocutor can in point of form be so recalled. In the meantime the Court cannot go farther until the pursuer produces proper disposition, and he remains liable to the diligence of his creditors.

Their Lordships were understood to express an opinion, that an arrangement for naming the incarcerating creditor to be trustee under the disposition omnium bonorum, was within the powers of the pursuer's counsel, without any special authority, and was binding on the pursuer, unless he established some other ground invalidating it than the mere want of power.

No. 156.

JOHN BALLANDENE, Claimant.—*Jameson—Turnbull.*

Feb. 6, 1834.

H. HANDYSIDE, W.S. Respondent.—*D. F. Hope—Monteith.*Ballandene v.
Handyside.

Arrestment.—A debtor having transmitted a sum to his agent to pay certain creditors, and a discharge having been signed and delivered by them,—Held, the arrestment thereafter used in the hands of the debtor, was inept to attach a part of the fund remaining unpaid in the agent's hands.

Feb. 6, 1834.

2d Division.

Lord McDwyn.

T.

IN 1824, Mrs Mary M'Lean or Elder, on the dependence of an action of declarator of marriage against her husband, used arrestments in the hands of certain debtors to him, which were loosed on caution, to the extent of £911, the late Mr Jacob Dixon of Dumbarton enacting himself as cautioner. Decree having been pronounced against Elder, with a large amount of expenses, an action of forthcoming was brought against Mr Dixon, by the several parties having claims for business accounts incurred on the employment of Mrs Elder, including, among others, James M'Kenzie, a writer in Glasgow. After some procedure, an offer of compromise was made by these parties to Mr Dixon, to accept of £684, 10s. in the pound on the £911 for which caution had been found by him. This was agreed to by Mr Dixon, and on the 19th of May, 1831, he transmitted that sum to his agent, the late Mr James John Baird, who immediately intimated to the parties interested, that he was ready to pay their several shares on receiving, in favour of Mr Dixon, a discharge and assignation of their claims against Elder. This discharge and assignation was accordingly signed by the several parties, and delivered to Mr Baird on the 20th June, 1831, the subscription by M'Kenzie being made on the 18th June, and the respective shares of the fund were paid to the different parties, with the exception of that due to M'Kenzie, as to which arrestments had been used by certain of his creditors. Of these Mr Baird, a banker in Dumbarton, used arrestments, of date 20th May, Mr Handyside, W.S., of date 27th May, Mr Alexander Hamilton, W.S., of date 20th May, and Mr Baxter, of date 22d July, all in the hands of Mr Baird. James Ballandene, likewise a creditor of M'Kenzie, used arrestments also in Mr Baird's hands, of date the 28th June; and further, on the 1st July, he arrested in the hands of Mr Dixon himself; and after the lapse of several months, the other creditors arrested in the hands of Mr Dixon's trustees, that gentleman having in the meantime died. Thereafter a tiplepointing having been brought by Mr Baird's executor, as to the share due to M'Kenzie, claims were lodged by Mr Handyside for himself and as assignee of Messrs Burns, Hamilton, and Baxter, claiming to be preferred to the fund in medio, according to the priority of their respective arrestments in the hands of Mr Baird, while Ballandene, on his part, gave in a claim praying to be preferred *primo loco*, in respect of his

estment in the hands of Mr Dixon, of date 30th June; and he contended, that Baird being Dixon's agent, the transmission of the money to him did not affect the situation of Dixon as the only debtor to M'Kenzie, and consequently, that the proper mode of attaching the fund was by arresting his hands, and not in the hands of Baird, who, as a mere agent holding the money for Dixon, was not truly debtor to M'Kenzie at all.

To this it was answered—

The discharge to Dixon, signed inter alios by Mackenzie, having been delivered to Baird on the 20th June, Dixon thereupon ceased to be debtor to M'Kenzie, so that the arrestments used by Ballandene on the 30th of that month, were necessarily inept, as used in the hands of a party no longer indebted to the common debtor.

The Lord Ordinary repelled the claim of Ballandene to be ranked *rimo loco*, and preferred the several claimants according to the priority of their arrestments in the hands of Baird.

Ballandene reclaimed.

LORD GLENLEE.—It is proved not only that the transaction was fully gone into on the 20th May, but that M'Kenzie signed the discharge on the 18th June, and that it was delivered on the 20th, while the arrestment by Ballandene in Mr Dixon's hands was not till the 30th, when, in consequence of the discharge, Dixon was no longer M'Kenzie's debtor.

The other Judges concurring,

THE COURT adhered.

WOTTERSPON and MACK, W.S.—H. HANDYSIDE, W.S.—Agents.

COL. JAMES TAYLOR'S TRUSTEES, Pursuers.—*D. F. Hope—Cunninghame.*

No. 157.

SIR WM. FORBES and Co. Defenders.—*Skene—Anderson.*

Expenses prior to Appeal.—In an action against a Bank by a legatee, alleging that he had, in collusion with the executor, transferred to his individual credit, sums of their hands known by them to have been specially set apart by the testator to pay legacies, the Court of Session, holding that no relevant averment had been made on this head, absolved the Bank; and the pursuer, on appeal, obtained a reversal, and a remit to send an issue to a jury; and a verdict was found for the Bank; held, that the Bank was entitled to the whole expenses of process, as well prior as subsequent to the appeal.

An appeal having been taken by the pursuers from the judgment in this case mentioned ante, V. 785, (which see,) the House of Lords reversed and remitted to try the questions of fact embraced in the issues after mentioned, and thereafter to proceed in the cause as should be just,

No. 156.

Feb. 6, 1834.

Taylor's Trustees v. Sir W. Forbes.

2^d DIVISION.
R.

No. 157. but without any mention of expenses. Thereafter, these issues were sent to trial:—

Feb. 6, 1834.
Taylor's Trustees
v. Sir W.
Forbes.

“ Whether any, and what part of the £5000 transferred by John Taylor to a separate account in his own name in 1803, subsequently transferred in 1814, into the name of Patrick Taylor, and again, in 1817, transferred into an account, called the separate account of John Taylor and Sons, has been received by the respondents in payment of a debt due to them from the firm of Taylor and Sons ?

“ Whether, when the respondents received such money, they knew that it was part of the estate of John Taylor, and that Patrick Taylor was possessed of that money as the executor of the said John Taylor, and held it, subject to the trusts declared by that will, and that the said trusts were not satisfied ?”

The jury returned a verdict for the pursuers on the first issue, (the point put in it having been, from the beginning, admitted by the defenders), and for the defenders on the second. The defenders now craved to have the verdict applied, by again assoilzieing them from the conclusions of the libel, which was done accordingly ; and they further craved the expenses of process, both prior and subsequent to the appeal, supporting their demand for the prior expenses, by reference to the several cases recently pronounced on that point.

To this it was answered for the pursuers, that all the cases in which prior expenses had been allowed, differed from the present in this respect, viz., that the parties ultimately succeeding, and craving expenses, were the parties who had prevailed in the House of Lords in getting the former judgment of the Court set aside ; and that there was no case in which a party who had lost his cause in the House of Lords, but had ultimately prevailed under the remit, had been found entitled to the expenses of the prior proceedings, which had been set aside by means of the appeal of his opponent, and in which he was thereby proved to have been in the wrong.

LORD JUSTICE-CLERK.—It is necessary to keep in view the nature of the action, and the defences maintained against it ; and if we attend to that, and the interlocutors of the Court, and the result now taken place, I apprehend there can be no difficulty as to the decision to be pronounced. The summons brought in issue the fair character of a respectable house, and raised the point, if they had acted honestly and uprightly ; and it charged the Bank with conniving at and participating in the fraudulent conduct of Patrick Taylor, in betraying the trust reposed in him. The defenders denied knowledge and connivance, though, from the beginning, they admitted receiving the £5000, &c. In the Inner House there was no proof craved. A condescence was allowed, but we held that there was no relevant averment made in it, and I am still satisfied of that. But the pursuers go to the House of Lords, and, no doubt, by an allegation of guilty knowledge on the part of the Bank, and by saying, if they had been let into a proof, they would have proved it, they induce the House of Lords to pronounce a judgment, reversing our

and directing us to allow an issue, and, after trial, to proceed further, **ust.** I could not see why the defenders did not admit the first issue, there put had never been denied, and the only true question was as to guilty knowledge. On the trial, it appeared that there was not a shadow for the pursuer to stand on; and verdict was given for the defenders. a do justice if we deny them the fair expenses of the litigation? I do hat, taking all the cases into consideration, there is nothing to prevent ing expenses due, and thereby doing as directed by the House of Lords, : just." There is nothing in the distinction that in these cases it was ceeding in the House of Lords who gained ultimately. We must do hever party succeeds; and justice would not be done without allow- : to the defenders.

ENLKE—I cannot see how any other judgment could be pronounced on the defences, and assoilzieing. The libel was laid entirely on the knowledge, which was denied. Then, as to the expenses, it is true the House of Lords are reversing our judgment, and so throwing aside what we have done, and remitting to us to begin ab ovo. I would, however, just in the same way as if we had done so ourselves. The pursuer has obtained a verdict, proving his libel to be false; and is his situation, as to expenses, improved by that? He may be right in saying that we were in too much of a hurry in pronouncing our former judgment; but when he is ultimately found to be wrong, does that improve his claim for expenses? I am for giving

SHADOWBANK.—There are two questions; 1. If we have power; and, 2. If we ought to exercise it. If we have power, I can have no doubt as to the justness of the expenses in such a case as this, when averments of this kind are entirely unfounded. The question, therefore, is as to our power; and, if there has been any doubt, it would have been removed by the terms of the remittance of Lords, which, as distinctly as possible, directs us to try and ascertain the facts, and then to do justice in the cause; and, from the very words, all doubt as to our power is excluded. But even if the House of Lords had not used these words, I should have had no doubt. Suppose *we* had altered the Lord Ordinary's verdict, and simply remitted to try these issues. When the verdict was given, would we have awarded all expenses? In the same way the House of Lords, on their judgment, the disposal of expenses is subject to the same rule; and we are equally entitled to find all expenses due, as might have been done had the Lord Ordinary's interlocutor been reversed by us, with a simple remit to send the case to a jury. It is only in a stage of the cause, when the superior Court has decided as to expenses, that a reservation is required, in order to keep an issue open; but when this cause was in the House of Lords, they could not have reserved expenses to the defenders, and a reservation would have been superfluous and unnecessary. Therefore, on the whole case, while I think there is no doubt as to our power, I consider it would be most iniquitous to refuse to exercise it.

COURT accordingly awarded expenses, both prior and subsequent to

. M'CALLUM, W. S.—CRANSTOWN and ANDERSON, W. S.—Agents.

- No. 158. WILLIAM KING HUNTER, Petitioner.—*Keay—Rutherford—Buchanan.*
 Feb. 7, 1834. WILLIAM F. HOME and Others, Respondents.—*D. F. Hope—Jameson*
 Hunter v. —*A. Wood.*
 Home.

Trust—Sequestration—Judicial Factor.—The Court refused to recal the sequestration of an estate and appointment of a judicial factor, at the instance of a party claiming right to act as trustee under a deed of assumption which was under challenge, and whose interests as an individual were conflicting with what would be his duty as trustee.

Feb. 7, 1834. SEQUEL of the case reported ante, XI. p. 538 (which see). The late Mr Home of Wedderburn, made an entail of his estates of Billie and Paxton; and to pay off debts, &c., he executed a trust-deed, and supplementary trust-deed, conveying these estates to the late Mr James Hunter, writer in Dunse, and others, as trustees. Hunter's two brothers William King Hunter and John Hunter, became bound as cautioners for his intromissions as trustee, and James appointed William to be factor on the trust-estate, in which character he had considerable intromission. James afterwards executed a deed, assuming these two brothers to succeed him as trustees; and, on his death, William claimed possession of the trust-estates. Another party, George Turnbull, W.S., also claims right to this, in virtue of a deed nominating him to be trustee, which had been executed by some of the trustees at an earlier stage of the trust. William F. Home, the first party called under the entail, presented a petition to have the estates sequestrated, and a judicial factor appointed. In these circumstances, the Court granted the prayer, and appointed a factor ad interim. He also raised an action of accounting against the trustees named by the entailer, including William and John Hunter, as the representatives of James; a reduction of a lease of part of the estate, alleged to have been unduly granted by James to John; and a reduction and declaration to try the validity of the deed of assumption of William and John Hunter. While these actions were in dependence, decree of reduction of the deed of nomination of Turnbull was pronounced, after which William Hunter presented a petition, alleging that the award of sequestration and the interim appointment of a judicial factor had only been made in consequence of the apparent competition between him and Turnbull; that this competition was now at an end; and, therefore, the Court should recal the sequestration, and find him entitled to the administration of the estate.

Home and others, besides maintaining that the deed of assumption was ineffectual, and that it was inexpedient to put the petitioner into possession at a time when the validity of that deed was under judicial discussion, insisted that the petitioner was personally disqualified. It would be the duty of the trustees to call him and his brother to account, as representatives of James Hunter, and as cautioners for his intromissions; to a

William himself to account for his own intromissions as factor; and to prosecute the reduction of the lease to John. It was therefore plain that he had, in all these matters, an interest adverse to the faithful performance of his duties.

No. 158.

Feb. 7, 1834.
St Ann's Dis-
tillery Co. v.
Douglas's
Trustees.

LORD BALGRAY.—Even supposing that the late James Hunter had possessed the most undoubted power to assume new trustees by his own deed, still that power, in its own nature, was not absolute and unqualified; it was conferred by the truster for the purpose of facilitating the execution of the trust, and it was received by Hunter under the condition of being exercised for that end. This Court has the superintendence of all trusts, and wherever it is brought under our notice, even incidentally, that trust-estates are mismanaged, or trust-powers are abused, we have a right, ex officio, to interfere for the safety of the trust. It belongs to the discretionary power of the Court to control a trustee in his mode of exercising his trust-powers, however explicitly the powers themselves may be conferred. When, therefore, I consider the connexion of William King Hunter with the affairs of this trust-estate; that he was cautioner for his late brother, the former trustee; that he was one of his brother's representatives; and that he himself acted as factor on the trust-estate under his brother's appointment, I cannot think it was a wise, fair, or prudent act on the part of his brother to name him as next trustee. Looking to his interests, on the one hand, as an individual, and his duties on the other hand as trustee, they are conflicting with each other, and that should have prevented him from being nominated trustee, especially as he would be entitled to intromit with the trust-estate without finding caution. Such a nomination appears to have proceeded, not from a regard to the welfare of the trust, which is the only legitimate object of a trustee, but from a desire on the part of James Hunter to benefit his father. On that ground chiefly, I am of opinion that this petition ought to be refused. It is a different question to determine how the trust-estate ought to be administered; but, at present, I am satisfied that its administration should not be ordered to the petitioner.

The other Judges concurred, and

THE COURT refused the petition with expenses.

W. POLLOCK, S.S.C.—H. MACQUEEN, W.S.—Agents.

SAINT ANN'S DISTILLERY COMPANY, Pursuers—*Cunninghame*.

DOUGLAS'S TRUSTEES, Defenders.—*D. F. Hope—More*.

No. 159.

Sole—Warrandice—Relief.—A party sold land to another, who, before getting a title, entered to possession, whereupon the superior brought an action against both seller and purchaser, for an alleged violation of the feu-contract, from which they were absolved, but the superior was not subjected in expenses—held, in the said circumstances, that the purchaser was entitled to be relieved by the seller of the expenses incurred by him in the action.

No. 158. WILLIAM KING HUNTER, Petitioner.—*Keay—Rutherford—Buchanan*
 Feb. 7, 1834. WILLIAM F. HOME and Others, Respondents.—*D. F. Hope—James*
 Hunter v. —*A. Wood.*
 Home.

Trust—Sequestration—Judicial Factor.—The Court refused to recal the administration of an estate and appointment of a judicial factor, at the instance of a claiming right to act as trustee under a deed of assumption which was under lence, and whose interests as an individual were conflicting with what would duty as trustee.

Feb. 7, 1834. SEQUEL of the case reported ante, XI. p. 538 (which see). The
 1st DIVISION. Mr Home of Wedderburn, made an entail of his estates of Billie
 Paxton; and to pay off debts, &c., he executed a trust-deed, and supplementary trust-deed, conveying these estates to the late Mr James Hunter, writer in Dunse, and others, as trustees. Hunter's two brothers William King Hunter and John Hunter, became bound as cautioners for his intromissions as trustee, and James appointed William to be trustee on the trust-estate, in which character he had considerable intromissions. James afterwards executed a deed, assuming these two brothers to succeed him as trustees; and, on his death, William claimed possession of the trust-estates. Another party, George Turnbull, W.S., also claimed right to this, in virtue of a deed nominating him to be trustee, which had been executed by some of the trustees at an earlier stage of the trust. William F. Home, the first party called under the entail, presented a petition to have the estates sequestrated, and a judicial factor appointed. Under these circumstances, the Court granted the prayer, and appointed a judicial factor ad interim. He also raised an action of accounting against the trustees named by the entail, including William and John Hunter, as the representatives of James; a reduction of a lease of part of the estate, alleged to have been unduly granted by James to John; and a reduction and declaration to try the validity of the deed of assumption of William and John Hunter. While these actions were in dependence, decree of reduction of the trust of nomination of Turnbull was pronounced, after which William Hunter presented a petition, alleging that the award of sequestration and the interim appointment of a judicial factor had only been made in consequence of the apparent competition between him and Turnbull; that this competition was now at an end; and, therefore, the Court should recal the sequestration, and find him entitled to the administration of the estate.

Home and others, besides maintaining that the deed of assumption was ineffectual, and that it was inexpedient to put the petitioner into possession at a time when the validity of that deed was under judicial consideration, insisted that the petitioner was personally disqualified. It would be the duty of the trustees to call him and his brother to account, as representatives of James Hunter, and as cautioners for his intromissions;

himself to account for his own intromissions as factor ; and to the reduction of the lease to John. It was therefore plain that in all these matters, an interest adverse to the faithful performance of his duties.

No. 158.
Feb. 7, 1834.
St Ann's Dis-
tillery Co. v.
Douglas's
Trustees.

ALGRAY.—Even supposing that the late James Hunter had possessed the absolute power to assume new trustees by his own deed, still that power, in itself, was not absolute and unqualified ; it was conferred by the truster for the purpose of facilitating the execution of the trust, and it was received by Hunter on the condition of being exercised for that end. This Court has the supervision of all trusts, and wherever it is brought under our notice, even incidental trust-estates are mismanaged, or trust-powers are abused, we have a right, in due officio, to interfere for the safety of the trust. It belongs to the discretion of the Court to control a trustee in his mode of exercising his powers, however explicitly the powers themselves may be conferred. When, therefore, I consider the connexion of William King Hunter with the affairs of this trust ; that he was cautioner for his late brother, the former trustee ; that he acted as his brother's representatives ; and that he himself acted as factor on the trust under his brother's appointment, I cannot think it was a wise, fair, or proper act on the part of his brother to name him as next trustee. Looking to the facts, on the one hand, as an individual, and his duties on the other hand as a trustee, they are conflicting with each other, and that should have prevented him from being nominated trustee, especially as he would be entitled to intromit with the trust-estate without finding caution. Such a nomination appears to have proceeded from a regard to the welfare of the trust, which is the only legitimate motive of a trustee, but from a desire on the part of James Hunter to benefit his family. On that ground chiefly, I am of opinion that this petition ought to be refused. It is a different question to determine how the trust-estate ought to be managed ; but, at present, I am satisfied that its administration should not be interfered with by the petitioner.

Other Judges concurred, and

COURT refused the petition with expenses.

W. POLLOX, S.S.C.—H. MACQUEEN, W.S.—Agents.

ST ANN'S DISTILLERY COMPANY, Pursuers—*Cunninghams*.
DOUGLAS'S TRUSTEES, Defenders.—*D. F. Hope—More*.

No. 159.

Warrandice—Relief.—A party sold land to another, who, before getting a conveyance, sold to possession, whereupon the superior brought an action against both the seller and purchaser, for an alleged violation of the feu-contract, from which the seller was absolved, but the superior was not subjected in expenses—held, in the circumstances, that the purchaser was entitled to be relieved by the seller of the expenses incurred by him in the action.

No. 159. **THE** late Robert Douglas, who held a feu from Lord Melville, entered in 1807, into a verbal contract of excambion of part of the feu with Lordship. Upon the death of Douglas, in 1816, he left a trust-disposition, under which his trustees sold the feu and the excambied ground : £1000 to his son, William Douglas, who possessed for several years, and erected some buildings on the ground, after which he died, leaving affairs in embarrassment. His father's trustees had never given him a title, and they arranged with his creditors that they should now sell the subjects over again. Accordingly, in January, 1824, they sold the premises, "all as the same were possessed by the late Mr William Douglas to the Saint Ann's Distillery Company, for a price of £1500; and bound themselves to grant a disposition as at Whitsunday, 1824, when the price was payable; and, in the meantime, the company entered into possession and erected additional buildings on the premises. The company, having objected to the title, consigned, on 27th May, 1824, the price in bank. In 1826, Lord Melville raised an action against Douglas's trustees and the company, libelling, that "all, or one or other of them, had, contrary to the tenor of the feu right," &c, "presumed to erect buildings on ground expressly saved and reserved to the said Lord Melville;" and concluding that they should be ordained to remove the buildings, and pay £1000 damages. The trustees, in defence, stated, inter alia, that "if any encroachments have been made, either by the late William Douglas, or by the Distillery Company, these cannot affect the defenders." Immediately thereafter, the company raised an action against them, concluding for a valid title, and to relieve them of Lord Melville's action, or to pay damages. This action was allowed to lie over till the result of the one at Lord Melville's instance, from which the Court assoilzied the trustees and the company, but refused expenses. The company then insisted in their conclusions for a valid title, and for relief of the expenses incurred in defending against Lord Melville's action.

Feb. 7, 1834.
1st Division.
Ld. Fullerton.
B.
St Ann's Dis-
tillery Co. v.
Douglas's
Trustees.

The questions raised were chiefly, 1st, Whether the trustees had lodged such defences as superseded the necessity of separate defence being lodged by the company? 2d, If it had been necessary for the company to lodge defences, was the necessity solely occasioned by the form of Lord Melville's summons, charging all, or one or other of the defenders, with acts of encroachment; and if so, were the trustees still to be responsible because this charge would not have been made if they had had a clear title to give to the company, covering the whole ground sold to them? Or, 3. Was there a separate necessity for the company putting in defences, in consequence of the conduct and pleadings of the trustees having been such as to compromise the safety of the company unless they put in separate defences; and if so, were the trustees liable for the expense which they thereby occasioned to the company, although Lord Melville had not been subjected in expenses to them?

In the question as to the validity of the title tendered by the trustees, No. 159. Lord Ordinary made a remit to a conveyancer, but assoilzied the trustees from liability for the expenses. The company reclaimed.

Feb. 7, 1834.
Ballandene v.
Chrystal.

THE COURT were equally divided, and, Cases being ordered, their Lordships, by a majority, altered the interlocutor of the Lord Ordinary, and “found the defenders, as trustees, liable, conjunctly and severally, in relief to the pursuers, of the expenses incurred by them in the action at Lord Melville’s instance, in terms of the libel; and, farther, found the defenders, as trustees, jointly and severally liable to the pursuers in the expenses of the present process.”

GARRIE and MORTON, W.S.—W. and D. ALLISTER, W.S.—Agents.

MRS LILLIAS BALLANDENE, Pursuer.—*Jameson—Turnbull.*
JAMES CHRYS TAL, Defender.—*G. Napier.*

No. 160.

expenses.—Circumstances in which the pursuer of an action of constitution was met the expense of making up a record on the point of expenses, after the case on the merits was at an end.

THE late James Chrystal, writer in Stirling, father of the pursuer, acted for several years as factor under a trust-deed, the beneficial interest in which belonged to the pursuer, Mrs Ballandene. When the trust was to be wound up in 1824, a reference as to the factor’s accounts was entered into between him and Mrs Ballandene, to Mr Scott, accountant Edinburgh. In 1826, pending this submission, Mr Chrystal died, and the pursuer served heir to him cum beneficio inventarii. Thereafter, Mrs Ballandene, for the purpose of leading an adjudication against the movable property of the deceased, in security of her claims under the submission in the submission in 1829, raised an action of constitution against the defender, concluding for £1000, less or more, as should be ordered on a final settlement of the accounts with his father, and also for expenses of process. Appearance was made for the defender, who, besides pleas against decree going out for this random sum, pending the reference, pleaded certain preliminary defences, which the Lord Ordinary (ingletie) repelled; but the defender having acquiesced, no finding was pronounced as to expenses. Condescendence and answers were then ordered on the motion of the pursuer; but after these were given in, the case was allowed to lie over till a decision should be given by the referee in the submission. The referee died in March, 1830, without having pronounced a formal award; but in the January preceding, he had issued notes, stating the balance due by the late Mr Chrystal to Mrs Ballandene, to be £111; and after some time, this was accepted by her,

Feb. 7, 1834.
2D DIVISION.
Ld. Medwyn.
T.

No. 160. and paid by the defender. The whole merits of the action of constitution were thus at an end; but Mrs Ballandene insisted on making up a record with a view to the question of the expenses of the action. The cause having now come before Lord Medwyn, his Lordship pronounced this interlocutor, adding the subjoined note:— “ Having resumed consideration of the debate on the question of expenses, and carefully examined the different steps of procedure in the course of the process, finds the pursuer entitled to the expense of discussing the preliminary defences, modifies the same to the sum of five pounds five shillings, for which decerns, but finds no other expenses due.”

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* “ It is often a difficult task to ascertain how far a party has incurred the penalty temere litigantium, and particularly so when the proceedings have not taken place before the Judge who is to dispose of that question. The Lord Ordinary feels the difficulty, particularly in the present instance, and he has examined the different steps of procedure with the more minuteness on that account. The sum due has been paid without the necessity of a decree, and no diligence has been led by any creditor, nor, so far as appears, was ever contemplated against the late Mr Chrystal's estate; and, further, the defender seems to have been taking proper measures for paying all these creditors equally. Perhaps, however, there was no blame imputable to the pursuer in raising this summons of constitution for her security. It was necessary for the defender to appear when a decree to such an extent as £1000 was craved. But the preliminary pleas urged were plainly ill-founded, and repelled by Lord Cringletie, 16th May, 1829. The defender acquiesced, and so it was unnecessary at that time to dispose of the question of expenses; but the Lord Ordinary thinks them due. It is said the defender wished the process to lie over, but this was declined. It rather appears that it would have been quite safe for the pursuer to have adopted this suggestion. The pursuer was now in a condition to secure her claim in competition with any other creditor, if any should attempt to secure a preference. But as she did not choose to do so, and insisted on making up a record in order to obtain an adjudication in security, the expense of this, according to the ordinary rule, must fall upon herself. Besides, there seems to have been little occasion for such a procedure. The reference was going on, and it was under it that the balance was to be ascertained. Under the reference to Mr Scott, the balance due was ascertained to be £111, 8s. 8d. The defender acquiesced, and offered payment of this sum. A reference of certain points to Mr Scott's partner was now agreed to; but this was rejected by the pursuer, on the ground that the agent had no authority. It was so found, and the pursuer proceeded with the cause, and took an order to revise the condescendence, with a view to limit the demand to the exact sum appearing to be due, instead of £1000 stated in the condescendence—see Letter Mr Maclaurin, 28th May, 1830, and Letter Mr Ballandene, 31st May, 1830.—She expressed herself willing to accept of the sum as appearing to be due by Mr Scott's note, which was accordingly paid by the defender. The pursuer finally adjusted and closed the record, with a view to this claim for expenses. The Lord Ordinary has great doubts whether this part of the expenses should not be awarded against the pursuer; but, at all events, he does not think her entitled to the expenses from the opposite party. If necessary at all, where the expenses were the only subject of discussion,—no decerniture being now necessary in the action itself—it was only necessary to correct the gross overcharge stated by her in the condescendence.”

landene reclaimed, but the Court adhered.

WHERSPOON and MACK, W. S.—G. and W. NAPIER, W. S.—Agents.

L, W. S., and J. CAMPBELL, W. S., Pursuers.—*Maidment*.
E OF MONTROSE, Defender.—*D. F. Hope—Rutherford*.

and Vassal.—Period for which retour duties, and the full rents respectively by a party in nonentry.

the judgment in this case, of date July 10, 1834, mentioned 958, the cause returned to the Lord Ordinary to fix the period in the retour duties and rents were payable, and to decide the questions of expenses. His Lordship, overlooking the fact that Hill's titles, which declared his entry to be at March 1808, contained no assignation to duties, except from and after he found the pursuers entitled to the retoured duties for forty years thereto, and to the full rents from the 11th July last, being after signing the interlocutor above mentioned; and as to expenses, no further expenses due to either party. Both parties claim—defender contending that the retour duties should only have been due since Martinmas, 1824, when the pursuers' title was properly completed by infestment, or, at all events, only from 1808, being the date of entry to the lands, and that the full rents should not have been due for any period; and the pursuers contending, on the other hand, that they were entitled to the whole expenses of process incurred since the date of July 10, 1828, mentioned ante, VI. 1133.

Court found, that the pursuers had right to the retour duties only since 1808; and as to expenses before answer, appointed the accounts since 1828 to be audited, but quoad ultra adhered.

J. CAMPBELL, W. S.—DUNDAS and WILSON, W. S.—Agents.

HENRY WOOD, Pursuer.—*J. Anderson*.
M'CAUL and OTHERS (Edinburgh Speculative Building Society), Defenders.—*D. F. Hope—Grant*.

Witness.—Circumstances in which objections to a witness of interest, and partial counsel, repelled.

of the case reported ante, p. 50. The Building Society, on September 1833, were allowed to prove, that a sum of £7 of rent included in a bill for £32, which Wood had granted to them.

No. 160.

Feb. 7, 1834.
Hill & Campbell v. Duke of Montrose.

Wood v.
M'Cauley.

No. 161.

Feb. 7, 1834.

2d Division.
Ld. M'Kenzie.
F.

No. 162.

Feb. 8, 1834.

1st Division.

No. 162. They adduced George Begley, who, being examined in initialibus, deponed, "That he was a member of the Edinburgh Speculative Building Society: That the deponent was an original member. Interrogated Whether he has remained connected with the society since its commencement? depones, That he did not: That he was occasionally out of the society, and he is not now a member; the last transfer by him being dated 19th November last, and, to the best of the deponent's belief, he last joined the society as a member on the 2d February, 1829; but if deponent saw his books, he could speak with certainty. Depones, That he has never perused any of the pleadings in this cause, nor heard any of them read: That the deponent has frequently attended meetings of the society where the subject of Wood's debt was discussed, and that since the action was brought: depones, That he was not present in Court during any of the discussions which took place there in reference to this cause. Interrogated for the defenders, Whether the deponent considers himself responsible for any of the debts of the society? depones, That he does not. Interrogated, Whether the deponent ever gave directions for the conduct of the suit? depones, That he did not. Interrogated by the commissioner, Whether the deponent interfered in relation to the process? depones, That he was always anxious that the litigation should be terminated: That he considered Mr Wood as debtor to the society, and, consequently, as his debtor, but he gave the advice that proceedings should stop from motives of neighbourly feeling, and in order to save expenses to Mr Wood and the Society, and this though the witness conceived it to be against his own interest." He farther deponed, that his estates were sequestrated, on 15th December, 1832, and, on 15th June, 1833, he received a discharge, under a composition-contract; and being interrogated, "Whether his shares were sold after the deponent knew that a proof had been allowed in this cause? depones, That they were so sold; that the deponent was told so by one of the members of the society more than two days, and the witness thinks, more than eight days before the sale, and the person who told him was either Charles M'Caul or Peter Bonnar. Depones, That sometime after he was so told, Peter Bonnar called and offered to purchase his three shares. Depones, That he, Bonnar, assigned no reason for making the said offer, and did not say any thing as to his being a witness in this cause. Depones, That he sold the shares to Bonnar, whom he knew to be a defender. That prior to his sequestration, the deponent subscribed a bond, amongst with the other members of the society, and which was ranked on his estate. Again interrogated for the defenders, Whether, at the meetings to which he has formerly sworn, the society deliberated as to the conduct of the process? depones, That they did, and the substance of the deliberations was to get quit, if possible, of the action."

The pursuer objected to the admissibility of Begley, on the grounds

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Wood v.
M'Caul.

interest, agency, and partial counsel. The commissioner repelled the objection.

The pursuer appealed to the Court, who affirmed the judgment of the commissioner.

F.
H.
M.
Tr.

D. CHRISTIE, S.S.C.—R. KENNEDY, W.S.—Agents.

AGNES HYSLOP and OTHERS, Pursuers.—*D. F. Hope—Rutherford.* N
MAXWELL'S TRUSTEES, Defenders.—*Shene—Jameson—Christison.*

Fact—Clause—Testament.—A lady executed a settlement, conveying to her sons the whole means and estate, heritable and moveable, which should belong to her at her death: afterwards, her uncle died, whose settlement directed his trustees pay her an annuity of £100, “and with power to her, by will, or other deed under her hand, to dispose of and convey as she may think proper, after her decease, a capital sum of £2000, to be set apart by my trustees for answering her annuity, which sum my trustees are directed to pay in the way she may order and appoint”—held that her settlement was a valid exercise of the power to dispose of £2000, and carried it to her sisters.

THE late Mr Maxwell executed a trust-settlement, by which, after Feb. 11, 1815, making provision for his wife, Mrs Marion Gordon or Maxwell, he directed, “4thly, My said trustees shall be bound and obliged to pay to my beloved niece, Marianne Hyslop, daughter of Mrs Jean Maxwell, my son, and the deceased William Hyslop of Lochend, a clear yearly annuity of £100 sterling, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first half-year’s payment at the first of these terms that shall happen after my decease, and so forth yearly thereafter during her life, with a fifth part more of penalty in case of non-payment; and with power to the said Marianne Hyslop, by will, or other deed under her hand, to dispose of and convey as she may think proper, after her decease, the capital sum of £2000 sterling, to be set apart by my said trustees for answering her said annuity out of the real and personal estate, and which sum my said trustees are hereby directed to pay in the way she may order and appoint.”

1st Div.
Ld. Clerk
S.

In 1815, a few weeks prior to the death of Mr Maxwell, Miss Maxwell executed a disposition and settlement, by which she disposed of her property among three sisters, equally, “all and whatever lands, annual-rents, and heritable subjects, now belonging or that may belong to me at the time of her death, with the whole writs and securities concerning the same, granted or conceived in favour of her, her ancestors, predecessors, and whole clauses of warrandice, procuratories, and other clauses therein contained, which she has followed, or is competent to follow thereupon; as also, all and sundry debts, and sums of money, owing, or which may be owing

No. 163. to her at the time of her death, together with the vouchers thereof, as all diligence and execution competent thereon, and together also with and sundry goods, gear, and effects, which may pertain and belong to her at the time of her death, wherever situated, dispensing with the generality hereof, and declaring this conveyance to be as effectual to all intents and purposes as if every particular subject and debt had been herein specially enumerated."

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Hyslop v.
Maxwell's
Trustees.

After the death of Mr Maxwell, Miss Hyslop received payment of £100 per annum from his trustees regularly, until her death in 1831, except that immediately prior to 1827, she received for one year £90, and for two years £80 each. She resided in the family of Mrs Maxwell after the death of her uncle, Mr Maxwell, and was resident there at her death. She made no settlement subsequent to 1815.

After the death of Miss Hyslop, her sisters, as disponees under her settlement, claimed the capital sum of £2000, contained in Mr Maxwell's bequest; to which the trustees objected that she had no property in that sum, but a mere power or faculty to dispose of it, and that her settlement was not an effectual exercise of the power, so that the sum of £2000 fell to the residuary legatee of Mr Maxwell.

Pleaded by the Pursuers—

1. By Miss Hyslop's settlement, she conveyed to her sisters every right, heritable or moveable, belonging to her at her death; and although the deed was executed before Mr Maxwell died, yet its date as a legal deed was the period of her death, and she expressly gave to her sisters every thing which should belong to her at the time of her death. By Mr Maxwell's deed, he conferred power on her, "by will, or other deed under her hand, to dispose of and convey as she may think proper, after her decease," the £2000 forming the capital of her annuity. This did not give a mere naked power of disposal. She was substantially proprietor of the capital, for she had a liferent equal to the interest of it, with an uncontrolled power of disposal after death.

2. But even if she held a mere power of disposal of the £2000, she had duly exercised that faculty, for her settlement afforded evidence of an intention to give every thing which it was in her power to give, which, by the law of Scotland, was enough, without any technical exercise of the special power, or any express reference to it. The doctrine of power in the law of England, was widely different from that of Scotland.¹ The former contained subtleties which had occasioned English judges to regret that its rules frequently defeated the intentions of testators, while professing to implement them. But even the law of England would hold the £2000 carried by Miss Hyslop's settlement.²

¹ Cameron, Aug. 29, 1833 (1 S. D. B. Supp. p. 125); 1 *Chance on Powers*, 41.

² 2 *Roper on Legacies*, 419; Haig, Nov. 11, 1823 (1 *Simon and Stuart's Reports*); Barford, June 6, 1809 (16 *Vesey*, 135); Irwin, 19 *Vesey*, 86.

Pleaded by the Defenders—

No. 163.

1. If Miss Hyslop had no vested property in the £2000, but merely a power to dispose of it, her settlement did not comprehend it, as it could neither be ranked among "debts and sums of money owing," nor the "goods, gear, and effects belonging to the testator" at her death. It was impossible to characterise the £2000 as her property. The annuity was a larger sum than the interest for many years before her death, and was quite detached from the capital. It was therefore immaterial whether the settlement was executed prior to the death of Mr Maxwell, or immediately before her death, as it was not conceived so as to reach the £2000.

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2. Neither was there a valid exercise of the power. An act by a party conveying his own property, is essentially different from an act exercising a power over property not his own. And a general conveyance of property cannot afford clear evidence of intention to exercise the power, unless either it make special reference to the power, or to the subject of the power; or unless there was no means of giving full effect to the will without the exercise of the power; or at least, unless there was enough in the deed to demonstrate that it was the intention of the testator to exercise the power.¹ The doctrine of powers in England sanctioned this mode of interpreting the deed;² and it rested on equity cases in Chancery, where the object had been to give true effect to the intention of a testator. Such cases were of authority in similar questions in Scotland.

The Lord Ordinary found, "that the deceased Mr Maxwell, by his trust-deed, settled a life rent annuity of £100 on his niece, Marion Hyslop, and directed his trustees to set apart a capital of £2000, to answer that annuity, and he empowered the said Marion Hyslop, by will or other deed under her hand, to dispose of the capital so set apart after her decease; that Marion Hyslop, by her settlement, gave, granted, and disposed to her sisters, the pursuers of this action, and the survivors or survivor of them, all the heritable property belonging to her, or that might belong to her at the time of her death, all debts due, or that might become due to her, and goods, gear, and effects that might belong to her at that time; that this conveyance to the pursuers must be construed to include the above-mentioned capital sum of £2000, of which the testatrix had the unlimited disposal under her uncle's settlement, with the interest due upon it, and therefore decerned in terms of the libel; and found the defenders, as trustees, liable in expenses."*

¹ Milne, June 6, 1826 (ante, IV. 679).

² Sugden on Powers, 284; Andrew, 2 Brown's Chanc. Ca. 297, and note of authorities there; Nannock, July 20, 1802 (7 Vesey, 391); Bradley, March 15, 1807 (13 Vesey, 445); Keith, Jan. 13, and Feb. 4, 1828 (4 Russ. Chanc. Rep. 268); Sugden's Law of Vendors, App. 50; 2 Roper on Legacies, 357; 2 Chance on Powers, 45.

* "It is not disputed that Miss Hyslop, under the settlement of her uncle, had power to dispose of the £2000 set apart to answer her annuity, by a will or other

No. 163. The defenders reclaimed, and the Court ordered Cases.

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LORD BALGRAY.—The object of the settlement made by Mr Maxwell was, to secure an annuity to Miss Hyslop during her life, and enable her to bequeath the sum of £2000 as she chose. For that purpose, he set apart £2000, and vested it in trustees who were truly trustees for Miss Hyslop. The trustees were directed “to pay that sum in any way she may order and appoint.” From the nature of this bequest, Miss Hyslop had all the substantial interest of a proprietor of that

probative writing, or that the settlement which she has executed is probative. The only question therefore is, whether the general conveyance in favour of her sisters is an execution of the power, and comprehends that sum. According to a very strict and rigorous construction of the instrument, it may perhaps be admitted that the words used do not comprehend it, for neither was the fee vested in her person, nor could the trustees have been called to denude of it during her life. But testamentary deeds are not so construed; on the contrary, it is an invariable rule that they shall receive the most liberal interpretation, and that which carries the presumed intention of the testator into effect. The sum in dispute, though not technically Miss Hyslop's property, was virtually so. She had the interest of it during her life, and the unlimited power of disposal at her death. So much was it considered her property, that at one time she submitted to a reduction of her annuity, when the rate of interest fell. Indirectly, she might have disposed of it even in her lifetime, for onerous causes, by a deed to take effect at her death. When she made a settlement therefore, leaving every thing she had, or might afterwards have, to her sisters, no reasonable doubt can be entertained that she meant to include a sum which, in effect, was as much hers as any part of her property. A circumstance much founded on by the defenders, viz. that her settlement was executed before she knew of her uncle's legacy, is quite immaterial. It is settled, that a testamentary and revocable deed is to be held as the ultima voluntas testatoris, that is, as approved of, and confirmed down to the last hour that he is of a disposing mind. If it were not so, it would have been revoked or altered.

“The parties, in their argument, referred to various English authorities and decisions, which, in so far as they profess to expound and illustrate those general principles of equity which should obtain in every system of jurisprudence, are entitled to the highest respect. But it is otherwise when they relate merely to arbitrary and technical rules, such as those which form the chief part of the abstract doctrine of powers in the law of England, and in describing one of which, a high authority in that law has said, that ‘it would startle a man of common sense, not versed in legal subtleties, to understand so refined a distinction.’ The defenders, relying on those English cases, and dicta, have pleaded that a general devise, however unlimited in terms, will not comprehend the subject of the power, unless it refer to the subject, or to the power itself, or unless some part of the will would otherwise be inoperative. If that be a rule of the law of England, it is enough to say that no trace of such a rule ever existed in the law of Scotland. Nor is this to be regretted, since Lord Alvanly, in allusion to it as applicable to a reserved power, stated that he wished the rule had been otherwise, and Lord Eldon said he was not sure that this rule, as now established, did not defeat the intention nine times out of ten. The Lord Ordinary has adverted to the English law, because it was pressed upon him at the debate, and because it was said that the Court had given much weight to it in the case of Milne v. Milne, June 6, 1826. But both the decision there, and the grounds of it, were in perfect accordance with the ~~views now~~ stated.”

was given to her. She had the full liferent of it while she lived, and the uncontrolled disposal of it at her death. A father often makes provisions of an analogous nature in favour of his daughter, vesting a sum in trustees to pay her the interest, secluding the *jus mariti*, and with full power to the daughter to dispose of the capital at her death. I consider Miss Hyslop to have possessed in substance the powers of a proprietor over the sum of £2000, and I think her settlement was sufficient to carry it to her sisters, the general disponees. It is clear that the settlement, though originally executed many years before Miss Hyslop's death, did, so long as it existed unrevoked, manifest a continuous act of the will on her part, giving it the same force as if executed in the last moment of her retaining a disposing mind. It must therefore carry every thing which it would have carried, if originally executed the day before her death. Upon these considerations, I think the interlocutor of the Lord Ordinary well founded.

LORD GILLIES.—I adopt the whole reasoning contained in the Lord Ordinary's note. It fully expresses the grounds of my opinion, and I have no wish to add any thing farther.

LORD PRESIDENT.—I concur in the judgment of the Lord Ordinary, and also in the views expressed in his Lordship's note, with a slight qualification. I would decline to hold even more decidedly than his Lordship, that though the fee may be in point of form, have been in Miss Hyslop, it was so in point of substance.

LORD CRAIGIE was understood to concur.

THE COURT adhered.

D. WELSH, W.S.—W. Renny, W.S.—Agents.

WILLIAM BURN CALLANDER, Pursuer.—Skene—Burn Murdoch.

No. 164.

MRS LAIDLAW, or ANDERSON, Defender.—Keay—G. G. Bell.

Agent and Client—Entail.—The law-agent of a deceased heir of entail, holding his title, is not entitled to found on his hypothec against a creditor adjudging the lands and titles, in virtue of an obligation by the entailer, secured by infeftment in the entailed lands.

MR JAMES JUSTICE sold the lands of Crichton, in 1738, to the predecessor of Mr Burn Callander, with warrandice against all future eviction of the teinds. He then bought the lands of Over Howden, and took a conveyance to them in 1739, under provision that they were "burdened with real warrandice with the payment of any augmentation of stipend hereafter imposed on the lands of Crichton;" and he granted an heritable bond over these lands to the purchaser of Crichton, in real warrandice against eviction of the teinds, in virtue of which infeftment followed. He afterwards executed a strict entail of the lands of Over Howden, now called Justicehall, under which several heirs successively made up titles to the estate. One of these heirs (James Justice 2d), while in possession, employed the late James Laidlaw, W.S., as his law-agent, from the year 1807 to 1812; and, in 1807, Laidlaw obtained decree against him for a

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No. 164. debt, including a business-account of about £550. Part of this was incurred in making up titles to Over Howden, as the heir had possessed on apparenay during the earlier period of the employment. In consequence of subsequent evictions of teinds, the predecessor of Mr Burn Callander, in virtue of the entailer's obligation of warrandice, obtained a decree of adjudication in 1818 of the estate, including the title-deeds. After the death of James Justice 2d, a decree of declarator of expiry of the legal of the adjudication was, in 1831, pronounced against his daughter, Mrs Rae Justice or Campbell. At the death of Mr Laidlaw, he was still custodier of the title-deeds, which had been placed in his hands by his employer, and his account was unpaid. His sister, Mrs Laidlaw, or Anderson, confirmed herself executrix to him, and obtained possession of these deeds. Mr Burn Callander, as in right of the decree of adjudication, raised an action of exhibition and delivery of the title-deeds, against Mrs Laidlaw, to which she pleaded in defence, that they were hypothecated for the account due to her brother. The Lord Ordinary ordered Cases.

Feb. 11, 1831.
Callander v.
Laidlaw.

Pleaded by the Pursuer—

1. The titles of an estate are an inseparable portion of the estate itself, and are as effectually entailed as the lands. An heir of entail cannot impledge the titles for his debts, any more than he can burden the lands. So soon as he dies, his right falls; and the next heir, or any person having an equal right, may insist on delivery of the titles free of burden.

2. Laidlaw's account was contracted by an heir of entail. His daughter did not represent him, or become liable for the account. She could have claimed the titles free of hypothec; and the right of the pursuer was superior to hers, and must, a fortiori, prevail over the defender's. It was not *jus tertii* for the pursuer to insist that the entail (though ineffectual against him, a creditor of the entailer) was effectual to limit the right of the heir who contracted the debt, and the defender as deriving right solely through him.

Pleaded by the Defender—

1. It is fixed that a prior creditor, heritably infeft, cannot prevail in competition with the agent of his debtor holding the titles hypothecated.¹ This proved that the titles were in so far separable from the lands, that an agent acquiring the lawful custody of them from the proprietor, could not be compelled by one having a real and preferable right in the land, to deliver them up without paying his account.

2. The circumstance of the pursuer being an entailer's creditor may be effectual to cut down the entail, but can give no title, and no legal interest, to support it, or to enforce any of its limitations. These fetters are imposed solely to carry into effect certain intentions of the entailer,

¹ Lidderdale, July 5, 1749 (6248). Hamilton, Aug. 9, 1791 (6255).
Feb. 1, 1815, F. C.

to preserve a special order of succession, &c. But no party, except an heir of entail, has a title to found upon them. No. 164.

The Lord Ordinary found, "that the defender is bound to exhibit and produce the writs and evidents called for by the pursuer, and to deliver them to him to be used and disposed of as his own property, and decerned, and found the defender liable in expenses." *

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* "NOTE.—The proprietor of an estate in fee-simple, or even the heir of such an estate in possession on his apparenacy, may hypothecate the title-deeds to a lawyer for a business-account; and the question of preference between the agent and heritable creditors, whose securities are of a date prior to the hypothec, after much difficulty, has been decided in the agent's favour.

"But those decisions do not apply to the present case, where the estate had been placed under the fetters of an entail. Before the pursuer's adjudication was led, the right of the late James Justice, the heir who hypothecated the titles, had ended with his life, and the estate, including the titles, its inseparable accessories, had been transmitted to his daughter, who did not represent him, and was not liable for his obligations. The lien therefore which Mr Justice constituted by delivery of the titles to Mr Laidlaw, could not affect her, or any in her right, more than an infeftment would have done proceeding on his heritable bond.

"The defender takes a distinction between lands and title-deeds, as if the one and not the other fell under the restrictions of an entail; and he says, that the indirect preference which the hypothec affords, not being a real encumbrance on the property, does not fall under a prohibition to burden. This is evidently a mistake. In the conception of law, an estate consists not of the ipsum corpus of the soil alone, but of that and the titles by which it is vested and held; and it is the estate so compounded which forms the subject of the entail, and without which no entail could be made effectual. Accordingly, in common style, both lands and titles are invariably conveyed, and all burdens which can affect the heirs, indirect as well as direct, are expressly prohibited.

"Another argument of the defender rests on a misapplication of the plea of jus tertii. She says, that the pursuer not being an heir of entail, or taking right from an heir of entail, cannot competently found on the conditions and restrictions of the deed. But Mrs Stewart, from whom the pursuer adjudged, although she does not represent her father, does represent the entailer, and is liable for his obligations; and the pursuer, as her creditor, as well as the entailer's creditor, is entitled to take the estate free from every burden by which she was not affected. According to the defender, although an heir of entail in possession might enjoy the estate unencumbered by the debts of prior heirs; as soon as his creditor attached his interest, all the debts of those prior heirs would rise up to defeat the diligence.

"Even if the pursuer had adjudged from James Justice himself, it is thought that Laidlaw's hypothec would not have been effectual against him; for though the creditor of a substitute cannot attach his right of declaring an irritancy against the heir in possession, it does not follow that the entailer's creditor may not competently found on the conditions of the entail. But into this question it is unnecessary to enter.

"It may be added, that the pursuer's claim is equally well founded to the title-deeds which James Justice inherited, as to those which were prepared by his directions. Both descended to his daughter, and became her property as completely as the lands. Although the pursuer may have derived benefit from Laidlaw's operations,

No. 164. The defender reclaimed.

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LORD BALGRAY.—The decree of adjudication carries not only the lands, but also the titles. An heir of entail obtains the custody of the titles only in virtue of the entail, and subject to all the conditions which the entail has imposed. So soon as the heir dies, the right to the custody of the titles passes free to the next heir. This is a point which has been solemnly adjudged. Therefore the late Mr Laidlaw never had, or could have, any thing but a qualified hypothec over the title deeds of the heir of entail, his employer. He had the hypothec such as his employer could give it; but so soon as his employer was dead, the hypothec was gone. Laidlaw was immediately bound to hand over the titles free to the next heir of entail.

LORD CRAIGIE.—I take a different view from the Lord Ordinary. The competition here is not between heirs of entail, nor between an heir in possession and the agent of a deceased heir: the pursuer founds his right of adjudication upon the basis that quoad him there is no entail. But if there had been no entail, the hypothec of the agent would have prevailed against him; and I think he stands in the same position as if there had been no entail. Suppose the entail had never been recorded, and the creditor of a deceased heir were to lead an adjudication, could such creditor, at the same time, carry off the land, because, quoad him, there was no entail, and also carry off the titles in spite of the agent's hypothec, because, quoad the agent, there was an entail? I think the interlocutor should be altered.

LORD GILLIES.—I entirely concur with Lord Balgray. The Court have gone far enough already, and much farther than I thought they ought to go, in sustaining the hypothec of a law-agent. Indeed, in the case of fee-simple proprietors, that hypothec now endangers all real securities; for accounts of expenses sometimes amount to thousands of pounds, so that any prudent purchaser of an estate must take care to ascertain whether the seller's account with his agent stands clear before he pays the price. But this is not a case where an agent has derived his right of hypothec from the titles of a fee-simple proprietor. Laidlaw was never in bona fide to rely on these title-deeds, to any other effect than such as could flow from the titles of an heir under a strict entail. The titles of an estate savour of the realty, and are part and portion of the estate itself. I think the interlocutor of the Lord Ordinary is right.

LORD PRESIDENT.—I am of the same opinion. The right of an heir of entail to the titles, is commensurate with his right to the lands.

The COURT adhered.

DALLAS and INNES, W.S.—LAWSON and GILMOUR, W. S.—Agents.

he is not bound to pay his account; on the same principle that he would not be liable to those who lent money, or furnished articles to James Justice, which were employed by him in the improvement of the estate."

ARTHUR GIFFORD and COMMISSIONER, Pursuers.—*Rutherford—
G. G. Bell.*

No. 165.

ARTHUR GIFFORD, Defender.—*D. F. Hope—G. Napier.*

Feb. 11, 1834.
Gifford v.
Gifford.

Id Principal—Process—Mandatory—Service.—1. A commission, by a party authorising the commissioner to take all necessary steps for serving him predecessor, and institute all actions necessary to make his right effectual, competent to warrant the commissioner raising an action of reduction of an service, by another party in a competition of brieves. 2. Statements as to instances of a mandatory, not amounting to an averment of bankruptcy, relevant to support a demand for a new mandatory, or for caution being expenses, in a reduction of a service by a competing party residing abroad.

Pursuer, a person in the royal navy, now settled in Canada, with obtaining himself served heir to the deceased Thomas Gifford, in Shetland, granted a commission to three brothers-in-law, in order, successively, the first being Andrew Duncan, writer in Lerwick, powers thus expressed in the commission :—“ Giving, grant-committing to them severally, in the order before expressed, full warrant, and authority for me, and in my name, to purchase and from his Majesty’s Chancery all necessary brieves, for serving me with, heir of provision or of entail to the deceased Thomas Gifford my great-grandfather, and to the said Andrew Gifford of Ollahy father, and any other of my predecessors, and to obtain and receive, served and cognosced heir aforesaid, before any competent court for me and in my name, to subscribe the claims of service, and to writs as may be necessary for expediting thereof, to obtain said returned to Chancery, and generally to do every thing thereanent could do myself, if personally present; and I hereby grant full warrant, and authority to my said commissioners, in their order, for me and in my name, to take the opinions of counsel in, upon all or any points touching my right as heir-at-law, and entail to the lands and estate which belonged to the said Thomas of Busta, my great-grandfather, or through him to the said Andrew my father, or to any other subjects or effects heritable or moveable which I may be interested through my said great-grandfather’s or through that of my said father, or any other relations whomsoever to any claims of whatever nature, which I may have upon the estates of the said Gideon Gifford, or upon the said Arthur his eldest son, or upon any other person or persons, or their effects in Scotland; and in the event of said opinions being adverse, to institute in my name, any processes or actions at law which seemed advisable, either before the Supreme Court, or any inferior court in Scotland, against whatever person or persons it may be necessary to direct the same, in order to determine and render effectual

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Ld. Moncreiff.
R.

No. 165. my right and title to the whole, or any part of said lands and estates, and other claims, subjects, or effects, heritable or moveable, and to defend me in all suits or processes which may be raised against me in reference to the same.”

Feb. 11, 1834.
Gifford v.
Gifford.

Under this commission Duncan sued out a brief from Chancery; and a competing brief having been also sued out by the defender, these came to be tried at Edinburgh, under an advocacy of briefs, before Lord Moncreiff and a jury, who returned a verdict serving the defender. Thereafter, Duncan raised a summons of reduction of the service, in name of his constituent and himself, on the grounds that the verdict was contrary to evidence, and that the pursuer was truly the heir of the deceased.

To this summons the defender gave in preliminary defences, pleading, (in addition to an objection as to the manner in which the pursuer's title was set forth, afterwards cured by an amendment of the libel,)

1. That the commission merely authorized the commissioner to sue out briefs, and conduct a service of the pursuer, but contained no mandate to institute a reduction of the service of another party; and,

2. That Duncan's circumstances were such as to entitle the defender to insist either that caution for expenses should be found, or a new mandatory sisted.

In regard to this last defence, the defender, being required to make his statement more specific, gave in a minute, bearing as follows:—

“1st, Mr Duncan was for some years factor upon Lord Dundas's estates in Zetland; but in consequence, as was understood, of the difficulty which had been latterly experienced, by Lord Dundas's agents in Edinburgh, in procuring remittances from Mr Duncan, Messrs Hay and Ogilvy of Lerwick (a highly respectable mercantile house in Zetland) were, in spring last (1833), appointed by Lord Dundas, as commissioners, to enquire into the circumstances, and call Mr Duncan to account. Mr Duncan, upon being close pressed by these commissioners, gave them, as a payment to account, his own bill or draft for £500, upon Sir William Forbes and Company, bankers in Edinburgh. But, upon this bill being transmitted to Edinburgh, and presented at Sir William Forbes's bank for payment, it was there stated, that the bank held no funds of Mr Duncan's at all, and did no business with him whatever. The bill was, of course, dishonoured; and it was not till after a horning had been raised upon it and sent to Zetland, and after various arrestments had been used upon it at the instance of Lord Dundas, that the money was at last paid; and it was reported, and currently believed in Zetland, (though with what truth the defender is not yet prepared to say,) that it was by drawing part of the trust-funds belonging to the estate of one Hughson, on which Mr Duncan was trustee, that the money was so paid. Mr Duncan was thereafter removed by Lord Dundas from his office of factor; and pro-

ist and reckoning has been raised against him in the Court of No. 165.
the instance of his Lordship.

bout two years ago, Mr Duncan had been employed by Messrs
and Son, merchants in Leith, to recover various sums due to
ersons resident in Zetland. Mr Duncan, in consequence, took
ry measures, and, in a short time thereafter, recovered, exclu-
own expenses, nearly £100 on account of Messrs Thorburn.
ither remitted the money so recovered, nor informed Messrs
of his having done so. The circumstances, however, having at
o the knowledge of Messrs Thorburn, these gentlemen, about
en months ago, raised an action against Mr Duncan for their
ore the Court of Session, and at the same time used inhibition
m. In that action, Messrs Thorburn obtained decree in
hich was thereafter extracted, and a charge of horning given
Upon the expiry of that charge, Mr Duncan was denounced,
on upon it was thereafter issued and transmitted to Zetland; and
until this caption had been intimated that the sums contained in
ice were at last recovered.

bout eighteen months ago Mr Duncan was employed, on be-
ssrs Callender and Sons, tanners in Leith, to obtain from Mr
Hillswick, in Zetland, an adjustment and settlement of a claim
em against that gentleman. Mr Duncan, immediately there-
from Mr Gifford a sum of about £20 in full of that claim, but
; mention the recovery of it to Messrs Callender; and it was
ut six months ago, when they had employed another person in
apply again to Mr Gifford for payment, that they learned, for
me, that the debt had been paid to Mr Duncan about twelve
fore. They then employed a professional agent in Zetland to
ie money from Mr Duncan, and thus only obtained payment

Mr Duncan had been due Messrs Hay and Ogilvy of Lerwick
t for furnishings, of a pretty old date. In spring last, being
r a settlement, he granted a bill for the amount. This bill he
y when it fell due; but in the month of May last he granted a
f it at two months. This renewed bill also was not paid when
, and in August last a horning was raised upon it against Mr
nd transmitted to Zetland; but the defender is not yet aware
been the result of that diligence.

Mr Duncan was, several years ago, appointed the trustee for
ors upon the estate of one Hughson, a merchant, now deceased,
een possessed of considerable property in Zetland. That pro-
all sold off by Mr Duncan, and prices to the extent of £2000
ls, received by him fully two years ago. Mr Duncan, however,
apparent movement towards a general division of the funds
s creditors. Some of the creditors having taken the alarm about

Feb. 11, 1834.
Gifford v.
Gifford.

No. 165. the state of his circumstances, one of them, in May last, raised a summons of multiplepoinding in Mr Duncan's name, as trustee, with the view of getting the money out of his hands, and divided. That summons was called in Court about the end of last Summer Session, and was taken out to see by his agent; but upon its being enrolled at the commencement of the present Session, no appearance was made for him, and no condescendence of the funds was lodged for him, and an interim decree was pronounced against him to compel consignment of a sum of £1500 sterling, which now remains to be obtempered.

Feb. 11. 1834.
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Gifford.

"6th, In addition to these specific circumstances which have come to the knowledge of the defender, the defender avers, generally, that the present state of Mr Duncan's credit in Zetland, is such as to entitle the defender to insist in the demand he is now making, before an action like the present shall be allowed to proceed in the name of the pursuer."

On the other hand, it was maintained for the pursuer—

1. That the commission was most ample, authorizing all actions which might be advisable to determine and render effectual the pursuer's right; and a reduction of an adverse service, under a competition of brieves, being the proper form of bringing the verdict under review of the superior Courts, it was impossible to doubt that it fell under the powers therein contained; and,

2. That the statement as to Duncan's circumstances, even if correct, did not amount to an allegation even of insolvency, and still less of bankruptcy; and that, consequently, there was no pretence for demanding caution or a new mandatory, or allowing any investigation into these averments, which were quite irrelevant to support the demand.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note :*—" Finds that the commission and factory produced, giving

* " The first part of this interlocutor hardly requires any observations. Though the form of proceeding in a competition of brieves is somewhat changed, the thing itself stands as it did; and it would formerly have been rather a staggering proposition, that a broad commission and factory, for obtaining a party served, and prosecuting all competent measures for that purpose before any Judge in the kingdom, was not a sufficient warrant for reducing an adverse verdict before the Magistrates of Canongate or the macers. The reduction is, in this matter, a simple process of review, in which (essentially different from a bill of exceptions or motion for new trial) it is a matter of right to require the judgment of the Court on the merits of the verdict; and the Lord Ordinary conceives that, with a view to such an object, no mandate could well have been conceived in clearer or broader terms, than the commission and factory here in question. The idea of the commissioner being satisfied with a divided verdict of a jury in such a case, never could have been thought of, unless the case itself had been believed to have entirely failed. It might have been against law and against direction, and yet no remedy but reduction would be competent.

" As to the second point in the interlocutor, the Lord Ordinary thinks the plea of the defender of a very serious nature. He does not aver that the sum

authority to Andrew Duncan, therein designed, to adopt all legal No. 165.
 ves before any competent Judge, for obtaining the service and
 of the pursuer, as nearest and lawful heir to the deceased Thomas Feb. 11, 1834.
 of Busta, is, by its terms and legal effect, a sufficient mandate as Gifford v.
 as person lawfully absent from the country, to enable the pursuer, by Gifford.
 and his said mandatary, to insist in this process of reduction, as
 y competent form of bringing under the review of this Court the
 of the jury libelled on, whereby they refused to serve the said
 r, as heir aforesaid, in the process by brieve of inquest duly taken
 t purpose, and did serve the defender heir to the said Thomas
 in the same character in which the pursuer claimed to be served,
 refore repels the first preliminary defence: Finds, that no relevant
 ent has been made in support of the second preliminary defence, or
 nt to disable the said Andrew Duncan, as holder of the factory and
 sion aforesaid, and at whose instance, as mandatary, the proceed-
 the competition of brieves were carried through without objection,
 sisting in this process of review in the names of his constituent and

either been sequestrated or become notour bankrupt, or granted a trust-
 called a meeting of his creditors. These are the criteria in the far stronger
 a cautioner in a suspension, given by the last Act of Sederunt (sec. 118), for
 time, as a ground for demanding new caution. But the defender merely
 statements, more affecting Mr Duncan's character than his ability to pay his
 f a nature which, if made the subject of a record and admitted to probation,
 ead into an interminable enquiry, without any definite point on which it
 e said to hinge. The result of all the statements seems to be, that though,
 me causes which the counsel and agent (Mr Duncan being in Zetland) say
 not fully or safely attempt to explain, there was delay in settling certain
 urged against Mr Duncan, and diligence issued against him, they were all
 tly satisfied,—as no ultimate diligence is alleged to have been used. The
 nts, therefore, do not prove Mr Duncan to be insolvent, far less bankrupt.
 does appear to the Lord Ordinary to be a very serious question, whether
 gue averments of insufficiency, which have no fixed point, and can only be
 by proof, in regard to a mandatary in equal condition of life with the prin-
 rauer, received and recognised as sufficient throughout the competition, and
 nly carrying on his business as a solvent man, shall be listened to as a
 for delaying the proceedings duly taken by the authority, and for the
 of a party in a foreign country, with whom no new communication can be
 a long period? Any one may make such averments, and care nothing for
 failure in them, if the object of preventing service, or any step towards it,
 mplished. The plea of the defender appears to be contrary to the principle
 nes of *Scott v. Gillespie*, January 29, 1823; and *Duncan v. Duncan*, March
 and a fortiori of the Act of Sederunt; and as to the case of *Hope v. Mutter*,
 1797, referred to by the defender, it evidently (according to the report)
 great deal too far; for no one will now maintain, that it is incumbent on
 igrant abroad to find caution before he can be heard in this Court. It seems
 no application to the present case, unless this be maintained; and the cases
 rred to are directly contrary to it, on any such principle. But even that
 st apply here."

No. 165. himself; and therefore repels the said second preliminary defence: Admits the alteration now proposed to be made by the pursuer in the first part of the summons, and, with that alteration, finds that the title of the pursuer is sufficiently set forth in the libel, and repels the third preliminary defence;—and the defender declaring that he intends to reclaim against this interlocutor, finds him liable in the expense of this preliminary discussion; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax, and to report; appoints the defender to be ready at next calling, to state whether he will take a day to satisfy the production.”

Feb. 11, 1834.
Reed v. Vis-
count Strath-
allan.

The defender reclaimed; but the Court adhered.

T. RANKEN, S.S.C.—G. and W. NAPIER, W.S.—Agents.

No. 166. MISS ANN REED, Pursuer.—*Sol.-Gen. Cockburn—Rutherford.*
VISCOUNT STRATHALLAN, Defender.—*D. F. Hope—Cunninghame.*

Clause—Testament.—Question as to the construction of a clause, bequeathing to a lady who resided with the testator, “the whole of the furniture in her own room and any other she may choose.”

Feb. 11, 1834. THE late General Drummond, by deed of settlement, conveyed all his property, heritable and moveable, to Lord Strathallan, under burden of the legacies therein mentioned, and such others as he should direct by any writing under his hand. Among other directions, General Drummond left the following, addressed to Lord Strathallan, in favour of the pursuer Miss Reed, who was his wife’s niece, and had long resided with him, and to whom he had left in the will a legacy of £5000. “The following articles are to be delivered to Miss Anne Reed, after my decease, viz.: The two portraits in the small drawing-room, of myself and her late aunt, Mrs Drummond, with all the alabaster vases, china jars and other small ornaments, the Malaga figures, pianoforte, &c. The whole of the furniture in her own bed-room, and any other she may choose, for furnishing her house; also my carriage and harness. Silver, one dozen and a half table-spoons, one dozen and a half of table forks, one dozen dessert-spoons, one dessert-fork, one soup-ladle, two gravy-spoons, two butter-ladles, one dozen and a half tea-spoons, and sugar-tongs; four plated dishes, covers, and warmers or stands; the whole of my bed and table-linen, towels, and napkins, and two feather-beds which she made herself, and all my books.”

2^d DIVISION.
Ld. Mackenzie.
R.

Disputes having arisen between Miss Reed and Lord Strathallan, to the legacies in her favour, she raised an action against him, concluding, inter alia, to have it found, that under the letter above quoted, she was entitled “to the whole furniture, which was in her own bed-room.”

any other furniture belonging to the deceased, at the time of his No. 166.
 which she might have chosen, or may yet choose, for furnishing Feb. 11, 1834.
 her, or a house suitable to her means and condition; and that she Ross v. Greig.
 entitled to make such choice or selection for furnishing the same
 the deceased's said furniture and articles at Culdees before men-

being resisted by his Lordship, the Lord Ordinary pronounced an
 edict on this point as follows:—"Finds that the pursuer's right to
 her is not limited to the furniture of any particular room or rooms;
 owes her to lodge a specification of the furniture which she claims;
 on the question as to whether she has already made a selection."
 Lord Strathallan having reclaimed, each of the three Judges on the
 put a different construction on the bequest of furniture—Lord
 concurring with the Lord Ordinary, with this qualification, that
 she was only entitled to such an extent of furniture as amounted
 to reasonable furnishing of a house for her station—Lord Meadowbank
 that she was only entitled to the furniture of her own bed-room,
 not of any other bed-room,—and the Lord Justice-Clerk being of
 opinion that she was entitled to the furniture of her own bed-room, and
 in any other room she might choose, whether bed-room or not.

THE COURT thereupon recalled the finding *hoc statu*, and the parties
 intimated that the cause would be referred.

J. M'BRAIN, W.S.—ROBERTSON and SPENCE, W.S.—Agents.

ROBERT ROSS, Pursuer.—*Pyper*.
 WILLIAM GREIG, Defender.—*More*.

No. 167.

Cautioner.—1. A guarantee that a bill drawn by A upon B, would be honoured
 by the latter, held not to cover a bill drawn by C upon B in favour of A. 2.
 That decree ought not to pass against a cautioner when the question was
 independent whether any obligation attached to the principal.

August, 1830, one George Henry purchased from the pursuer Feb. 11, 1834.
 a fish-curer in Orkney, a sloop, at the price of £62, increased by 2d DIVISION.
 small expenses to £63, 13s. 3d., which purchase Henry represented Ld. Mackenzie.
 as the joint behoof of himself and John Irvine, merchant in F.
 Leith, Shetland. At this date Irvine was in Leith, and after wait-
 ing some time there in expectation of Henry's arrival from Orkney,
 he sailed from Leith for Shetland, having previously had some communi-
 cations to the tenor of which parties were not agreed, with the defender

Mr Cringletie was absent during the remaining part of the Session from
 illness.

No. 167. Greig, who was agent at Leith for the trader by which Henry was expected to arrive. In consequence of this communication, Greig wrote to Ross the following letter, of date October 20,—“ I was desired by Mr John Irvine of Scalloway, Shetland, to say that he had been in Leith and was greatly disappointed that he had to go away before Mr George Henry arrived here ; and he also desires me to say that the balance which will be due upon the sloop, that if you draw upon him, you will send the bill through for his acceptance ; and I have no hesitation to say it will be duly honoured by him.”

Feb. 11, 1834.
Ross v. Greig.

Henry had made two partial payments to Ross, towards the price of the sloop, of £7, 4s. and £10 respectively, and on the 5th of November he drew on Irvine, in favour of Ross, two bills at thirty days and ten months respectively for the balance, and thereupon received from Ross delivery of the sloop. He immediately took her on a voyage to Shetland, but on her passage she struck on a rock, and sustained considerable damage, for the repair of which she was retained by the carpenters employed. The two bills were forwarded to the branch of the National Bank at Lerwick, for acceptance by Irvine ; but on their being presented to him for this purpose, on the 13th December, he refused to accept them. This was intimated by Ross to Greig by a letter of date 24th February, 1831 but Greig having refused to pay the amount of the bills, Ross raised the present action against Henry and Irvine, as principals, and Greig a guarantee, for payment of the amount contained in the two bills drawn by Henry upon Irvine, but refused to be accepted by the latter.

In defence, Irvine denied that Henry had any authority from him to purchase the sloop ; that he had ever agreed to accept any bill therefor or had any connexion with the transaction. And Greig maintained—

1. That the letter was not of the nature of a guarantee, but was merely a communication of a message left by Irvine ; and Ross, in his letter of 24th February, showed his own understanding that it was not a guarantee.

2. Even if it were a guarantee, it was limited to the case of a bill drawn by Ross upon Irvine, and cannot cover bills of a totally different description, namely, drawn by Henry upon Irvine in favour of Ross ; and,

3. At all events Greig, as a cautioner for Irvine, could not be found liable until the principal obligation was fixed against that party.

The Lord Ordinary repelled Greig's defences, and “ in respect of the letter of guarantee,” decerned against him with expenses, in terms of the libel, and as to Irvine, allowed Ross to put in a reference to his oath.

Greig reclaimed.

LORD GLENLEE.—I think the interlocutor wrong. The claim which the Lord Ordinary has decided is not that in the letter. The letter may be a guarantee that a bill drawn by Ross on Irvine will be honoured, but the libel justifies the action.

that though Ross drew no bill on Irvine, Greig is to be liable for two other No. 167.
 together. The demand must be in terms of the obligation, and it is not
 to say that they are substantially to the same effect. But it is plain Greig Feb. 12, 1834.
 t all in the same situation as he would have been had the terms of the let- Magistrates of
 : complied with. In the one case he would clearly have had relief against Montrose v.
 but in the other, he is liable to be met by the objection that he had no Forsyth.
 a. This is just a case where something has been done different from what
 wanted; and besides, I do not understand deciding against Greig, before
 terminated whether Irvine is liable or not. I am therefore for altering.

D MEADOWBANK.—I am clearly of the same opinion.

D JUSTICE-CLERK.—Before a person can be bound under a letter of gua-
 the terms of it must be complied with, and the party is not to be held lia-
 something different. The letter was confined to a bill to be drawn by Ross,
 ody else; and therefore, although I think that saying a person will accept a
 quivalent to a guarantee, I do not think the letter here can cover these two
 ferent from that agreed to be guaranteed. Further, how can we decern against
 tioner, before it is settled whether Irvine is liable?

THE COURT accordingly altered and assoilzied.

R. URQUHART, S.S.C.—S. BEVERIDGE, S.S.C.—Agents.

MAGISTRATES OF MONTROSE, Pursuers.—*Rutherford—Ivory.*
 JOHN FORSYTH, Defender.—*Cuninghame.*

No. 168.

ration—Contract.—Circumstances not warranting a breach by a builder of a
 ; contract; and the amount of damage fixed at the difference between the
 t price, and that for which the work was afterwards completed, the defender
 ing any other mode of determining the amount.

: Magistrates of Montrose having advertised for offers to build a Feb. 12, 1834.
 , according to a certain plan and specification, the defender For-
 ive in the following, dated 16th June, 1832,—“ I hereby agree to 2D DIVISION.
 nd complete the proposed new steeple at Montrose, exclusive of Ld. Mackenzie.
 ole of the church, agreeably to the plans, specifications, and sec- T.
 ade out by you, for the sum of £2000 sterling; the whole works
 lone in the most substantial and tradesman-like manner, and to your
 tion, it being understood that the whole stone required for the in-
 of the building is to be got from quarries in the neighbourhood.”
 : was accepted by the Magistrates, on condition, inter alia, that For-
 ould do the work “ to the satisfaction of one or more competent
 tors to be named by the council,” a condition agreed to by Forsyth.
 agistrates thereafter appointed Bailie Smith, builder in Montrose,
 e of the magistrates, to be inspector. No objection was stated to
 : Forsyth, who commenced the work, and after carrying it on some

No. 168. little way, on the 1st of September drew from the Magistrates £150, account of the price. In the meantime a formal contract had been prepared for signature, but the day after he had drawn the £150, Forsyth announced his determination not to sign it, writing to the Provost in the terms:—"Queensferry, 2d September, 1832.—DEAR SIR, My reason for giving up the work is this. In looking over the calculations from which I made my estimate, I find that I have made this mistake—instead of £2000 it should have been £2721. You can let the council know this; I am exceedingly sorry for this transaction—this is the sole reason that I am not able to carry on the work."

Feb. 12, 1834.
Magistrates of
Montrose v.
Forsyth.

The Magistrates thereupon presented a petition to the Sheriff of Linlithgow, praying to have Forsyth ordained to sign the contract, and implement the same. In this process a record was made up, and the following judgment pronounced:—"Finds it admitted by the defender, and proved by writings in process, that he entered into an engagement with the pursuers to perform certain operations upon the parish church of Montrose at a stipulated price, and that he agreed to give caution for the due performance of these operations: Finds it admitted by the defender, and proved by writings in process, that he named his cautioner for the due performance of the work, and that he entered upon the operations by employing men and otherwise, and that he received £150 to account of the work performed: Finds it admitted, and proved by writings in process that the defender afterwards abandoned and deserted the work, and refused to sign himself, or to bring forward his cautioner to sign the contract produced: Therefore repels the defences, and decerns, and ordains and grants warrant in favour of the petitioners, in terms of the prayer of the petition, reserving to the petitioners to bring an action of damages against the defender, as accords of law: Finds expenses due, and allows an account thereof to be given in."

This judgment was acquiesced in by Forsyth, but he failed to obey it, and the Magistrates afterwards entered into a new contract for completing the steeple, at the price of £2715, exclusive of the work previously done by Forsyth. They further raised this action against him, concluding for damages. In defence, he pleaded that the offer was made on the express understanding that the stones were to be had in the immediate neighbourhood of Montrose, whereas it turned out that they could not be obtained nearer than eight miles, which was sufficient to entitle him to throw up the agreement; and, further, that the appointment of one of the bailies themselves as inspector, also warranted him in abandoning it.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note: "Finds, that the breach of contract libelled is established, both

* "The defender's own letter expressly declares that he had no ground for giving up the contract, excepting an error made by himself in his own private calculation. This excludes other grounds now pretended. And the Lord Ordinary has said

gment of the Sheriff of Linlithgow, which stands unquestioned, No. 168.
 by the admissions and writings produced in this case : finds, that
 ler must therefore be liable in damages for the said breach of ^{Feb. 13, 1894.} Paul v. Gibson.
 and in respect the pursuers have expressed themselves willing
 sified with a modification of damages to the amount of £465,
 the record affords sufficient evidence that the damage cannot be
 ount; and, therefore, finds the defender liable to that amount,
 ns: finds also expressly, that the above modification of damages
 on the assumption that the defender has no claim for any of the
 e by him towards execution of the said contract, before he aban-
 : same : finds the defender liable to the pursuers in expenses.
 1 reclaimed.

ourt, while they were agreed that damages were due, doubted
 he mode of ascertaining the amount adopted by the Lord Ordi-
 correct; but Forsyth not desiring to have that fixed otherwise,
 s were to be found due at all, their Lordships, in respect thereof,

IBSON—CRAIGS and WARDLAW, W.S.—J. W. MACKENZIE, W.S.—Agents.

WILLIAM PAUL, Objector.—*D. F. Hope—Russell.*
 ARCHIBALD GIBSON, Respondent.—*Jameson—Moir.*
 Competing.

No. 169.

tcy—*Sequestration—Husband and Wife—Foreign.*—1. A claimant, who
 ated as to be unable to make any other oath than that a sum was due to
 ding to the best of his knowledge and belief, upon the premises founded
 ending action against the bankrupt, but without prejudice to augment
 the sum afterwards—held entitled to vote for a trustee.
 e a party made affidavit to a precise sum as being due, and was so situ-
 : to require, *hoc statu*, to produce a voucher, held, that his founding on
 support of his claim, did not vitiate his vote, although the deed did not
 e claim made, but was at variance with it.
 ty, in emitting an affidavit, having deponed that he could not write, and
 eing signed by the magistrate—held that there was no need of a signa-
 taries for the party.
 rried woman whose husband was abroad under sentence of transporta-
 g been found entitled to pursue an action of count and reckoning, with

e is now any statement made in the record respecting that alleged error
 ich is relevant to relieve the defender of his bargain, even if the judgment
 rriff were out of the way. In truth, the record makes no statement of any
 or calculi, which is always a thing that, if true, can be stated with the
 plicitness and precision."

No. 160. concurrence of a curator ad litem; and the defender's estates being sequestrated, he was held entitled to claim and vote in the election of a trustee, without her husband's concurrence.
 Feb. 13, 1834. *Paul v. Gibson.*

5. A party having contracted debt in Jamaica, and having returned to Scotland, was held that his creditor was not bound to deduct the difference of exchange, in settling and voting in the sequestration of his estate.

Feb. 13, 1834. *THOMAS ANDERSON* died in Jamaica in 1810, leaving a deed of settlement, by which he appointed his brothers, John and Alexander, and two other parties, his executors. John accepted and intromitted; Alexander lived in Scotland, and did not intromit; but it did not appear whether the others had done so. After bequeathing some legacies, the testator directed the interest of the residue of his estate to be paid, one-half to his sister, Margaret Anderson or Bain, and to her husband, and the survivor of them; and one-half to his brother Alexander and his wife, or to the survivor; and that after their decease, the children of both brothers, together with Eliza Anderson, daughter of his brother John, should "have each a dividend of the interest, and may draw equal shares of the capital as they become of age."

John died in Jamaica in 1818, leaving a deed of settlement, by which he appointed William Shand and John Carne Pownall his executors. He bequeathed to his sister Margaret, and to her children, in Scotland, the sum of £1000, divisible equally among them; to her son, William, in Jamaica, £500 currency; and, after several other legacies, the residue to his brother Alexander, in liferent; whom failing, his brother's son, Alexander Anderson, junior, in liferent; whom failing, the son living of Alexander Anderson, junior; whom failing, two of his natural daughters and their heirs; whom failing, the heirs of his sister Margaret. The party taking the residuary estate was bound to pay a legacy of £200 to each of the children of Alexander Anderson living.

Shand accepted, and intromitted generally, both with the estate of John Anderson, and with the estate of Thomas so far as extant. Paul died in 1824; and it did not appear how far he had intromitted. The estate of John Anderson was ultimately thrown into the Court of Chancery in Jamaica; and an accounting was held as to Shand's misdeeds, which issued in a decree, finding him creditor of the estate £5248, currency. Shand afterwards returned to this country; which Margaret Anderson, and some of her family, raised an account and reckoning against him, as liable to account for the value of the estates both of John and Thomas. He pleaded *res judicata*, in virtue of the Jamaica decree; but the plea was repelled,¹ and the accounting allowed to proceed.

¹ Ante, XI. 688.

her estates being afterwards sequestrated, creditors, to the No. 169.
of £28,856, voted for William Paul, accountant in Edinburgh, Feb. 13, 1831.
he, who had previously been in the management of Shand's affairs Paul v. Gibson.
private trust. The pursuers of the action of count and reckon-
the family of Alexander Anderson now deceased, stating their
it £93,708, 7s. 4d., voted for Archibald Gibson, accountant in
gh. Each nominee applied for confirmation, and Paul lodged
ns to the votes in favour of Gibson. These votes rested on the
g grounds:—

aret Anderson had emitted an affidavit, designing herself “ relict
deceased Alexander Bain, day-labourer at Altyre, in the county
ay, and one of the representatives, legatees, and devisees, or
y legatees, and nearest of kin to the deceased Thomas Ander-
brother-german, and also one of the representatives, legatees, and
, or residuary legatees, and nearest of kin to the also deceased
nderson, her brother-german.” She deponed, “ that William
vas, at the time and date of the sequestration awarded against
d is still justly indebted, resting and owing to the deponent, as
and devisee, or residuary legatee, under the last will and testa-
the said deceased Thomas Anderson, and as one of his represen-
nd nearest of kin as aforesaid, and as relict of the said deceased
ler Bain, the sum of £14,498, 14s. 2d. sterling, being her share
ggregate sum of £43,496, 14s. 2d. sterling, arising from the intro-
of the said William Shand with the estates and effects of the
omas Anderson, lying in the island of Jamaica, conform to state
ed by the deponent as relative hereto. As also depones, that the
illiam Shand is also justly indebted, resting, and owing to the
it, as a legatee and devisee, or residuary legatee, under the last
testament of the said deceased John Anderson, and as one of his
ntatives and nearest of kin, in manner foresaid, and as relict of the
eased Alexander Bain, her husband, the sum of £2848, 10s. 10d.
, being her share of the aggregate sum of £8545, 2s. 6d. sterling,
from the intromissions of the said William Shand with the estates
cts of the said deceased John Anderson, lying in the said island
ica, conform to state subscribed by the deponent as relative here-
ing together the sums claimed by the deponent in her own right,
of £17,347, 5s. sterling, upon the premises assumed and founded
ie process of count and reckoning depending before the Court of
, at the instance of the deponent and Elspet Bain, her daughter,
the said William Shand; nevertheless, without prejudice to the
at to augment or restrict her claim hereafter as she may see proper
cause: Farther depones, that neither the deponent nor any other
on her account and behoof, hold any other security for the foresaid
han an action and process of count and reckoning, presently
ing before the Court of Session, at the instance of the deponent

No. 169. and Elspet Bain, her daughter, against the said William Shand; and letters of inhibition and arrestment raised at their instance on the dependence of the said action, with the executions, inhibition, and arrestments following thereon; and that no part of the said sums has been paid or compensated in any manner of way." She deponed "that the deponent cannot write," and the affidavit was signed by the magistrate. The relative mandate to vote for her at the meeting of creditors was signed by two notaries in presence of four witnesses.

Feb. 13, 1834.
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Elspet Bain, the wife of one Garrow, who was abroad under a sentence of transportation, made an affidavit, designing herself "the surviving child, and nearest of kin to the deceased Alexander Bain, who was a legatee under the testaments of Thomas and John Anderson, and who had other legal rights and interests in their succession as husband of Margaret Anderson," &c. She deponed that Shand was owing to her, "as representing her deceased father, the sum of £28,997, 8s. 4d., being her share of the aggregate sum of £43,496, 2s. 6d., arising from the intromissions of Shand, with the estate of Thomas Anderson, conform to state," &c.; also the sum of £4697, 1s. 8d., being her share of the aggregate sum of £8545, 2s. 6d., arising from the intromissions of Shand with the estate of John Anderson. The oath was, in other respects, of the same tenor with that of her mother, and it, together with the relative mandate, bore to be with concurrence of a curator ad litem, who had been appointed to her in the action of count and reckoning, in which she was a joint pursuer along with her mother. The affidavit and mandate were signed only by Elspet.

The relict of Alexander Anderson, as legatee of Thomas Anderson and as relict of Alexander, a legatee, and one of the next of kin to both Thomas and John, made affidavit to a debt composed of the same proportion of the half falling to Alexander's family, which was claimed by Margaret Anderson, out of the half falling to her family.

Each of three children of Alexander made affidavit to £7249, 7s. 4d. as his proportion of the aggregate sum of £43,496, 2s. 6d.; and £1174 5s. 5d. as his proportion of the aggregate sum of £8545, 2s. 6d. The affidavits, mutatis mutandis, were the same with that of Margaret Anderson. The total sum claimed by her and her daughter, was £51,041, 15s. the total sum claimed by Mrs Alexander Anderson and her three children, was £42,618, 3s. 3d.

The state referred to in all the affidavits, as being that conform to which the debt was estimated, was entitled "State of the claims and interest, at the instance of the representatives, legatees, and nearest of kin of the deceased Thomas and John Anderson, against William Shand, Esq. of Arnhall, for his intromissions with the estates of the said Thomas and John Anderson." It commenced thus—"Estate of Thomas Anderson

"To amount of claim arising due by the said William Shand as the executor of John Anderson, who was executor of Thomas Anderson."

test of Thomas Anderson, upon the data given and assumed by the No. 169.
William Shand, and on the principles founded on in the process
him before the Court of Session—

Feb. 13, 1831.
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the hire of 54 slaves on Charing-cross estate, from 2d
January, 1810, to 2d January, 1811, £2817 currency
orly, or sterling, £2012 1 0
the hire of said 54 slaves from 2d January, 1811, to
January, 1812, 2012 1 0"

in similar manner the hire of slaves on another property was stated.
for the estates was also charged. These charges were carried
through a succession of years, until the dates when the slaves on the
were said to be respectively sold, at which dates their price was
in the account. Interest was computed on all the items. The
of charge continued through the whole of John Anderson's life,
several after years, during which Shand's acting as executor took
The estate of John Anderson was also computed out of similar
as. The state was summed up with an abstract, estimating Thomas
Anderson's estate at £86,992, 5s. ; and John Anderson's, at £17,097, 2s.
One half of each of these sums was stated as belonging to Marga-
ret Anderson and her family, and one-half to Alexander Anderson's
Each half was classed according to the following "apportion-

	The Estates of Thomas Anderson.	The Estates of John Anderson.
to, Alexander Anderson's family,	£43,496 2 6	£8,548 11 5½
Whereof one-third to the relict,	14,498 14 2	2,848 2 10
For the children, two-thirds,	£28,997 8 4	5,700 8 7½
Alexander Bain's family,	£43,496 2 6	£8,548 11 5½
Whereof one-third to the relict,	14,498 14 2	2,848 2 10
For the children, two-thirds,	£28,997 8 4	£5,700 8 7½

res, 18th September, 1833.—This is the state referred to in our
five affidavits against the sequestrated estate of William Shand,
Arnhall, emitted this day."

signatures of the claimants were subjoined.

as stated by the claimants that Margaret had five children, and
der six, at the death of Thomas.

he meeting for choosing the trustee, John Johnson, writer in
right, appeared as mandatary for these families, and produced the
Thomas and John Anderson. To their votes, Paul stated the
objections :—

No. 169. *I. Objection.* The affidavits did not bear that any debt was due, except "upon the premises assumed and founded on in the count and reckoning"—and "nevertheless without prejudice to augment or restrict claim hereafter." This was not an oath of verity, or even of credulity a debt of any specific amount; and there was no oath that the said premises were true, or believed to be true.

Feb. 13, 1834.
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Farther, although each affidavit stated a sum to be due, conform to subscribed as relative thereto, and the state was thus made part of affidavit, yet in no instance did it contain the precise sum sworn to the affidavit, but only slump sums, without apportioning them among claimants; and the affidavit supplied no principles of apportionment.

Answer.—The affidavits stated a precise sum to be justly due; and as this was deponed to be on the premises assumed in the action, it implied an attestation of their truth, as much as a statement that a sum was due, conform to bill, or account, which implied that it was only due if the bill was genuine, or the account correct. As the claimants had personal knowledge of Shand's intrusions, the reserved power to augment or restrict was necessary; and, besides, the claim might have been enlarged or diminished without any such clause. The reference to the state was not necessary, but it was at least harmless, as the sums were specifically apportioned in the affidavits.

II. Objection. Margaret Anderson had not signed her affidavit, even before the notaries. She had only signed by their aid the mandate to Johnson and the state relative to the affidavit, but to the last there was no document stating their authority to sign. Farther, the husband of Elspet (though abroad under sentence of transportation) was the party entitled to claim as his moveables were not escheat; and the concurrence of the curator litem was unavailing, as his office was confined to the action of count and reckoning in which he was appointed.

Answer.—The affidavit by Margaret bears, that she cannot write; and it is signed by the magistrate. The relative state was part of the affidavit, and therefore was duly signed, if the affidavit was so. And, generally even after deducting the claims of Margaret and Elspet, together with all the claims arising out of John Anderson's proper estate, the claims of Mrs Alexander Anderson and her family, arising out of the estate of Thomas Anderson alone, afforded a decided majority in value to the claimants. The same objection to Elspet's title was taken and repelled in the count and reckoning.

III. Objection. The claims were bad, being contradicted by the documents on which they were rested. As the claimants founded on the wills of Thomas and John, any claim on the footing of intestate succession was out of the case. Under the will of Thomas, nothing but the interest of his residuary estate was to fall to his sister Margaret, or Mrs Alexander Anderson. But in the state, they shared the principal with the other claimants, to whom a proportion of the sum

was bequeathed. Farther, as the claimants stated that Margaret No. 169. five children alive at the death of Thomas, and Alexander had six, which Eliza Anderson (daughter of John) must be added, only one- Feb. 13, 1834. Paul v. Gibbon. th part of the capital could be claimed by each of the children; the capital was ordered by the will (not to be divided between the es, as it was in the state, but) to be distributed per capita among hildren of Margaret Anderson; and of Mrs Alexander Anderson; Eliza Anderson. Again, the will of John gave only £1000 equally g Margaret and her children; and all the younger children of nder had but a legacy of £200, while no provision was made for Alexander Anderson at all. It was impossible, therefore, to sustain aims as made; and the claimants could not be allowed to plead, nder the testaments, they would have as large or a larger claim, by ating it in a different way. Besides, the calculation of the claim eded on an unfounded assumption, that John had intromitted to the t of £67,000 from Thomas's estates, and had left the full amount, n estate of his own, amounting to £17,000.

ver.—This was not the period to enquire into the validity of the ; but the claimants were ready to prove, at the proper time, that t was the only surviving child of Margaret, and that three of her en died domiciled in Jamaica, by the law of which colony their sion fell to their parents; and that, computing only the interest ng to Margaret from Thomas's estate, together with her share of ird (as relict) of the proportions given to the three sons who died maica, her claim against Shand amounted to £17,758, 5s. 9d., as she had only voted upon £14,498, 14s. 3d. In the same way, her claimants would prove, in due season, that they were creditors the will for a larger sum than they had voted on. In regard to the : of the estates, it was the fault of the bankrupt if there was not clear ce of the amount of his intromissions. The claimants had calcu- heir debt from the best data which it was possible for them to go and they were confident they would ultimately prove that amount, a the meantime, they were entitled to vote.

Objection. The claimants possessed securities which they had not and deducted.

They had put no value on the security afforded by the liability of -executors of John Anderson, and Pownall, the co-executor of . 2. The claimants were preferable to Shand's common creditors, ny part of the estates of Thomas and John Anderson still extant, t this preference was not valued. And, 3. Inhibition and arrest- had been used on the dependence of the count and reckoning by ret, and her daughter, Elspet; but neither of them had valued and ted the security thence arising.

ver.—1. It is not proved or admitted that any co-executor had had missions; and if not, even although liable to the claimants, they must

No. 169. have relief against Shand, in which case there was no need to value and deduct. 2. Nothing remained of the estates of Thomas and John, except
 Feb. 13, 1834. Paul v. Gibson, a personal claim against Shand. And, 3. The inhibitions and arrestments had attached nothing.

V. Objection. The claimants had not deducted from their claim the amount of exchange, which was $21\frac{1}{2}$ per cent, against Jamaica. They claimed £93,659 sterling, or £131,122, Jamaica currency, as due to them in Jamaica, from funds in the hands of Shand, there received. But even supposing £131,122, Jamaica currency, to be due to them, that sum would be paid in full in Britain, by a sum of £76,102, 19s. 2d., in place of the sum of £93,659. The claimants must therefore be restricted to that sum.

Answer.—The claimants were not bound to give credit for the difference of exchange. As Shand had been for some time domiciled in Scotland, and possessed heritable estates, and had been sequestrated here, he must pay the debts proved against him, without charging his creditors with the cost of bringing his funds from abroad to do so.

VI. Objection. The claimants formed one family-interest hostile to the general body of the creditors, and yet capable of controlling the whole sequestration, if allowed to elect their own trustee.

Answer.—The claimants were truly the great body of the creditors of Shand. They had no interest hostile to the rest, except in so far as the interest of every creditor in a sequestration is hostile to that of every other.

The Lord Ordinary “made avizandum with the cause to the Court.”*

* “NOTE.—There is an evident necessity for reporting this competition.

“It would require a very minute and extended statement to exhaust all and each of the objections, and the points of fact and law involved in them. The Lord Ordinary will only, therefore, observe in general, that it appears to him that the objections are insuperable; and, in particular, that no good answer has been made to the three first objections.† There is no doubt that the same accuracy and completeness in the evidence of the debt is not required in a question as to the right of voting, as in the ultimate question of ranking; and that objections which might be good in the latter case, will not be good or relevant in the other. That distinction requires no enforcement. But it does not appear to the Lord Ordinary to settle the present case. The first question is, whether the affidavit is sufficient as a positive oath to a debt of defined amount, without condition or qualification; and the second is, whether, on the face of the affidavit, and the account or voucher necessarily produced in support of it, the one agrees with the other, so as to show the same specific debt as due to the individual claimant. It is entirely a different and separate question, by what evidence, apart from the affidavit and voucher produced, the claim may competently be shown to be unfounded or incorrect. In the present case, the Lord Ordinary thinks that the claims fail in the two first points. And he will only farther observe, that however just and expedient it may be, that the Court should not, in general, be required to go into the question as to the actual verity of the debts, where the affidavits and vouchers are clear, positive, and consistent; yet

† In the Report these are 1 and 3.

D BALGAY.—The question, whether the tenor of the affidavits be such as
 by the statute, is one of a very general nature. It seems to me to result
 whether, in the circumstances of this case, the claimants can be laid under
 necessity of swearing to a debt as absolutely due, or whether an oath, to the
 the claimant's knowledge and belief, having substantially been given, this
 1 that should be required. It is true that the bankrupt-statute points out, in
 tail, the classes of claimants, such as agents, factors, &c., to whom an oath
 credulity is made competent. But there are peculiar circumstances which
 der a claimant wholly unable to give any other oath than one of credulity,
 he be himself the creditor, and yet, where it would expose him to great hard-
 he were deprived of the power of claiming and voting. In this case, the
 is found upon grounds of debt, the details of which are not in *facto proprio*;
 y allege, that it is the misconduct of the bankrupt, by keeping them in the
 ick has prevented them from having a more accurate knowledge of the facts.
 g on his bankrupt estate, I think that is a material point for the Court to
 view, so as not to aggravate the hardship of the claimants' situation, by set-
 ir votes aside, if they truly have done all that the most undoubted credi-
 their situation, could have done. There is a case on this subject, which
 rt decided, on 1st July, 1825,¹ where it seems to have been considered,
 se deviation from the usual form of the oath would be admissible in special
 ad where good reasons were shown to exist. I look upon the present case
 n which the claimants could make no other oath than they did, even sup-
 the whole debt to be most justly due. In this stage, therefore, I do not
 ranted to reject the votes.

D CRAIGIE concurred.

D GILLIES.—I am of the same opinion. These parties make an oath to a
 sum as due to them, according to the best of their knowledge and belief.
 e not in the ordinary situation of creditors. They are so placed, that I
 loss to see how they could have emitted any other oath than they did.
 present stage of the sequestration, I am not prepared to set them aside.

D PRESIDENT.—I take the same view with the rest of the Court. It is
 to observe, that the grounds of claim on which all these parties found,
 na fide stated and pleaded upon by some of them, long before the seques-
 was heard of. They are not a parcel of claims manufactured for the first
 order to any mandate in the sequestration. I do not think that the refe-
 the count and reckoning is at all fatal to the oath. In substance, each

n the face of those documents the claims are so manifestly uncertain, and
 any given amount at mere random conjecture, as he thinks they are in the
 case, it is a question of very serious importance whether the whole com-
 f the business of such a sequestration may be assumed by parties resting
 ch hypothetical, uncertain, and conditional claims. It may be of little con-
 here, which of the two competitors for the office of trustee shall be pre-
 uth being known to the Court to be equally respectable. But there are
 which the principle might lead to serious evils in that point.

Lord Ordinary does not enter into the more particular Objections. But
 them seem to require careful attention, if the general objections should not
 ght to be made out."

son (ante, IV. 131).

No. 169.

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No. 169. claimant swears to a precise amount of debt due, conform to the premises founded on in that action. Suppose that he had sworn the debt to be due, conform to a certain bill, or conform to the report of an accountant in a process, in either case there would be no debt due at all, if, de facto, the bill should turn out to be forged, or the report to be erroneous. But, *hoc statu*, there would be a sufficient claim and affidavit to make a vote, and I think the present claims do not rest on weaker grounds. In short, the claimants swear that the respective sums are due, to the best of their knowledge and belief; and, in the peculiar circumstances of the case, I think the objections should be repelled.

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THE COURT accordingly repelled the objections, and confirmed Mr Gibson as trustee.

LAMONT and NEWTON, W.S.—GIBSON and HECTOR, W.S.—Agents.

No. 170. ARMSTRONG'S ASSIGNEES, Pursuers.—*D. F. Hope—D. McNeill.*
LEITH BANKING COMPANY, Defenders.—*Skene—Anderson.*

Proof.—1. A witness residing in London having been examined on commission in June, and it being proved at the trial in December following that he was still in London—held that the evidence was admissible, though no application had been made to the witness in the interim to attend the trial.

2. An objection to the admissibility of the evidence of a bankrupt abroad, taken on commission, that he had failed to attend the statutory examinations, and to take the relative oath, and that he had therefore incurred the penalty of the bankrupt act,—“to be considered as a fraudulent bankrupt, and infamous,”—repelled, in respect that there had been no trial and conviction.

3. The drawer and indorser of a bill raised an action of repetition of its contents from an indorsee, alleging that he was induced to draw and indorse it through the fraudulent device of the indorsee and the acceptor, and for the accommodation of the acceptor, now bankrupt—held, in the circumstances, that the acceptor was not an admissible witness for the drawer, being disqualified on the ground of interest.

Feb. 13, 1834. THE late Thomas Armstrong drew a bill of the following tenor on Archibald Scot, agent of the Leith Banking Company: “Carlisle, October 3, 1826. Six months after date, pay to me, or order, at the Leith Bank, Leith, £1500 sterling, for value.” Scot accepted the bill, and Armstrong indorsed it. When it fell due, the Leith Bank were the holders of it, and raised diligence on it against Scot and Armstrong. Armstrong paid it, under protest that it was not justly due. He raised an action against the Bank, concluding for reduction of the bill, the indorsation, and the diligence, and for repetition. The summons libelled, that after Scot had fallen above £34,000 into arrears to the Bank, and had been suspended from his office of agent, the Bank imposed upon Scot, by holding out a false promise of continuing him in the agency, if he could procure his friends to interpose their credit for him to a certain amount, and also imposed on the public by holding out Scot as still their agent;

1st Division.

acted in concert with the Bank in concealing the suspension of his
 and the embarrassed state of his affairs; that "the pursuer, in
 nce of being misled into such a state of ignorance and misappre-
 by such deceitful concealment and conduct on the part of the said
 nking Company and the said Archibald Scot, was induced to
 his credit in the following manner:" "The said Archibald
 ed to the pursuer that the said Leith Banking Company had
 as a condition of continuing him in the foresaid agency, that he
 id a temporary additional security for his agency transactions,
 books of the agency should be completely brought up, and cer-
 les in his own private books, with which the Leith Banking
 have no concern, should be satisfactorily explained; and upon
 ment, the said Archibald Scot requested the pursuer to inter-
 redit for behalf of the said Archibald Scot to his said constitu-
 is agency transactions, to the extent of the sum of £1500 ster-
 signing a bill to that amount, to be deposited with the said Com-
 at the said Leith Banking Company, and the said Henry John-
 nananager thereof, who was at Carlisle at the time, was in the
 ledge of the statements that were thus made by the said Archi-
 to induce the pursuer to sign such a security bill; but the said
 hnston, as well as the said Archibald Scot, not only concealed
 pursuer that the said Archibald Scot had already been truly
 ect deprived of his agency; and that the said Leith Banking
 were claiming from him an immense sum, as the alleged ba-
 n his transactions; but likewise endeavoured to induce the pur-
 gn the proposed security bill, by offering to him, that if he
 so, any accommodation of cash which he might require for his
 ess, should be given to him upon his own security, although,
 alarm which then existed as to mercantile credit, such accom-
 were not in general granted: that the pursuer being prevailed
 these inducements, not only signed, as the drawer, a bill for
 rling, which was accepted by the said Archibald Scot, and was
 3d day of October, 1826, and payable six months after date,
 his name as indorser thereof, in order that the same might be
 he said Leith Banking Company as a security bill for the pur-
 e mentioned:" that the Bank and Scot "attempted to practise
 ful device of applying the said bill to purposes altogether dif-
 m those for which it had been signed by the pursuer, and
 in the books of the said agency at Carlisle, as having been
 there; but no part of the contents of the said bill was ever
 he pursuer, and he never received any value whatever for ha-
 nd and indorsed the said bill: that, on the contrary, according
 said device which was practised by the said Leith Banking
 and the said Archibald Scot, all the contents of the said bill
 ned by the said Leith Banking Company to themselves, and

No. 170.

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 Company.

No. 170. were applied by them in paying alleged debts, which were said to be due by third parties; but for which the pursuer was not liable, and with which he was not connected in any way whatever; and a state and letter in the following terms, was taken by the said Leith Banking Company from the said Archibald Scot, as explanatory of the device which was thus practised :

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Company.

" Thomas Moor,	£571 4 0
Thomas and James Armstrong,	316 0 0
Moat Road Account,	30 0 0
John Machell,	80 17 4
	<hr/>
	£998 1 4

Messrs James and William Yeoman's promissory-note to Mr Scot, dated and payable on demand, and indorsed to the Leith Banking Company for	£500 0 0
Interest on ditto, from 22d August to 6th October,	0 19 2
Discount on Mr Scot's note to Mr Armstrong, dated 3d October, 1826, and payable six months after date, for £1500,	37 16 8
	<hr/>
	£1536 16 8

" *Carlisle, 4th October, 1826.*

" Sir,—I hereby acknowledge that you have just now advanced me on account of the Leith Banking Company, the sum of £1,462, 3s. 10d., being the proceeds of my acceptance to Mr Thomas Armstrong, Springhouse, dated the 3d day of October current, and payable six months after date, for £1500 sterling, less £37, 16s. 2d. of discount thereon, and which sum has been applied by me in part payment of the above. I am, &c. (signed) Arch. Scot." Addressed, " Henry Johnston, Esquire."

The second reason of reduction was in these terms: " The said bill and indorsation thereof were obtained from the pursuer in consequence of fraudulent concealment and misrepresentation, as before mentioned, on the part of the said Leith Banking Company, or those acting for them as aforesaid, as to the state of matters between the said Archibald Scot, and the said Leith Banking Company, and of the pursuer having been thereby induced to interpose his credit, in circumstances in which, if the state of matters had not been so concealed from him, he would not have done any such thing; and he never received any value or other consideration for having signed the said bill as drawer, and for having indorsed it as aforesaid."

The Bank pleaded, in defence, that the bill was discounted by them in the ordinary course of business; that full value was paid to Scot for it; that they were no parties to any communication between Scot and Arm-

ating the bill, and they had recovered payment as onerous and No. 170.
dorsees.*

g having died, his assignees insisted in the action. The fol-
s went to trial before a jury, on December 26, 1833:

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Company.

ether the late Thomas Armstrong was induced, by the false
ent representations or concealment of the defenders, or any
grant the bill of exchange, No. 9 of process, dated the 3d day
1826, for the sum of £1500 sterling?

ether, on or about the 11th day of July, and 21st day of Au-
the defenders wrongfully exacted and received from the pur-
ms of £1500, and £19, 14s. 6d., or any part thereof, as pay-
: said bill, with interest? and whether the defenders are in-
resting owing to the pursuers in the sum wrongfully exacted
?"

ting in the bill and diligence, the pursuers tendered the depo-
ot, which had been taken on commission, as he resided in

the defenders, objected—The evidence was taken as far back as the
is, as the trial was then expected to proceed in July. Though Scot
of the country, he may have returned now, or he may have been
rn, if duly asked by the pursuers to do so. The defenders have a
rest that the evidence of Scot should be taken from him in presence
less it be proved that it continues out of the pursuer's power to bring
lingly, it is provided by § 28 of the Jury Court A.S. that after the
ry witnesses has been taken on commission, "it being established
the satisfaction of the Court, by affidavit, or by oath in open Court,
nesses cannot attend, owing to one or other of the causes foresaid,
petent to read to the jury the evidence so taken, subject to all just
as to its admissibility." One of the "causes foresaid" is the wit-
ce abroad; and the pursuer is not entitled to found on that, unless
the witness, though recently asked, declined to come to this country.
pe, for pursuers.—The witness is still in London. The pursuers
his attendance here. It is enough if they prove that he still resides
r that purpose we tender the oath of Mr Niven, agent of the pur-
ance—though we apprehend even this to be unnecessary, as Scot
o be resident in London in June last; and it should rest on the
nstruct his return to Scotland, if they are to found upon it.

sworn, and stated, that from his enquiries, and from his correspond-
t, he was certain Scot was not in Scotland since June, and that he

unds of reduction, and other defences, were pleaded; the pursuers,
red, that Scot was not owing to the Bank the sums to which the pro-
fit had been applied.

No. 170. was now remaining in London. On his cross-examination, he stated that he never applied to him since July to come here and give evidence at the trial.
 Feb. 13, 1834. The LORD PRESIDENT repelled the objection, and intimated, that he found difficulty in doing so.
Armstrong's Assignees v. Leith Banking Company. *Skene* took an exception, in respect that *Scot* had not been applied to, July, to come to Scotland, and that there was no evidence before the Court that would not have come if asked by the pursuers.

After the above objection had been repelled—

Skene, for the defenders, farther objected—*Scot*, though a bankrupt under process of sequestration awarded several years ago, had hitherto refused to submit to the statutory examinations. By § 33 of the Bankrupt Act, it is enacted, in reference to the examinations and relative oath, “that if the bankrupt shall wilfully to exhibit a fair state of his affairs, or to make oath in the terms above specified, he shall be considered as a fraudulent bankrupt, &c., and be accounted infamous and incapable of giving evidence in any court of justice.” From the sequestration of the sequestration, now in Court, it appeared that *Scot* had failed to attend the diets of examination; and the Sheriff had certified his failure accordingly. He thus incurred the penalty of the statute, and was incapable of giving evidence.

LORD PRESIDENT.—It is unnecessary for the pursuers to answer this objection. The severe penalty of infamy attaching to a charge of fraudulent bankruptcy not be enforced until the accused party has had the benefit of a trial. He may have a valid excuse to offer for not attending the diets of examination; he may have been detained by sickness, or otherwise: it is enough that there is not a conviction of fraudulent bankruptcy obtained after a regular trial.

Skene then objected—*Scot* is inadmissible on the ground of interest. He has an interest in the issue, and to obtain a verdict against the defenders, being the assent of the bill, which being granted for his use and accommodation, he was allowed to relieve the pursuers who are the representatives of the drawer, not only of the principal sum and interest, but also of all expenses, loss, or damage, which may have incurred in consequence of *Thomas Armstrong* being an obligor in the bill; and farther, inasmuch as, in the event of a verdict being returned in favour of the pursuers on the issues, the defenders could not thereafter enforce payment of the bill, by diligence or otherwise, against *Scot*.

After hearing the pursuers in answer,

The LORD PRESIDENT sustained the objection, observing that *Scot* had an obvious interest to show that the bill had originated in a fraud on the part of the Bank. Fraud was set forth by the pursuers as the ground on which they claimed repetition. If proved, they would get repetition of the contents of the bill from the Bank, and would be prevented from ranking on *Scot's* estate for the amount of that bill, and would be prevented from ranking on *Scot's* estate, in virtue of that bill, or to claim the contents otherwise, would be in a much worse position even in a question with *Scot*, than the pursuers were. It was for *Scot's* interest to rid himself of all obligation to *Armstrong*, which he would do, if the pursuers prevailed in the action and recovered from the Bank.

In consequence of this decision, the pursuers gave up the case, and the Jury found for the defenders. The pursuers presented a bill of exception.

No. 170.

led by the Pursuers—

is true that if Armstrong's assignees fail to recover against the Bank, they have a claim against Scot's bankrupt estate, which they would have if they recovered from the Bank. It is also true that Scot has a right to reduce the claims against his estate. But, though the pursuers prevailed in this action, and recovered payment from the Bank, the estate would gain nothing, as the Bank would rank upon it for the contents of the bill. The Bank found their defence on the averment that Scot got full value for the bill from them. In a question of ranking, they must therefore be entitled to rank for that sum. Their ranking would remain, even if they could not use the bill itself as evidence of a constituted debt: they might prove the advance by their receipt and his, and by his letter, and rank for the full sum. But as it was a matter of indifference to Scot which of two parties should rank on his debt for the same sum, he had no interest in the issue of an action which would merely change the name of the creditor.¹

Feb. 13, 1834.
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Company.

Scot could not use the verdict to any effect in an after question as to the Bank and himself; and that ground alone was enough to render the defence inadmissible.² It was only Armstrong's own obligation which was in question under reduction, and not any obligation by Scot to the Bank. The amount of ranking would not be increased by the pursuers' action, as the expenses of their process against the Bank could not be a charge against Scot, who was not liable for their having raised the action, if it proved unfounded.

led by the defenders—

The bill was drawn by Armstrong on Scot, and indorsed by Armstrong to the Bank. The first issue was, whether the fraud of the Bank vitiates the constitution of the bill by Armstrong's drawing it, and its indorsation by him. Scot had an interest that the pursuers prevail in that issue, as it would destroy the bill. Whatever might remain between the Bank and him on other grounds, the bill, as a fraudulent document, would be of no force against him, and he would thus be rid of a constituted and highly privileged obligation. The question of interest should be tried, as if Armstrong's assignees, in place of the Bank, were still resisting the Bank's claim for payment. In such a case, the drawer could not refuse payment to an onerous indorser, and would be obliged to offer to prove fraud against him by the oath of the acceptor.

Scot had an interest that the pursuers should obtain a verdict against the Bank on the ground of fraud, he was disqualified.

The success of the pursuers would diminish the ranking on Scot's debt; for, if the pursuers lost their action, they would rank both for the debt and for the expenses of the process, if they could prove Scot to have

¹ 2 Bell, 483; 1 Phillips, 66, 125, 140; Birt, 2 East, 458.

² Ralston, July 10, 1833. 1 S. D. B. Supp. 92.

No. 170. dealt unfairly with Armstrong, and by his misrepresentation to have induced him first to sign the bill for his accommodation,¹ and afterwards to pursue the Bank. Scot had an interest, therefore, that the pursuers should prevail.

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LORD PRESIDENT.—It appears from the letter of Scot, relative to the bill, as stated in the summons, that £316 of its proceeds were paid to Thomas and James Armstrong, of which firm the late Mr Armstrong is said to have been a partner. Part of the proceeds appears therefore to have been applied for his behoof.

M'Neill, for pursuers.—It is expressly denied by the pursuers that any part of the bill was applied for his behoof; and no proof on that subject was adduced at the trial.

LORD CRAIGIE.—I think the reference to Phillips, who is a writer on the law of England, should be looked at with much caution by the Court. The law of evidence in Scotland differs so essentially from that of England, that an indiscriminate use of English authority would lead to mischievous consequences. I am for refusing the bill of exceptions.

LORD GILLIES.—It is quite clear, in principle, that if a party be so situated that the issue of an action in one way will cause the pursuer to rank on his estate and the issue in another way will equally cause the defender to rank, then the party stands indifferent between the parties. If he must sustain the same ranking whatever be the issue, the issue is indifferent to him. But I doubt whether the principle applies to the facts of the case. The first issue distinctly tries the question, whether the falsehood and fraud of the Bank induced Armstrong to grant the bill of exchange. It is difficult to hold that Scot, the acceptor, has not an interest to establish this. If Armstrong's assignees prevailed under that issue, could the Bank have a claim, in virtue of the bill, against any mortal? Could they found an action on the fraudulent document? I certainly think that Scot, at least, has a clear interest rather to be left to try the question of his liability with the Bank, after the bill has been proved to originate in fraud, than to have it ranked against him by the assignees of Armstrong, as to whom he can bring no ground of challenge whatever. I think the bill of exceptions ought to be refused.

LORD PRESIDENT.—If the bill originated in fraud, to which the Bank were parties, then it cannot be the ground of an action to them in a court of law. I remain of the opinion which I expressed at the trial.

LORD BALGRAY concurred.

The bill of exceptions was refused, with expenses.

J. ROBERTSON, S.S.C.—J. BISSET, S.S.C.—Agents.

¹ Phillips, 61. Thomson on Bills, 660.

JAMES SCOTT, Suspender.—*Jameson—Neaves.*
JAMES CAMPBELL, Charger.—*Rutherford—Baxter.*

No. 171.

Feb. 14, 1834.
 Scott v.
 Campbell.

oner—Contract.—Parties having become cautioners for a composition, under
 agreement whereby the debtor's estate was conveyed to trustees for payment
 and relief of the cautioners; and during the currency of the contract, a new
 ment, containing essential alterations, was entered into by the debtor, the
 , and creditors, without consulting the cautioners—held that they were dis-

PETER JUST, merchant in Arbroath, having become insolvent, called a Feb. 14, 1834.
 g of his creditors, which was held on 13th March, 1826. His whole
 rs were from twenty to thirty, but only seven were present. He
 a composition of 10s. per pound, payable by four instalments; the
 d second, of 2s. 6d. each, at four and eight months respectively;
 rd, for 4s., at twelve months; and the fourth, for 1s., at eighteen
 ; and he agreed "to become bound to manage his estate under the
 on of any two of the creditors whom the meeting might nominate
 he first two instalments were paid," and to find security for the
 instalment. This offer was made "on the condition that the whole
 reditors should accede thereto, and agree to discharge him accord-

1st Division.

The creditors present agreed to the offer, and appointed James
 ell and George Gleig as the two creditors, "under whose super-
 nce Just should become bound to manage his estate." The acces-
 eight other creditors was afterwards obtained. James Scott and
 signed a minute of obligation to subscribe a bond as cautioners for
 it of the third instalment. Accordingly, on the 20th of April, a
 t, bearing to be by Just and his cautioners on the one part, and by
 ditors on the other, was executed by Just and the cautioners, nar-
 the above arrangement, and, particularly, that Just had "become
 to manage his estate under the direction and superintendence" of
 ell and Gleig; and that "in security of the third instalment, and in
 ration of the said Peter Just having this day granted a disposition,
 ing his heritable property to James Campbell and George Gleig, as
 s, for themselves, and for behoof of the whole cautioners," the latter
 themselves for payment of the third instalment to these trustees.
 rence to this contract, Just executed a trust-disposition of certain
 e, in favour of Campbell and Gleig, for behoof of the cautioners,
 narrative that they had undertaken the cautionary obligation on
 h of such disposition being granted, with power of sale in the event
 ersonal funds not proving adequate to the payment of the two first
 ents, and of his failure to pay the third, and the proceeds to be
 in payment of the latter. The contract was signed by eight cre-
 before 2d May.

No. 171. After the term of the first instalment was passed, the Dundee Union Bank, who had not then subscribed the contract, gave a charge to Just, in consequence of which another meeting of his creditors was held on 28th July, 1826. The meeting approved of the diligence by the Bank, "as having been done for the general behoof," authorized payment of it out of the first proceeds of the estate, and appointed three of their number a committee, with power to name one of themselves to take the active management of the estate, and to pay him for his trouble.

Feb. 14, 1834.
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Campbell.

At another meeting, on 11th August, the creditors required Just to execute a conveyance of his whole heritage and moveables to the committee, as trustees "for paying the instalments of the composition as far as there are means, and in general, for the purpose of carrying the composition-contract already entered into, into effect, so far as the funds would allow." Accordingly, in December, Just, with consent of Campbell and Gleig, executed a general conveyance of his whole estate, heritable and moveable, in favour of the committee, as trustees for the creditors, with power to pay the trust expenses, a suitable gratification to themselves, to pay the first instalment, (or, in the event of deficiency, an equal proportion thereof,) to all who, though creditors prior to 18th March, had not yet received payment; to pay the second instalment, in a similar manner, to the creditors who had not received it; and the third instalment if there were funds. The trustees were exempted from liability for omissions &c. Thereafter, they discharged Campbell and Gleig of all liability to account for their intromission with the trust-funds conveyed to them except to a specified amount, which was afterwards paid. The cautioners were not parties to any of these proceedings.

In February, 1829, a demand was made on Scott for payment of £80 being the sum for which he had bound himself as cautioner. He refused payment, and in January, 1830, three creditors in addition to the eight who had subscribed the composition-contract, signed it; but there were several who never did so. In June thereafter, (Gleig being dead,) Campbell gave a charge of horning to Scott in virtue of the contract.

Scott suspended, and pleaded—

1. The contract under which he and the other cautioners had become bound, was departed from, the whole management having been placed in other hands without their consent. Besides, the heritage had been conveyed by Just, Campbell, and Gleig, to new administrators, although it was pledged for the relief of the cautioners, and therefore they must be free, though the purposes of the new conveyance had been the same with that to Campbell and Gleig. But the new committee had power to give a salary to their manager, which was a new power; were exempted from liability for omissions, &c., which was so unusual, where remuneration was made, that no party could be bound who did not directly consent to it; and, the subjects which had been conveyed to Campbell and Gleig were no longer reserved exclusively for relief of the third instalment.

ly a few of the creditors had acceded when the change was made, No. 171.
 ny of them never acceded at all. The contract was considered by Feb. 14, 1834.
 as to have fallen to the ground, as appeared from the diligence Scott v.
 the Dundee Union Bank, and approved of as for the general Campbell.
 and from the lapse of time after 13th March, 1827, when the
 stalment fell due, before any demand was made on the cautioners.
 as it was answered—

the conveyance of the estate to the new committee was done with
 ent of Campbell and Gleig, and the object of it was substantially
 erance of the interests of the cautioners, seeing that the whole
 s of the estate were to be applied towards payment of the compo-
 t could not void their obligation. The allowance of a salary to
 nager was only a part of the necessary expense of realizing the
 and no act of omission was alleged.

ie whole creditors had acceded, rebus et factis, which was as bind-
 f they had signed the contract.

Lord Ordinary found, “that In April, 1826, a contract, being that
 arged on, was prepared between Peter Just and his creditors, by
 hey agreed to accept of a composition of 10s. in the pound, pay-
 four instalments, namely, 2s. 6d. per pound at four months, 2s. 6d. at
 onths, 4s. at twelve months, and 1s. at eighteen months: that by
 contract the suspender became bound as cautioner for the third
 ent of the said composition, alongst with certain other persons: that
 tract contained various provisions relative to the said instalments,
 he manner in which, in general, the contract was to be carried
 ect: that the charger, and the now deceased George Gleig, were
 ed on the part of the creditors to see the terms of the agreement
 into effect, and to recover from the suspender and the other cau-
 the amount of the sums for which they had respectively become
 n payment of the third instalment, in the event of such instalment
 ng paid by Peter Just: that in relief of the said cautionary obliga-
 rtain heritable subjects were made over by Peter Just to the
 and George Gleig for behoof of the cautioners: that in December,
 hile the foresaid contract had been signed only by a very few of
 ditors, and before the third instalment became payable, another
 ment was entered into between Peter Just and his creditors: that
 ist-deed executed in December, 1826, for completing that arrange-
 Peter Just conveyed his whole property, heritable and moveable,
 in trustees, different from the persons appointed by the foresaid
 t: that the said trust-deed, though bearing to be granted pro-
 r for carrying into effect the foresaid composition-contract, did, in
 essential particulars, alter the provisions and conditions of the said
 t: that the said trust-deed was acceded to by the charger and
 : Gleig; but that neither the trust-deed itself, nor the resolu-

No. 171.
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tions concerning it at previous meetings of creditors, nor any of the alterations made on the terms of the contract of April, 1826, received the sanction of, or were even intimated to, the suspender and the other cautioners, and that no demand was made upon the suspender for payment of the third instalment until the 28th February, 1829, being more than two years after the new trust-deed had been granted, and nearly two years after the third instalment had become due: that in these circumstances the creditors of Peter Just must be held to have departed from the contract of April 1826 now charged on, in so far as regards the cautioners and therefore suspended the letters simpliciter, and decerned; found the suspender entitled to expenses."

The charger reclaimed.

LORD BALGRAY.—The interlocutor of the Lord Ordinary is quite right upon general grounds, and independently of the many specialties of the case. The cautioners undertook the obligation on the footing that Just was to manage his estate for a certain period, under the superintendence and direction of Campbell and Gleig, and also on the footing that certain heritage was conveyed to Campbell and Gleig in relief of the cautioners. In these circumstances, neither Just nor his creditors had a right to introduce a change in the management, throwing all this into new hands, without the consent of the cautioners. By so doing, they altered the liability to which alone the cautioners had exposed themselves. Having done this without the cautioner's consent, the Court are not called upon to go into an examination whether the cautioners can qualify prejudice by the change. If the cautioners show that, by the voluntary act of the creditors, the contract is no longer the same to which their obligation referred, they are entitled to be liberated from liability to the creditors, or to Campbell, their trustee. It is enough for the cautioner to say, "You have altered what I agreed to, and my agreement is no longer binding."

The other Judges concurred, and THE COURT adhered.

It was intimated from the Bar, that a doubt was entertained whether it was necessary to move specially for expenses, where the interlocutor of a Lord Ordinary, finding expenses due, was adhered to.

The LORD PRESIDENT observed, that he understood an award of the Inner House expenses, in that case, to be implied in a judgment of adherence.

LORD GILLIES said, that perhaps the safest course was to make a special motion for expenses. They were moved for and awarded accordingly.*

J. MORGAN, S.S.C.—T. DEUCHER,—Agents.

* See the rule as to this fixed by the Judges of both Divisions after consultation, ante, July 2, 1831 (IX. 864).

WILLIAM CLARK, Advocate.—*Shene—Christison.*

No. 172.

GEORGE LEWIS, Respondent.—*Jameson—Russell.*

Feb. 14, 1834.

Clark v.

Lewis.

Interdict.—Circumstances in which a party who craved interdict on his allegation, that the respondent had stopped up a water-course, was in modified expenses. Littlejohn v. Hamilton.

was a possessory question, and of a special nature. Clark and Lewis were conterminous proprietors of small feus in the vicinity of

1st Division.

Ld. Corehouse.

D.

Clark complained to the Sheriff of Lanarkshire, that Lewis had stopped up the open course of a burn, and substituted a covered drain, the original defect or from neglect, was inadequate to carry off the water and caused it to regorge on Clark's grounds and cotton-mill. He craved the Sheriff to find Lewis bound to keep up a sufficient drain to carry off the water; to grant warrant for having the drain cleared at his expense; to interdict him from making any erection which would impede the flow of the water; and to ordain him to restore the original water-course to the burn. The Sheriff, after a proof, and a visitation of the burn, found that a covered drain existed in the property of Lewis, which part of the burn used to flow, and that Clark was still entitled to the same use of it as had formerly been taken; that the obstruction of the drain commenced in Clark's own ground, but that when Clark cleared out his part of the drain, Lewis was bound to clear out his. As Lewis had performed no wrongous act, the Sheriff found there was no ground for interdict, and subjected Clark in expenses. Both parties appealed.

The Lord Ordinary varied the Sheriff's interlocutor, but the Court affirmed the same, with the qualification of subjecting Clark only in modified expenses.

For Clark, HUNTER, and WHITEHEAD, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

MARGARET LITTLEJOHN, and OTHERS, Petitioners.—*D. F. Hope* No. 173.
—*Monteith.*

JAMES HAMILTON, Respondent.—*Shene—Moir.*

Application of Land Estate—Trust—Judicial Factor.—1. Sequestration of a feu, which was craved in respect of pending actions of mails and duties, of which the feu had already been sequestrated—and there being a subsisting trust of creditors, though no acting trustee, refused. 2. Special powers also craved of the judicial factor previously appointed to recover the fruits reaped by the feu from lands in his own possession.

ARCHIBALD M'NIVEN, Suspender.—*M'Neill.*
MALCOLM M'KINNON, Charger.—*A. M'Neill.*

No. 174.

Feb. 14, 1834.
M'Niven v.
M'Kinnon.

Jurisdiction—Citation.—A party, with no fixed domicile, but exercising a profession following which he is in use to travel constantly throughout the country, from one jurisdiction to another, liable to be convened in that jurisdiction he is personally cited.

The suspender, M'Niven, was an emigrant agent, whose profession it was to travel through the Highlands to engage settlers to the colonies, and to arrange for their passage, and taking charge of the disposal of their effects. Having in this capacity been allowed to sell the effects of the deceased, M'Kinnon, who had contemplated emigrating, and to draw the debts, but not having accounted therefor, M'Kinnon raised an action against him before the Sheriff of Inverness-shire, concluding for an account. The summons having been executed against him personally on the island of Skye, within the county of Inverness, he entered appearance and pleaded, that he was not subject to the jurisdiction of the Sheriff of that county—having, as he alleged, a domicile in Tobermory, in the county of Argyle. The Sheriff allowed him a proof of this, but he failed to produce evidence, while, on the other hand, it was proved that he had truly resided at Tobermory, and was constantly engaged in the way of his business, moving from place to place in different jurisdictions. The Sheriff allowed this defence; and after a litigation on the merits, during all of which appearance was continued for M'Niven, the Sheriff found a balance due by him, and gave decree therefor, with expenses. On appeal, being charged on this decree, he presented a bill of suspension, on the ground of want of jurisdiction, to which it was answered, that as a party has no fixed domicile, but in the course of his business moves from place to place, it is competent to cite him personally within the jurisdiction he may be found; and that M'Niven having been duly cited, and having appeared, the proceedings were perfectly regular. The Lord Ordinary pronounced this interlocutor: “In respect that the decree charged on was pronounced in foro contentioso, the defender not only appeared, but continued from the beginning to the end of the process to defend the case, and to take part in the proof and all the proceedings; in respect, that though he was allowed a proof of his averment that he had a domicile at Tobermory, no such proof was led or supported by him; and in respect that the judgment of the Sheriff, on the question of jurisdiction, appears to be well founded in legal principle, the Lord Ordinary is contented with the facts of the case, refuses the bill, and decrees the balance due.”

Feb. 14, 1834.
2d Division.
Bill-Chamber.
Ld. Moncreiff.

No. 173. THE Court, of date December 15, 1832, on the application of the petitioners, pronounced an interlocutor, sequestrating the "rents" of the estate of Kames, belonging to the respondent, Hamilton, and appointing a judicial factor (as to which see ante, XI. p. 217), and they afterwards granted execution pending appeal, under which the factor entered on the discharge of his office. Part of the property being in the natural possession of Hamilton himself, and he having refused to account to the factor for the fruits, the petitioners presented this application, praying the Court "to grant authority to Mr Robert Thom, the judicial factor appointed by your Lordships, as aforesaid, to let those portions of the lands and estate of Kames, which are in the personal possession of the said James Hamilton; or otherwise to sequester the whole lands and estate of Kames, belonging to the said James Hamilton, and to appoint the said Robert Thom factor thereon, with the usual powers, on his finding caution in common form; and, in particular, with power to let the portions of the estate in the personal occupancy of the said James Hamilton, as aforesaid." This was opposed by Hamilton, on the ground, that the trust mentioned in the former report, under which he had important interests was still in existence; and that although the Court had, in consequence of there being no acting trustee, sequestered the rents, there were no grounds for sequestrating the estate during the subsistence of the trust or for granting to the factor any other powers than those legally belonging to judicial factors, under which he might adopt any measures against Hamilton which seemed competent to him—to enforce any claims he might imagine he had to the fruits of the land in Hamilton's own possession.

LORD JUSTICE-CLERK.—We formerly refused to sequester the estate. We only sequestered the rents, and I can see no reason to pronounce a different interlocutor now. We have done nothing to overturn the trust; and even if the factor himself had applied, we would have told him just to exercise his ordinary powers and we are not to advise parties how to proceed. If this party has any claim against Mr Hamilton, he may follow his own course, but we cannot enlarge the powers we have given.

LORD GLENLEE.—I am entirely of that opinion.

LORD MEADOWBANK.—It is quite clear. There being a subsisting trust, we cannot sequester the estate; and this being an outrageous proceeding, Mr Hamilton should have his expenses.

THE COURT accordingly refused the petition, with expenses.

W. A. G. and R. ELLIS, W.S.—TOP and ROMANES, W.S.—J. HAMILTON, C.S.—Against

ARCHIBALD M'NIVEN, Suspender.—*M'Neill*.
MALCOLM M'KINNON, Charger.—*A. M'Neill*.

No. 174.

Feb. 14, 1834.
M'Niven v.
M'Kinnon.

Jurisdiction—Citation.—A party, with no fixed domicile, but exercising a profession, in following which he is in use to travel constantly throughout the country, passing from one jurisdiction to another, liable to be convened in that jurisdiction where he is personally cited.

THE suspender, M'Niven, was an emigrant agent, whose profession it was to travel through the Highlands to engage settlers to the colonies, arranging for their passage, and taking charge of the disposal of their effects. Having in this capacity been allowed to sell the effects of the charger, M'Kinnon, who had contemplated emigrating, and to draw the proceeds, but not having accounted therefor, M'Kinnon raised an action against him before the Sheriff of Inverness-shire, concluding for an accounting. The summons having been executed against him personally at the island of Skye, within the county of Inverness, he entered appearance, and pleaded, that he was not subject to the jurisdiction of the Sheriff of that county—having, as he alleged, a domicile in Tobermory, in the county of Argyle. The Sheriff allowed him a proof of this, but he led no evidence, while, on the other hand, it was proved that he had truly no fixed residence, but was constantly engaged in the way of his business, moving from place to place in different jurisdictions. The Sheriff repelled this defence; and after a litigation on the merits, during all which appearance was continued for M'Niven, the Sheriff found a certain balance due by him, and gave decret therefor, with expenses. Having been charged on this decree, he presented a bill of suspension, on the ground of want of jurisdiction, to which it was answered, that where a party has no fixed domicile, but in the course of his business travels from place to place, it is competent to cite him personally within whatever jurisdiction he may be found; and that M'Niven having been cited, and having appeared, the proceedings were perfectly regular.

The Lord Ordinary pronounced this interlocutor: "In respect that the decret charged on was pronounced in foro contentioso, the defender being not only appeared, but continued from the beginning to the end of the process to defend the case, and to take part in the proof and all the proceedings; in respect, that though he was allowed a proof of his averment that he had a domicile at Tobermory, no such proof was led or attempted by him; and in respect that the judgment of the Sheriff, on the question of jurisdiction, appears to be well founded in legal principle, and sufficiently warranted by the facts of the case, refuses the bill, and the expenses due."

Feb. 14, 1834.
2d Division.
Bill-Chamber.
Ed. Moncreiff.

No. 174. M'Niven reclaimed.

Feb. 14, 1834.
Drummond v.
Boyd.

The Judges were clearly of opinion, that the pretence of this party not having been properly cited was quite untenable; and that if a man carries on a trade of this kind, he must be amenable wherever he is personally cited.

THE COURT accordingly adhered.

M'LEAN and GIFFEN, W.S.—E. M'MILLAN, W.S.—Agents.

No. 175. JOHN DRUMMOND and THOMAS DOBIE, Petitioners.—*Cunninghame*.
JOHN BOYD, Respondent.—*D. F. Hope—Neaves*.

Diligence—Process—Arrestment.—Questions, 1. Whether it be competent for the Supreme Court to loose arrestments, which have been laid on by an inferior Court. 2. Whether letters of loosing arrestment be a competent mode of proceeding where the arrestment is one in execution, and the objection is, that the subject arrested does not belong to the debtor. 3. Whether imposts or town customs let assigned in consideration of the payment of an annual sum, be arrestable by a creditor of the tacksman or assignee; and, 4. Whether his cautioner can object to the arrestment.

Feb. 14, 1834.

1st Division.
Bill-Chamber.
Ld. Moncreiff.

In November, 1833, John Drummond granted an obligation to the city of Edinburgh, to pay “the sum of £180 sterling, as the rent of tack-duty for the city’s impost on wines, spirits, &c., conform to a printed table thereof, subscribed by you, as relative hereto, and which shall be levied in terms thereof, and of the articles of roup after mentioned, of which impost I the said John Drummond have become tacksman for the year, from Whitsunday last, to the term of Whitsunday, 1834, to be paid in twelve equal monthly instalments, the first thereof on the 11th day of December next, for the month preceding, and so forth monthly thereafter, on the 11th day of each month, till the 11th November, 1834, when the last-mentioned instalment will become payable.”

Thomas Dobie bound himself as cautioner for Drummond, and for farther security, Drummond placed two monthly instalments in the Chamberlain’s hands, to remain there until the whole should be paid. The city allowed a credit of six months to the vintners and others by whom the impost was payable, so that it was leviable from Whitsunday preceding the date of the agreement.

In January, 1834, Boyd, a creditor of Drummond, in virtue of a constituted debt, used arrestments, under a precept of the Admiralty, laid in the hands of several of the principal hotel-keepers in Edinburgh, who were liable in payment of the impost. Drummond and Dobie obtained a bill for loosing the arrestments without caution of these grounds.

1. The imposts which had been arrested are customs or taxes, due not to Drummond, but to the city of Edinburgh; for although he is styled a tacksmen, yet he is truly the mere agent or collector of the town, and therefore a creditor of his cannot attach the imposts.

No. 175.

Feb. 11, 1834.
Drummond v.
Boyd.

2. At all events, the cautioner has a right to have the arrestment loosed. It is clear, that if the town of Edinburgh appeared, their right would be preferable to that of any of Drummond's creditors. But if the cautioner had to pay any part of the £180 to the town, he could insist for an assignation of their right to levy the imposts; and therefore he was entitled in the meantime to keep the subject entire, by preventing it from being carried off. No doubt, if Boyd chose to pay £180 to the town, he might thereby remove the cautioner's interest to object, but unless he did so, he could not impair the subject of the cautioner's security.

To this it was answered by Boyd—

1. It is incompetent for the Supreme Court to loose arrestments laid on by an inferior Court. But even if the Court could do so, this is not a case for loosing. The arrestment is one not in security but in execution, and cannot be loosed. If the subject do not belong to the debtor, the only competent mode of proceeding is by bill of suspension.

2. But the subject arrested does belong to Drummond. The town have assigned to him the imposts, in consideration of the rent or tack-duty of £180; and accordingly, however much he may draw from the impost, he is liable for no more than £180, and he is bound to pay it, though the impost should fall short.

3. The cautioner has no right to suspend lawful diligence done against the effects of the debtor, and there is here no question with the town of Edinburgh.

The Lord Ordinary "reported the bill and answers."*

* "NOTE.—There seems to be no doubt as to the competency of this Court granting letters of loosing arrestment, though the arrestment may be on the precept of an inferior Judge. The Lord Ordinary understands this to be matter of settled practice.

"The Lord Ordinary holds it also to be clearly competent, on sufficient cause shown, to pass a bill of loosing arrestment without caution or consignment; *Rev. v. Fullerton*, March 4, 1823. Such cases frequently occur where the arrestment is either inept or oppressive.

"The case on the merits is very special and peculiar. He has not much doubt in the second plea, founded on the interest of the cautioner; but, on the first point, the nature of the funds arrested, he has great doubt. The complainer has a *ius exigiendi*; and when the funds are paid to him, he has only a fixed sum to pay to the magistrates. But though he is called a tacksmen, and there is a species of lease, the Lord Ordinary doubts whether this is such a proper lease or assignation of the duties as to render them really due to the complainer, otherwise than as collector for the magistrates, and by mandate from them. Before a demand of payment, each

No. 175. LORD PRESIDENT.—At present, I am inclined to consider the arrestments as perfectly competent.

Feb. 15, 1834.
Ferguson v.
Ferguson.

LORD GILLIES.—I think the case is attended with very considerable difficulty. The cautioner seems, perhaps, entitled to plead on all the rights on which the town of Edinburgh could have founded if it were a party. And if the town were here, claiming these imposts in competition with a creditor of their collector or tacksmen, I have great doubt as to the creditor's claim.

LORD CRAIGIE.—I think the bill should be passed.

LORD BALGRAY.—I think it ought to be passed, but on moderate caution only.

THE COURT passed the bill in terms of the suggestion of Lord Balgray.

T. CORBET, —J. MURDOCH,—Agents.

No. 176. MRS FERGUSON OF CHRISTIE, Claimant.—*D. F. Hope—More.*
MRS FERGUSON OF RITCHIE, Claimant.—*Skene—Cuninghame.*
JAMES HUNTER, Claimant.—*Skene—Cuninghame.*
Competing.

Testament—Succession—Clause—Implied Will.—A testator directed his executors to purchase a certain estate, and settle it according to a particular destination; but the free fund fell short of enabling them to buy the estate—held, in the circumstances, that the fund was subject to the same destination as the estate, if bought, would have received.

Feb. 15, 1834. THE late Mr Rennald of Jamaica, executed a settlement in 1781, by which he bequeathed a number of legacies, and also directed that his executors should purchase the estate of Cairney, in Forfarshire, or another estate of equal value, and settle it upon "Patrick Ferguson, my nephew, and to the heirs-male of the body of the said Patrick Ferguson, lawfully issuing; and for default of such issue, then to and upon, and to the use and behalf of the first son of the body of Jean Rennald, my youngest sister, lawfully issuing, who may be named Patrick, and to the heirs-male of his body, lawfully issuing; and for default of such issue, then my will

1st DIVISION.
Ld. Corehouse.
H.

vintner is debtor for the impost to the magistrates, and when he pays, it is in virtue of their title only, exercised through the complainer as authorized collector.

"The case of toll-bars is very similar. The tolls are let to the keeper much in the same sense as the impost is let here; but it would be singular if his creditors would watch passengers at the toll-bar, and arrest the toll-duties.

"Yet, there is difficulty in distinguishing the case from other analogous cases the other way; and as the proceeding of the respondent may lead to other similar questions, the Lord Ordinary thinks it proper to report the case."

said estate be sold to the best advantage, and the price divided No. 176.
and every of the children then living of my said sisters, share
like ; and amongst the child or children of such of my nephews Feb. 15, 1834
s may be then dead, such child or children to have his, her, Ferguson v.
her's or mother's share only." Ferguson.

nald's funds fell far short of paying his legacies and purchasing

His executors raised a process of multiplepoinding, in which
in 1791, directed that the free funds should be divided between
d heirs of provision of the estate of Cairney, and the legatees,
oportion that the value of the estate of Cairney, minus £2950,
e said sum of £2950," the amount of the legacies. After va-
state of Cairney, a remit was made to an accountant to distribute
nd according to these principles. In his report, the accountant
" Patrick Ferguson falls to be ranked for £750, as the sur-
r the estate of Cairney." " And concerning the retained
ught entailed to the said Patrick Ferguson, the heir, and the
s-male of his body ; whom failing, the first lawful son of the
Rennald, youngest sister of the said Patrick Rennald, and the
s-male of his body, the heirs always assuming the surname or
ie of Rennald only, under an irritancy ; whom all failing, to be
ong all and every the children then alive of his the said Patrick
said sisters, share and share alike, and among the child or
such of the nephews and nieces of the said Patrick Rennald
then dead, such child or children to have his, her, or their
mother's share only. The trustee, in terms of Mr Rennald's
end out the same to the best advantage, and to account with
aid Patrick Ferguson, of and concerning the same, when he
the age of twenty-one years ; and in case of his demise before
uch age, the said trustees to manage and improve for the heir
f the said Patrick Ferguson, until he shall attain majority, ex-
ways a suitable sum for the education of the said Patrick Fer-
l failing him, for the education of the next heir of entail."

ort was approved of; and on 3d July, 1793, the Lord Ordi-

" that Patrick Ferguson was entitled to rank upon the fund
alongst with the other legatees, for the legal interest upon the
ws as a surrogatum for the estate of Cairney, from six months
estator's death." Patrick Ferguson survived majority, and
for several years to draw the interest on the retained capital.*
daughter, Mrs Ferguson or Christie ; he was survived by a
Ferguson or Ritchie ; and another of his sisters left a son,
nter. The testator's sister, Jean Rennald, having died without

Ferguson, and a son, a sailor, went abroad, and were understood to
be, but no certain accounts of their death reached this country.

No. 176. issue, a competition as to the division of the retained capital arose between these parties; and a process of multiplepinding was raised to set the question.
 Feb. 15, 1894.
 Ferguson v. Ferguson.

Pleaded by the Daughter—

The claimant has right to the whole fund; for it is impossible suppose that it was the testator's intention that the destination of the estate of Cairney was to regulate the succession of the comparative small sum of money which was ultimately retained. Indeed, so soon Patrick Ferguson came of age he was entitled to have called up the retained capital, and discharged the executors, so that the absolute right clearly vested in him, and now belonged to the claimant, his daughter. There is no *res judicata* to the effect that the retained capital is *surrogatum* for the estate of Cairney. On the contrary, the accountant report, which was approved of, implies that it belonged to her father.

Pleaded by the Sister and Nephew—

The retained capital formed the *surrogatum* of Cairney; and accordingly it was recognised as such, both in the interlocutor under which the remit was made to the accountant, and in the one approving of the report so that it was in truth *res judicata*. It must therefore follow the destination of that estate, and be distributed as the testator had directed regarding that estate, so soon as the male issue of Patrick Ferguson, and the issue of Jean Rennald, failed. On these principles, one-third of it fell to the daughter of Patrick Ferguson, and one-third to each of the claimants.

The Lord Ordinary "preferred the claimants, James Hunter and Mr Jean Ferguson or Ritchie, to the extent of two-thirds of the fund in medio, equally between them, and the claimant, Mrs Jean Ferguson or Christie to the remaining one-third of said fund, in terms of the destination contained in the will of the deceased Patrick Rennald, and decreed in the preference accordingly."

Mrs Ferguson or Christie reclaimed.

THE COURT unanimously adhered, subject to caution being found for repetition in the case of Patrick Ferguson or his son being still alive.

MAGISTRATES of WIGTON, Pursuers.—*Keay—Marshall.*
 CLYMONT and A. GLOVER, Defenders.—*D. F. Hope—Pyper.*

No. 177.

Feb. 15, 1834.
 2d Division.
 T.

Leave refused to appeal against a judgment repelling a preliminary

Magistrates of
 Wighton v. M^c.
 Clymont.

on by the defenders, for leave to appeal from the judgment men-
 a, 289, which see.

Moncrieffe's
 Tutors v. Perth
 Navigation
 Commissioners.

JUSTICE-CLERK.—Our judgment does not exhaust the cause, but only
 begin. If the defenders would admit the usage, we might allow the
 the judgment would then be one substantially exhausting the cause;
 mds, we cannot. The case of Aikman v. the Duke of Hamilton,¹ re-
 the petitioners, was not a question of title, and I am for refusing the

GLENLEE and MEADOWBANK concurred.

PETITION refused.

TOD and ROMANES, W.S.—M'MILLAN and GRANT, W.S.—Agents.

MAS MONCRIEFFE'S TUTORS, Suspenders.—*D. F. Hope—Patton.* No. 178.
 NAVIGATION COMMISSIONERS, Respondents.—*Keay—Smythe.*

—*Harbour.*—Question under a local statute, for improving the
 harbour of Keith, whether a part of the river called Friarton
 within the limits thereof, in the intendment of the statute, so
 is entering it were liable in the duties imposed by the act. It
 in the form of a bill of suspension, at the instance of the tutors
 omas Moncrieffe of Moncrieffe, by whose estate Friarton Hole
 ded. The Lord Ordinary reported the bill on Cases; and the
 ing clearly of opinion that it was included, refused the bill with-
 dice to any special claims of exemption the suspenders might

Feb. 15, 1834.
 2d Division.
 Bill-Chamber.
 Ld. Moncreiff.

J. G. MACKAY, W.S.—WM. MURRAY, W.S.—Agents.

¹ Ante, IX. 594.

No. 179. MRS DYKES or M'KENZIE, and Others, (BOYES' TRUSTEES,) Pursuers.

—*D. F. Hope—Maitland.*

Feb. 18, 1834.
Dykes v. Mar-
shall.

DAVID MARSHALL and JAMES BRYSON, Defenders.—*Rutherford—
Paterson.*

Process—Teinds—Warrandice.—The proprietor of separate lands, all lying within the same parish, sold part absolutely, and part in real warrandice, and granted a personal obligation of warrandice: the real warrandice did not apply to future augmentations, but the personal obligation did: and in a process of locality, a decree was pronounced, localising an augmentation on the warrandice lands, in respect of the real warrandice: Held, in a reduction of the decree by the representatives of the grantor, that the decree must be set aside, reserving to the purchaser to make his personal obligation effectual as accords.

Feb. 18, 1834.
at Division.
d. Moncreiff.
D.

IN 1723, Mrs Grizel Hamilton, with consent of her husband, Walter Gilchrist, disposed to John Bryson, the lands of Neilsland, Sheriff-faulds, and Burnhouses, the wood of Neilsland, and the teinds, parsonage, and vicarage thereof, “as for the principal, and sicklike all and hail the lands of Earnockmuir, and lands of Devonhill, in special and real warrandice and security for the foresaid lands of Neilsland, Sheriff-faulds, and Burnhouses, teinds, parsonage, and vicarage thereof, wood of Neilsland, and hail pertinents thereof, principally above disposed, so that, if it shall happen the same, or any part thereof, or the maills, farms, profits and duties of the samen, to be evicted from the said John Bryson, or him any-ways troubled, molested, or debarred from the possession thereof, by and through any debts, diligences, encumbrances, and warrandices affecting the same, that then, and in that case, the said John Bryson shall have immediate access, ingress, and regress to the hail warrandice lands, respective above mentioned, and to the uplifting the hail rents and duties thereof, and that effeiring and corresponding to any eviction or distress that may happen upon the said lands, teinds, wood, and others, principally above disposed, by virtue of the said debts or encumbrances.”

The disposition also contained this clause:—

“We both, with one consent, bind and oblige us, our heirs and successors, to warrant to be free, safe, and sure, to the said John Bryson, from all by-past wards, marriages, &c., and, generally, from all and sundrie other perils, encumbrances, burdens and inconveniences *whatsomever*, which may any way stop or impede the said John Bryson, in the peaceable possession of the lands, teinds, wood, and others above disposed, and from uplifting and receiving the maills and duties, and casualties thereof, at all hands and against all deadly, as law will; *excepting always* furth and from the said disposition and warrandice thereof *above written*,

sum of twelve pounds Scots money, yearly, of feu-duty, and eight No. 179.
 and a half of meal yearly, in name of teind-duty, and that as well
 mage as vicarage, and the sum of forty shillings Scots, yearly, of ^{Feb. 18, 1834.}
 master's fee, with which the said lands, teinds, wood, and others ^{Dykes v. Mar-}
 ipally above disposed, are hereby expressly declared to be burdened ^{shall.}
 affected, in all time coming; as also, excepting the current tacks, &c.
 I, the said Grizel Hamilton, with consent of the said Walter Gil-
 t, my husband, for his interest, and I, the said Walter Gilchrist, for
 lf, and taking burden on and upon me for my said spouse, and we
 with one consent, bind and oblige us and our foresaids, to warrant
 nds, teinds, woods, and others above disposed, to be free of and
 the payment of all bygone feu and teind duties, ministers' stipends,
 masters' fees and salaries, cesses, taxations, and all other public
 ns, due and payable furth of the lands, teinds, wood, and others
 : disposed, at and preceding the term of Martinmas 1723 years, and
 all furdur augmentations, or bearing any furdur proportion of the
 or ministers' stipends presently payable out of the lands, both prin-
 y and in warrandice above disposed, and in all time coming."
 Infestment in the principal and warrandice lands followed on the dispo-
 ; the saine did not contain the clause of personal warrandice. All
 nds lay in the parish of Hamilton.

1741, John Bryson sold to David Marshall the lands of Neilsland
 Burnhouses, with the teinds, parsonage, and vicarage, "as for the
 ipal and sicklike the lands of Earnockmuir, and the lands of Devon-
 in special and real warrandice and security of and for the foresaid
 of Neilsland and Burnhouses, teinds, parsonage, and vicarage there-
 ood of Neilsland, and haill pertinents of the same principally above
 ned, in so far allenarly as the said principal lands, or any part thereof,
 : maills and duties of the same, may happen to be evicted from the
 David Marshall, by or through any debts, diligences, encumbrances,
 rrandices affecting the same, at and preceding the date of the dispo-
 s thereof in my favours, and no farder."

e disposition contained an assignation to the obligations and clauses
 rrandice, contained in the deed of 1723, but did not specifically recite

Infestment followed on the disposition.

nes Gilchrist succeeded to his mother and father, Mr and Mrs
 rist, after which he died, leaving two daughters. One married Mr
 : of Wellhall, and left a son, John. The other was married to the
 of Dundonald. John Boyes, possessed one-half of the lands of Earn-
 air, pro indiviso, along with the heir of the Countess of Dundo-
 and both represented Mrs Gilchrist. John died in 1818, after con-
 g his property to trustees.

the last locality of the parish of Hamilton, the common agent
 g proposed to local part of the augmentation on the lands of Neila-

No. 179. land, &c., belonging to Marshall, and on the lands of Sheriff-
 belonging to Bryson, they objected, that, in virtue of the real warr
 contained in the disposition by Mrs Gilchrist, that augmentation
 be localled on the warrandice lands of Earnockmuir, &c., belonging
 representatives, and lying in the same parish. The Lord Ordinar
 tained the objections, and the teind-clerk accordingly localled the au
 tation upon the lands of Earnockmuir, &c. The rectified localit
 approved as a final one by the Lord Ordinary, in 1826.

Feb. 18, 1834.
 Dykes v. Mar-
 shall.

In 1830, the trustees of Boyes raised an action of reduction of t
 cree of locality, in so far as it burdened the teinds of Earnockmuir
 with the augmentation properly effeiring to Neilsland, &c., and S
 faulds.

Pleaded by the pursuers—

1. The clause 1723, in so far as it relates to the disposition
 lands in real warrandice, does not reach future augmentations of st
 and therefore the decree which rests on the warrandice must b
 aside.

2. Although there is a separate clause of personal warrandice,
 may reach such augmentations, yet this cannot support the decree
 it is incompetent, in a process of locality, to give effect, de pla
 personal bonds of relief, in the same way as if they had been real o
 tions of warrandice. The case of the Duke of Roxburghe¹ is
 point. The question in that case was chiefly whether the heir of
 could be made primarily liable without discussing the heir of line.
 Court held that the obligation was laid on the heirs of entail, a
 heirs did not object to the competency of trying, in the locality,
 liability under the clause of warrandice, because they held entailed
 in the parish.

Pleaded by the defenders—

1. The clause of real warrandice applies to all future augment
 and therefore the decree is well founded.

2. But, at all events, the obligation of personal warrandice r
 these; and, as the pursuers are the representatives of the gr
 they have no interest to set aside the decree, even though rest
 the clause of real warrandice, because they must immediately be li
 indemnify the defenders to the full extent to which any augmen
 might be localled on their lands.

It is competent to determine their liability, and to give effec
 in the process of locality. In the Duke of Roxburghe's case, an o
 tion of warrandice was found effectual against the grantor's represen

lands in the parish; and these lands were localled upon accord- No. 178.

Lord Ordinary found, "that it is competent and relevant for the pursuers in this process, in order to support the allocation of the stipend on the lands of the pursuers, to prove that the said pursuers, proprietors of the said lands, represent the original author of the decree, and are bound, by such representation, to relieve the said lands of the augmented stipend otherwise allocable on their

Feb. 18, 1834.
Dykes v. Marshall.

pursuers reclaimed; and having craved a diligence for setting at issue the question as to representation, the Court, "in hoc statu, recalled the decree contained in the interlocutor reclaimed against, and before answer was given, remitted to the Lord Ordinary to grant the diligence asked for recovery of the writings specified in modum probationis, reserving for future consideration all matters in dispute between the parties, including the effect of the writings when recovered, and all questions of expenses."

On the remit the Lord Ordinary, in respect it was admitted by the pursuers that they "represent Mrs Gilchrist, the author of the defenders' obligation, grantor of the obligation of warrandice in question; and, in that it still appears to the Lord Ordinary, that the decree of localled lands ought to be reduced, so far as it is challenged by the summons in question, was just in itself, and sufficiently warranted by the state of the facts between the parties, and according to the authority of the late case of *Macdonald v. the Duke of Roxburghe*, January 18th, 1831, the judgment of the Court has now been affirmed, sustained the defences to this effect, but refused to assize the defenders, and decerned." †

RE.—The Lord Ordinary would have had great doubt on this question. But the decision in the case of *Ker v. Duke of Roxburghe's tutors*, January 18, 1834, seems to be conclusive of it. The question arose in a locality, simply; and was nothing but a personal obligation of warrandice alleged. Yet this was sufficient even against an heir of entail."

RE.—After the remit by the Court, the cause was enrolled for debate, on the question of representation. But, after some short discussion, it was conceded that representation had been sufficiently established. The debate then proceeded on merits. It was admitted in argument, and the Lord Ordinary is clearly of opinion, as he formerly was, that the real warrandice in the original titles does not cover the case of augmentations of stipend. But the personal obligation of warrandice is perfectly distinct from this. And the Lord Ordinary is of opinion, 1. That the obligation is by its terms effectual to bind Mrs Gilchrist and her representatives to relieve the defenders' lands of all augmentations of stipend; 2. That the obligation has been sufficiently transmitted to the defenders, though not specified in the intermediate conveyances. 3. That, as that obligation of warrandice requires, that the lands and tenements disposed, shall be free of all further augmentations, &c., according to the opinion above stated, and it is not denied, that the lands were proprietors of lands in the parish, on the tenements of which the augmen-

No. 179. The pursuers reclaimed.

Feb. 18, 1834.
Dykes v. Marshall.

LORD BALGRAY.—I think the decree under reduction rests on an erroneous basis, as it is founded on the clause of real warrandice in the original titles. On that subject I concur in the opinion expressed by the Lord Ordinary, in the early part of his note, and hold that it does not apply to the case of augmentations stipend. The decree must therefore be reduced as to this, and this question determined as if it were stated in a depending locality. There has been a considerable relaxation of late years in the practice of the Court, as to the extent to which they have gone in deciding questions arising among the heritors, though not strictly proper to the process of locality. At least this has been allowed to occur when no party had an interest to object.

His Lordship was understood to add, that though the Court might find it necessary to sustain the pursuers' objection to their being localled upon, *hoc statu*, in virtue of the clause of personal warrandice, the only result would be, that the defenders would subject them to the same liability by a more circuitous and expensive procedure.

tation could be localled, the relief could only be effectually given by laying that portion of the augmented stipend, which, in a question with other parties, would have attached to the lands of the defenders, on those lands belonging to the pursuers; and, 4. That supposing it to be true, that, in the process of locality, it had been supposed that the real warrandice applied, this can give the pursuers no title or interest to reduce the decree, which simply imposes the augmented stipend on their lands, if it shall be held that, in virtue of the personal obligation, that allocation was correct in itself, according to the just rights of the parties. In explanation of the 3d and 4th points, the Lord Ordinary has to observe, that the question as to the competency of adjusting the rights of the parties in this manner, in a process of locality, might possibly be different, if the minister or the titular, or other heritors were objecting to it, and could show an interest so to object, though it is difficult to suppose such an interest to exist. But here it is the party himself who is bound to give the relief, who objects in substance that the relief has been given in the only effectual way. In the case of Ker against the Duke of Roxburghe, the Lord Ordinary thought that there was great difficulty in giving the relief in this way; but his chief ground of difficulty was, that the party in the locality was an heir of entail and that, though there was a clear personal obligation of warrandice, it was at least a very doubtful question, whether that obligation attached primarily to the heir of line or to the heir of entail, and it was impossible in the locality effectually to discuss that question, because the heir of line, having no lands in the parish, was not, and could not be made a party to the process. The Court, however, finding that the grantor of the obligation had made an entail of lands in the parish, and also considering that the entail was not recorded, seemed to have been, on the whole, of opinion, that the obligation was meant to attach to the heir of entail, and, at the same rate, that effectual relief of the lands could only be given against him; and, therefore, they altered the Lord Ordinary's judgment, and threw the burden at once on the Duke of Roxburghe, leaving him, if so advised, to try any question of relief with the heir of line. That judgment has been affirmed; and it appears to the Lord Ordinary fully to decide the principle on which the present case depends, and indeed to decide it a fortiori."

LORD CRAIGIE was understood to observe, that the process of locality was not the proper process for trying the liability of the representatives of Mrs Gilchrist to fulfil a personal obligation of hers. No. 179.
Feb. 18, 1883.
Dykes v. Mar-

LORD GILLIES.—I am for altering the interlocutor. The merits of the question now at issue between the parties should be disposed of, as if raised in a depending process of locality. In that process it is the duty of the Teind clerk to local stipend upon all the teinds of the same sort. Proceeding in this way, a certain portion of the augmentation falls to be localled, according to the ordinary rules of law, on the lands belonging to the defenders. They oppose this upon the ground that they hold a personal bond of relief from Mrs Gilchrist, whose representatives have lands in the parish, and are parties to the process. I do not think this enough to warrant the teind clerk to deviate from the usual rules of law, in allocating on the defender's teinds. It was a simple personal obligation which was given and taken by the predecessors of these parties. Can the Court at once alter this, in so far as to treat it precisely as if it were a real obligation? Suppose that a person sold his estate, and gave a personal obligation of warrandice against future augmentations. When future augmentations were imposed, how is the relief to be made good against the seller, except by raising an ordinary action against him? And if the seller should, in the meantime, have purchased a new estate in the parish, could the teind clerk be made to operate the personal bond of relief, to the effect of at once localling the augmentation wholly upon the new estate? If he could do so, it may be difficult to see why he might not go against the stock as well as the teind, if both were necessary in order to afford complete relief. As to the case of the Duke of Roxburghe, it is not in point to this. The Duke objected that he was merely an heir of entail of the granter of the obligation, and that the heir of line was the party liable. The Court held, in the circumstances, that the heir of entail was liable; and that was the chief, if not the sole question, discussed. In short, I do not think that the defenders in this cause take the proper method of making effectual the personal obligation in their favour, when they attempt to do so in the locality. Nothing but a personal obligation passed between their authors, and the Court cannot treat it as if it were real.

LORD PRESIDENT was understood to concur with Lord Gillies.

THE COURT altered the interlocutor of the Lord Ordinary, and reduced in terms of the libel, "reserving to the defenders to make effectual their relief under the personal clause of warrandice in any competent form, as accords:" and found the pursuers entitled to the expenses of process, except as to the question of representation, for which last expenses they were found liable to the defenders.

W. KERRIE and M. FARLANE, W.S.—LOCKHART, HUNTER, and WHITEHEAD, W.S.—Agents.

No. 180.

ANDREW WILLIAMSON, Pursuer.—*D. F. Hope—M'Dougall.*A. T. F. FRASER, Defender.—*Sol.-Gen. Cockburn—Rutherford.*

Feb. 18, 1834.

Williamson v.
Fraser.

Landlord and Tenant—Proof.—Circumstances in which a notarial copy of a missive of lease, delivered by the landlord's factor to the tenant, was held sufficient proof of the terms thereof, in a question with the landlord's representative, in regard to a claim for meliorations.

Feb. 18, 1834.

2^d DIVISION.
Ld. Mackenzie.

T.

THE late Fraser of Lovat, in 1808, let two farms on his entailed estate of Lovat, called Teachnuik and Croyard, to the late George Urquhart, for nineteen years, from 1808 as to the latter, and 1809 as to the former. These farms had previously been possessed separately by two tenants, under leases granted by the commissioners for managing the forfeited estates, while the Lovat estate was in the hands of the Crown, and which provided, that the tenants should be entitled, at the end of the lease, to the value of meliorations made by them. The Lovat estate was restored to the late Simon Fraser, under burden of all the obligations and contracts entered into by the commissioners; and, accordingly, at the expiry of the leases of Teachnuik and Croyard, processes were raised by the outgoing tenants, against Lovat, before the Sheriff of Inverness-shire, for the value of their meliorations. After considerable procedure, the value of the improvements for which remuneration was to be made, was fixed by the Sheriff at £451 for Teachnuik, and £146 for Croyard; and these sums the incoming tenant, Urquhart, paid, taking a receipt therefor from Lovat. At the conclusion of his leases, in 1827 and 1828, Urquhart had the houses, fences, and trees appraised, and demanded their value, to the extent of three years' rent, from the defender, Fraser of Abertarf, as representative of the late Lovat, who had left him all his unentailed and moveable property—the entailed estates, including the farms in question, having descended to the present Lovat, who, under the entails, was not liable to implement the personal obligations of his predecessor, and, consequently, not bound to pay the value of improvements, &c., stipulated for in leases. Urquhart having thereafter died insolvent, the pursuer, Williamson, who had obtained himself decerned executor qua creditor, raised the present action against the defender, concluding for payment. The original missives between Lovat and Urquhart could not be recovered; but before Lovat's death, his factor, who was also a notary-public, had delivered to Urquhart a copy, attested by him as notary. According to this copy, these consisted of an offer by Urquhart, with a simple acceptance by Lovat—the offer, in so far as regarded buildings and improvements, bearing as follows: "I also agree to pay, at my entry to these farms, for the biggings, according to comprisement for the farm of Croyard; and to pay you the claim of the outgoing tenant, or rather the

claim of Mr Robertson, the present tenant, as the same may be ascer- No. 180.
tained, in terms of the commissioners' lease to William Robertson, and sub-
sequent minutes by them relative thereto—it being understood, that if I Feb. 18, 1834.
pay for the trees, I shall be at liberty to cut down and dispose of the one- Williamson v.
half of all the trees upon the farm. It is likewise understood that I am Fraser.
to be allowed for the biggings, fences, and trees, whatever sum they shall
be comprised at, not exceeding three years' rent, at the expiry of my
lease, which is to be for nineteen years from the terms of my entry."

In defence, it was pleaded—

1. That the defender was not liable in this claim, which lay properly
against the heir of entail, who had succeeded to the estates of which the
farms in question formed part.

2. That there was no legal evidence of the alleged stipulations as to
buildings and improvements; and,

3. That, at all events, he was entitled to set off counter claims for
failure on the tenant's part to implement his obligations as to leaving in
good condition the buildings, &c., delivered to him by the landlord.

The Lord Ordinary pronounced this interlocutor: " Finds that the
pursuer has a sufficient title to pursue, as vested in the right which was
in the deceased George Urquhart, as tenant of Teachnuik and Croyard;
and that the defender is liable in the obligation corresponding to that right,
as being the representative of Fraser of Lovat, the landlord of these farms:
finds there is sufficient evidence in process, that the said George Urquhart
had a lease of the said farms; and that, upon entering upon the said farms,
he paid certain considerable sums of money to the outgoing tenant, as me-
liorations, for which they were entitled to receive value from the landlord,
from the incoming tenant, under a new lease to be made by the landlord:
finds sufficient evidence that these payments were made, in consideration of
an agreement that the said George Urquhart should, at the expiry of his
lease, have right to a claim against the landlord, on account of the biggings,
fences, and trees, not to exceed three years' rent; but finds it not proved,
by the evidence in process, nor competently offered to be proved, that the
said claim was to be made on account of such biggings, fences, or trees,
as were not meliorations, either paid for or made by the said George Ur-
quhart: further, finds it not proved, or competently offered to be proved,
that the said George Urquhart was liberated from the ordinary obligation
upon a tenant, of keeping up the houses and fences, so far as these were
not meliorations paid for by him, but delivered to him without payment by
the landlord; and finds, on the contrary, that there is sufficient evidence
in process that such obligation was undertaken by him as tenant; finds,
therefore, that any claim the pursuer, as in right of Urquhart, may have
for meliorations against the defender, as the landlord's representative,
must be set against any claim which may be competent to the defender,
as said representative, for failure by George Urquhart to leave the big-

- No. 180. gings and fences delivered by him to the landlord in proper condition ;
 Feb. 20, 1834. and appoints the cause to be enrolled, that the parties may be heard on
 Henderson v. the evidence existing in process on the amount of said opposite claims
 Gilfillan's respectively, or on the mode of proving the same.
 Agent. The defender reclaimed, but the Court adhered.
 Oldaker.

Æ. MACBRAY, W.S.—GEO. MONRO, W.S.—Agents.

- No. 181. A. P. HENDERSON, Pursuer.—*Cunninghame*.
 GILFILLAN'S AGENT, Compearer.—*D. F. Hope*.

Agent and Client—Mandatory.—A party, in whose favour expenses had been awarded, having gone abroad—held, that his agent was entitled to compear and crave that decree should go out in his own name, without there being any mandatory sisted for his client.

- Feb. 20, 1834. EXPENSES having been awarded to Gilfillan, in an action with Hender-
 2D DIVISION. son, and he having gone abroad, compearance was made for his agent, who craved, that the decree for expenses might be allowed to go out in his name. This was objected to by Henderson, on the ground that, Gilfillan having gone abroad, no motion could be made in the cause till a mandatory for him was sisted.

THE COURT repelled the objection, and allowed decree to go out in name of the agent.

C. F. DAVIDSON, W.S.—WOTHERSPOON and MACK, W.S.—Agents.

- No. 182. MRS MARIA OLDAKER OF GOLDNEY, Pursuer.—*G. G. Bell*.

Jurisdiction—Husband and Wife—Divorce.—English parties married in England, having come to Scotland, and one of them having committed adultery there, and having been personally cited in an action of divorce—held, that the Scotch court had jurisdiction to entertain it.

- Feb. 20, 1834. THE pursuer, Mrs Goldney, and her husband, both natives of, and domiciled in England, and having been married there, came, in March, 1831, to
 2D DIVISION. Edinburgh, where they took no house, but resided in lodgings. It was stated, that the husband had had some intention of settling there, but that, not
 Consistorial. being able to make suitable arrangements, he had abandoned the plan. In
 Ld. Mackenzie. the meantime, and while in Edinburgh, he was guilty of repeated acts of adultery ; and the pursuer having raised an action of divorce, the summons was executed against him personally, after the parties had been more than forty days in Edinburgh. No appearance was entered for the husband, and the pursuer, on the 9th July, made the usual oath de calumnia.

there was no collusion betwixt her and her husband, and that she had No. 182.
 reason to believe he had committed adultery. Thereafter, towards the
 of July, both parties returned to England, but no longer living to- Feb. 21, 1834.
 der. A proof of the adultery having been allowed, the cause came Henderson v.
 re Lord Mackenzie, who appointed an additional proof of the Thomson.
 der's having been domiciled in Scotland at the date of raising the
 on. A proof was led of the facts above mentioned, and thereupon
 Lord Ordinary reported the cause to the Court "on the point of
 icile."

The pursuer accordingly gave in a Case, contending, that the acts of
 ltery having been committed in Scotland, the defender having been
 iced there by forty days' residence when the action was raised,
 having been personally cited, there could not now be any doubt under
 several authorities on this point,¹ that the action was competently
 ight in the Scotch courts.

ORD JUSTICE-CLERK.—The question of collusion is not before us; and as to
 of domicile, I cannot entertain a doubt after the decisions.

ORD GLENLEE.—But for the decisions, I would have thought this not the
 per forum; but after the decisions, there is no need to say any more about it.

ORD MACKENZIE.—Whatever view may be taken of such proceedings by
 English Courts, our law is clear. I do not go on there having been residence
 forty days, nor on the supposition that the residence was *animo remanendi*, but,
 pendently of these considerations, the decisions establish the competency.

THE COURT accordingly sustained the instance, and remitted to proceed
 accordingly.

JAMES USHER, S.S.C.—Agent.

WILLIAM HENDERSON, Suspender.—*Whigham—W. Forbes.*

No. 183.

JOHN THOMSON, Charger.—*Coventry.*

Process—Suspension.—After a record has been closed in a reduction of an infe-
 court decree, it is incompetent, in a relative suspension, to turn the decree and
 ge into a libel, though the record be not closed in the suspension, and the
 cases are not conjoined.

HENDERSON presented a bill of suspension of a charge upon a decree Feb. 21, 1834.
 ounced against him by the Sheriff of Kinross in 1818, alleging that
 had never been cited, and had never appeared; that although the 1st Division.
 rection of citation bore, that a copy was delivered to him personally, Ld. Moncreiff.
 t the witnesses were not designed, and did not subscribe it, so that both S.

¹ Mentioned in Ferguson, 8, 11, 12.

No. 183. In terms of the statute 1686, c. 4, and of an Act of the Sheriff-court i
 1804, whereby it was declared, that an officer, executing a summon
 Feb. 21, 1834. should leave a copy thereof with a copy of the citation, "in presence
 Henderson v. two witnesses, who shall subscribe the execution," there was no legal ev
 Thomson, dence of citation. The charger answered, that an execution of citatio
 in a Sheriff Court, according to common practice, did not require to b
 signed by witnesses, or to contain the designations of witnesses; and th
 Henderson was barred from the objection, as his agent had taken on
 the summons to see for him.¹

The bill was passed, and the suspender, besides expeding letters of sus
 pension, raised a process of reduction on the same grounds. In eac
 process, Thomson stated a plea that, supposing the execution to have been
 incorrect, the decree and the charge should be turned into a libel.² The
 processes were not conjoined. After the record in the reduction was
 closed, but before closing the record in the suspension, Thomson moved
 the Lord Ordinary, in the latter process, to turn the charge into a libel.
 Henderson objected that the reduction was properly the leading process,
 and the record was closed in it; that judgment must be given upon that
 record as it stood, and it was incompetent to turn the charge into a libel
 in the suspension.³

The Lord Ordinary pronounced this interlocutor:—"In respect that
 the execution of citation in the action before the Sheriff of Kinross appears
 to have been irregular and improbativ, whereby the decret obtained was
 ineffectual as a ground of diligence, and in respect that it appears to the
 Lord Ordinary to be competent and just in the circumstances of the case,
 that the decret and charge thereon should be turned into a libel, turns
 them into a libel accordingly; and appoints parties to be farther heard on
 the course of proceeding proper to be adopted for adjusting and closing a
 record in this process, on the merits of the cause; and, in hoc statu,
 reserves all questions of expenses." *

¹ Calder, Dec. 20, 1825 (ante, IV. 331).

² *Herbertson and Co.*, 12th June, 1793; *Gordon*, 19th Feb. 1822; *Allan*, Jan. 13,
 1825 (ante, III. 429); *Fraser*, Feb. 26, 1825 (ante, III. 590); *Semple*, 2 Br.
 Supp. 457.

³ *Campbell*, Feb. 22, 1827 (ante, V. 412); *Watts*, July 1, 1828 (ante, VI. 1048).

* "NOTE.—This cause has got into a little apparent perplexity in the form.
 There is a reduction and a suspension, and, in both, the charger and defender has a
 plea, that supposing the execution of citation to have been incorrect, so as to vitiate
 the decree as a ground of diligence, the decree and charge should be turned into a
 libel. In the reduction, the record was closed apparently without its having been
 observed, that by the decision of the Court, February 22, 1827, *Campbell v. Mac-*
donel, it may be held to be incompetent to turn the charge or decret into a libel
 after the record is closed. The Lord Ordinary was not aware of this state of the
 process till after it was at avizandum for judgment. But the record has not been
 closed in the suspension; and the processes have not been conjoin — ing of

l Ordinary, at the same time, pronounced this interlocutor in No. 183.
 n :—" Having considered the closed record, and heard parties' Feb. 21, 1834.
 thereon, and made avizandum with the process, and with a Henderson v.
 cess of suspension, finds, that the execution of citation in the Thomson.
 on before the Sheriff of Kinross, was irregular and improba-
 ur as it was not signed by two witnesses, and did not bear that
 as were present at the execution, in terms of the standing

fore, that it is competent in law, and that justice requires that the
 creet should be turned into a libel, he has pronounced the above
 n the suspension, and after a finding to the same effect in the reduc-
 ned farther judgment in that process until a record shall be closed
 sion.

ving are his grounds of judgment :—The Lord Ordinary is inclined to
 provision of the Act 1686, c. 4, as to executions, was meant to apply
 of citations in the Sheriff-courts; because it is clear that the first part
 to citations themselves, expressly applies to those of all Judges, and
 nd others whatsoever,' in the second part, are quite broad enough to
 tions of citation, and he rather supposes that this was one of the statu-
 ns which had gone into disuse in the Sheriff-courts of Fife and Kinross,
 re meant to be rendered operative by the regulations published by the
 onypenny) in 1804. But at all events, the rule of that Court in 1818
 he Lord Ordinary cannot think that an execution directly contrary to
 l execution, on which a valid decret in absence could pass. From
 as made, he believes that the practice in the Sheriff-court of Edinburgh
 at the executions returned are signed by the witnesses.

ther hand, the Lord Ordinary is satisfied, by the certificate of Mr
 he Sheriff-clerk, that he had as an agent, and not then Sheriff-clerk,
 process in question; and must presume that he did not do so without
 way employed by the party. There is probably little doubt, there-
 summons had been served, and was well known to the pursuer; and
 he law allows of a remedy, there is no cause for giving the pursuer any
 age over the defender from the error of the officer.

g the decret and charge into a libel, the Lord Ordinary proceeds on
 precedents cited, particularly *Herbertson and Company v. Rattray*,
 ; *Gordons v. Milne*, February 13, 1822; *Allan v. Harrison*, January
 d *Fraser v. Fraser*, February 26, 1825. The title of the report of
 id Company is: 'The decret of an inferior court, though fundamen-
 y be turned into a libel:' and the nullity in that case being in defect
 a, was certainly as fundamental as possible. There are also earlier
 ame effect; and in the case of *Allan*, the question occurred in a reduc-
 erior court decree, founded on a blunder in the form of the proceed-
 regard to expenses, in the case of *Fraser*, the Ordinary had found
 to the suspender; but the Court altered the judgment in that point,
 the question of expenses till the determination of the cause.

future course of procedure, if the interlocutor becomes final, the par-
 at *Caldwell v. Campbell*, March 5, 1829."¹

¹ Ante, VII. 545.

No. 183. regulations of that Court; therefore finds that the decree obtained in absence on such citation, was ineffectual to constitute the debt against the present pursuer, or to be sustained as a ground of legal diligence, without prejudice to the effect of it as a ground of action; but in respect of the interlocutor pronounced in the relative process of suspension of this date supersedes further advising in this cause until a record shall be closed in that process, and in the meantime reserves all questions of expenses."

Feb. 21, 1834.
Kirkland v.
Cadell.

The suspender reclaimed.

LORD BALGRAY.—Had there been no process but the suspension, I should have had no doubt about allowing the charge to be turned into a libel. I should have been clear for adhering.

LORD GILLIES.—I think the closing of the record in the reduction was fatal to any subsequent attempt to turn the decree and charge into a libel in the suspension. I think it incompetent to take that step now.

LORD CRAIGIE was understood to be for adhering.

LORD PRESIDENT concurred with Lords Balgray and Gillies.

THE COURT altered, "and, in respect the record is closed in the action of reduction, found it incompetent to turn the decree under suspension into a libel:" and remitted to the Lord Ordinary to proceed, reserving the question of expenses.

J. TAYLOR, S.S.C.—R. WILSON, S.S.C.—Agents.

No. 184. JOHN KIRKLAND, Pursuer.—*D. F. Hope—Cunninghame—Milne.*
W. CADELL and R. ALLAN, Defenders.—*Rutherford—A. Dunlop.*

Process—Bankruptcy—Sequestration.—A proprietor, who got decree against the trustee on a sequestrated estate, qua trustee, for the rents and feu-duties payable under a lease and feu held by the bankrupt from him, found not entitled, in attempting to make good his claim against the individual creditors on the estate, to select one or two of them against whom to proceed, without calling the others.

Feb. 21, 1834.
2d Division.
Ld. Medwyn.
T.

THE pursuer, Kirkland, along with one Sharp, (in whose right he now stood,) raised an action against the trustee on the sequestrated estates of the Wilsonton Iron Company, concluding to have it found that the trustee, by entering into possession of a lease, and taking infeftment in a feu held by the company of them, had become liable as trustee for the rent during the currency of the lease, and the feu-duty in all time to come. The Lord Ordinary found "that the Wilsonton trustee having entered into possession of the lease, and been infeft in the feu-rights, and having for so many years taken benefit of the lease and feu-rights for the use of the sequestrated estate, has become the assignee to the lease, and the vassal in the feu-rights, and must be bound to fulfil the prestations due under these contracts towards the landlord, and is not now entitled to abandon

and he decerned against him qua trustee for the rents and feu- No. 184.
 allen due, and to fall due. This judgment was adhered to by the
 house,¹ and affirmed by the House of Lords.* The funds of the
 eing exhausted, Kirkland addressed a circular to each of the cre- Feb. 21, 1834.
 n the estate, so far as known to him, requiring payment of the Kirkland v.
 amounting to nearly £7000. The creditors having either refused Cadell.
 ply with this demand, or having returned no answer, Kirkland
 two of their number, the defender Cadell, and the late Thomas
 who had each ranked for a debt of £525, and had been commis-
 on the estate, from whom to attempt to operate payment; and he
 ighly, under form of instrument, “protested, intimated, and repre-
 to the said Thomas Allan and William Cadell, defenders, that
 h all the said creditors under the said sequestrated estates were
 onjunctly and severally, in payment to the pursuer, the said John
 id, of all the foresaid claims as above mentioned, yet, under the
 tances above referred to, and the whole circumstances in general
 ng the case, the pursuer, the said John Kirkland, had found it
 le and expedient to select them, the said Thomas Allan and
 a Cadell, defenders, because, besides being creditors on the said
 rated estates, they had been and were commissioners thereon, (the
 ommissioner being Richard Scougall, merchant in Leith, who
 bankrupt, and his own estates were sequestrated, when he ceased
 and took an active management from the period of their election
 o that date, in the whole matters embraced under, or connected
 e said sequestration, and particularly with the matters out of which
 esaid claims originate; and that under these circumstances, the
 demanded payment from the said Thomas Allan and William
 defenders, of the above-mentioned total accumulated sum of prin-
 id interest, as at Whitsunday last, of £6995, 10s. 5½d. sterling,
 o of the interest of that part of the said sum which is principal,
 £5040 sterling, from the said term of Whitsunday last until pay-
 nd that within fourteen days from the said 20th day of June, 1833;
 the event of their refusing or delaying payment of the said foresaid
 eyond the foresaid period, the pursuer, the said John Kirkland,
 ad that he would raise the present action against them both, con-
 , as herein after mentioned.”

further protested, and intimated, “that, notwithstanding of the
 test and of the process so to be raised against them, the pursuer,
 t John Kirkland, still held all the other creditors on the said se-
 ted estates, conjunctly and severally liable to him in payment of
 ns and claims above specified: And (the pursuer, the said John

¹ 17, 1831 (ante, IX. 596).

* March 25, 1833 (1 S. D. & B. Supp.)

No. 184

Feb. 21, 1834.
Kirkland v.
Cadell.

Kirkland, by the said protest, farther intimated,) that notwithstanding of what was therein stated, as above set forth, he was quite willing and ready to call any person or persons as a party or parties to this process, provided always, that they, the said Thomas Allan and William Cadell, became bound, conjunctly and severally, to free and relieve, and indemnify the pursuer, the said John Kirkland, of the whole expenses which he might incur, or be found liable for, in consequence of his so doing at their request."

No answer having been returned to this protest, Kirkland raised a summons against Cadell and the late Mr Allan (repeated after his death against the present defender, Robert Allan, his son and representative) "as being in one, or other, or several, or all, of the situations herein after described, viz. as creditors on the said sequestrated estates of the said Wilson and Sons, and William Wilson, junior, and James Wilson, and as having, by themselves, or by mandataries duly authorized by them, attended meetings of the creditors on the said sequestrated estates, held under the said sequestration, in terms of the bankrupt statute, or as having claimed and been ranked as creditors upon the said sequestrated estates, or as having been chosen commissioners on the said sequestrated estates, and having accepted of that office, and acted in that capacity from the date of their election downwards to that time;" and concluding against them, conjunctly and severally, for payment of the arrears due, and of the rents and feu-duties to fall due in time to come.

As a preliminary defence, it was pleaded that the other creditors on the estate ought to have been called; and the Lord Ordinary having sustained the defence, and sisted process till the proper parties should be called, Kirkland reclaimed, and pleaded—

Having obtained decree against the trustee, this is equivalent to a constitution of the debt against all the creditors, in the same way as a decree against a company is a constitution against the individual partners. They are all conjunctly and severally liable, and consequently it is perfectly competent (as decided in principle in the case of *Reid v. Moffat*) to select any one or more against whom to proceed to operate payment of the full amount, leaving them to get their relief against their co-creditors, as to whom they had better means of knowledge than a third party could have. It is no doubt true, that in the cases of *Johnstone v. Arnott*,¹ and *Hamilton v. M'Laren*,² the pursuers were obliged to call all the creditors; but the action in the former of these cases was at the instance of the trustee, and, in the latter, of the agent in the sequestration, who were both aware of the individual creditors with whom they contracted, and who had a duty to perform as officers in the sequestration, which pre-

¹ Feb. 21, 1828 (ante, VI. 570).

² Jan 28, 1830 (ante, VIII. 300).

³ March 11, 1830 (ante, VIII. 709).

na from partially selecting particular individuals from among No. 184.
 d body of creditors against whom to proceed. Farther, in the
 se, the pursuer had offered to call whatever other creditors the
 might require; but they, having returned no answer to this offer,
 arred from insisting in it.

Feb. 21, 1884.
 Kirkland v.
 Cadell.

it was answered—

ra on a sequestrated estate are associated together by act of the
 hey are in no respect in the situation of partners of a company,
 decree against the trustee should be a constitution of a claim
 the individual creditors, conjunctly and severally. The ques-
 er, if there be any liability here at all, that liability is conjunct
 d, is one of the questions to be determined on the merits; and
 sible to assume, in this stage, the existence of that liability, in
 ave which tried, all the creditors must be called. The cases of

v. Arnott, and Hamilton v. M'Laren, are directly in point,
 lthough the trustee was pursuer in the former, the principle of
 as, that creditors being associated by act of the law, were in a
 situation from ordinary conjoint employers, while in the latter,
 er, the law-agent, was as much a proper third party as the pre-
 ers, the law acknowledging no such officer as that of agent; and
 were more favourable for the pursuers' plea, inasmuch as the
 ere were pursuing on obligations directly come under by the
 themselves, and not on a pre-existing obligation incumbent
 unkrup, and adopted by the trustee, as in the present case.

of Reid and Moffat, again, was very special, the creditors
 ne out of the statute, and formed themselves into a manufac-
 sociation, appointing a manager, not the trustee, by whose
 in purchasing goods (as to which the action related), they were
 his direct employers under a voluntary association; but even
 he creditors were concluded against, and the Court merely sus-
 excuse for not citing particular individuals whom the pursuer
 discover. Then as to the offer to call the other creditors, it was
 ler the special condition, that the defenders should become
 njunctly and severally, to free and relieve the pursuer of all the
 he might thereby incur; but if the pursuer was bound, in
 ll them, he had no right to stipulate for any such condition;
 the defenders were entitled to have them called, they were not
 comply with it.

USTICE-CLERK.—I am of opinion, that the interlocutor is well found-
 said as to the case of Johnstone, that it rested on the duty of the
 o knew all the creditors. There is a solid answer to that on the
 : pursuer's own summons. It is just a statement of what was his
 states that he intimated to all the creditors so far as known to him, and
 an action—not against Mr Cadell and Mr Allan, but against them all.

No. 184. Here then is a person in full knowledge of all the creditors who had ranked, and that is a statement of what he knew to be his duty, and he should have followed it out, and he is not entitled to say that he knows nothing about them. He is entitled to no such benefit; and if there were any reluctance on the part of the trustee to give him access to the Sederunt-book to ascertain more accurately who the creditors were, the Court would have compelled exhibition. He, however, chose to select two persons who are said to have been commissioners, and, as individuals, are said to have personally acted. It is a complete mistake to suppose that our former judgment was against any one except the trustee. All that is decided is, that the trustee as such is liable, and there is no decision going to find any individual creditor liable. So far as the trust-estate is concerned, it is fixed against the trustee, but not at all against one individual creditor. The case of *Reid v. Moffat* was a special case. The creditors formed an association, and appointed a manager for spinning yarn, and authorized the purchase, and it was quite different from this. On the other hand, the cases of *Arnott* and *Hamilton* clearly apply, particularly the case of *Hamilton*, who was a law-agent, which is not an office in the sequestration. The question on the merits is a very important question of liability, which is not to be decided without calling all the other creditors; and I see no reason to doubt that the interlocutor is well founded, nor is there any ground for imposing on the defenders the condition of their being liable for expenses before the others are called.

LORD GLENLEE.—I am entirely of the same opinion. The pursuer takes it for granted that all the creditors are liable conjunctly and severally. But if the debt was so fully constituted by the former decision, why did he not give a charge of horning? The very point in debate on the merits, is whether there is a joint and several liability. This and the other points will be discussed on the merits, but how can these points be tried without calling all the creditors? Suppose a decree against a company is disputed, and a new decree sought against one or two individual partners, they might insist on the whole being called, and certainly the pursuer is bound to call all that he himself alleges to be liable.

LORD MACKENZIE.—I think the principle of the former cases apply. There may be individual creditors, as to whom an excuse for not calling them would be sustained, and I give no opinion as to who shall be liable for the expense, but under these decisions it is clear that the pursuer must call such parties as he knows and says are liable.

THE COURT accordingly adhered.

GREGG and MORTON, W.S.—JOHN KERMACK, W.S.—Agents.

ROBERTSON and Co., Advocators.—*Keay—Cowan.*
 JOHN DRYSDALE, Respondent.—*D. F. Hope—W. Bell.*

No. 185.

Feb. 21, 1834.
 Robertson and
 Co. v. Drysdale.

Land and Tenant—Tacit Relocation.—The proprietor of grain lofts, let to a tenant on a bargain for a year, sequestrated the grain in security of the rent, and, in a litigation which ensued, the sequestration was recalled, on condition of the tenant finding caution; and the tenant not having found caution, and having the grain to remain under sequestration in the premises until after the term of the bargain, he was bound as tenant for another year.

In May, 1829, the advocates, Robertson and Co., took from the respondent, John Drysdale, for one year after Whitsunday then next, four grain lofts in Leith, belonging to the latter. After Whitsunday, 1830, Robertson and Co. continued to possess by tacit relocation, but on the 7th of May thereafter, they wrote to Drysdale the following letter:—"SIR, with this, you will receive the key of your lowest loft, that was let to you for a time by Messrs Maxwell and Co. They have given it to you, being fit to put grain into, from the state of the roof. During the rains, the whole lofts have been inundated—the water has passed into the oats in the garret loft—through the barley in the one below it—into the loft occupied by Maxwell and Co., where there was a puncheon of water. Under these circumstances, the whole lofts will be given to you successively, as they are emptied."

Feb. 21, 1834.
 2D DIVISION.
 Ld. Medwyn.
 R.

Drysdale on this, of date August 13th, presented a petition to the Court of Edinburgh, for sequestration of the grain in the lofts, in security of the current year's rent. The Sheriff in the meantime granted the sequestration, but on the 3d September, while he remitted to a builder to repair the premises, he recalled the sequestration, "upon the defendant finding sufficient caution in the Sheriff's books for payment of the current year's rent, and the expenses, in so far as such may ultimately be found due by the respondent."

The litigation as to the sufficiency of the premises went on until the 25th of May next, and was ultimately settled, though not for some time thereafter, by a judgment in favour of Drysdale; and in March, 1831, the litigation was still pending, Robertson and Co. wrote to Drysdale as follows:—"With reference to our letters to you, of 7th and 23d August last, we beg to prevent any farther misunderstanding between you and us, in relation to the lofts we occupied and still occupy, on a missive of yearly date from you, situated at the Wet Docks here, we beg to give you to understand that we hold ourselves entitled to remove from the whole premises the grain on the 25th May next, the day on which the current year's lease expires, much sooner as the grain now in the lofts may be removed, on account of their insufficiency."

In the meanwhile, Robertson and Co. not having found caution in security of the current year's rent, and the Sheriff's interlocutor of the 3d September, 1830, the grain

No. 185. remained in the lofts, and it so remained after Whitsunday, and til
 Feb. 21, 1834. month of July, 1831, when Robertson and Co. consigned the ren
 Robertson and which sequestration had been used, and also found caution for expe
 Co. v. Drysdale. and thereupon took steps for removing the grain. They were, how
 stopped by a second application for sequestration for the rent for the
 from Whitsunday, 1831, to Whitsunday, 1832, of the lofts which
 continued to be occupied by the grain subsequent to the former of t
 terms, on the ground that thereby Robertson and Co. had become b
 by tacit relocation as tenants for another year.

The Sheriff pronounced this interlocutor :—" Finds that the defend
 having chosen to allow their grain to remain in the premises for w
 rent is claimed, for a considerable period after Whitsunday, 1831, altho
 they had it in their power to remove it long before that term, by fin
 caution or making consignment judicially, they are liable to pay rent
 the premises, for the year from Whitsunday, 1831, to Whitsunday, 18
 at the rate claimed in the petition, being the rent for the immedia
 preceding year ; and that the grain which was in the premises, at
 time between Whitsunday, 1831, and Whitsunday, 1832, was hypo
 cated, and subject to be sequestrated for payment of that year's r
 Allows to the pursuer a proof, that the grain taken up on the inven
 by the assistant-clerk of Court, was within the premises during that y
 and allows to the defenders a conjunct probation." And he there
 granted warrant to sell so much of the grain as would satisfy the rent f
 Whitsunday, 1831, to Whitsunday, 1832.

Robertson and Co. then brought an advocacy, and pleaded—

Tacit relocation can only arise from implied will on the part of
 landlord and tenant renewing their contract for another year. There
 however, no room for that here, in respect, first, of the letters expre
 giving up the premises ; and, second, that the continuance of the g
 in the lofts resulted from the act of Drysdale using sequestration,
 thereby forcibly detaining it ; and although Robertson and Co. may
 haps be justly liable for rent during the period while the lofts w
 actually occupied by the grain (and which rent they offered to pay
 is impossible to infer a renewal of the contract for a year by tacit r
 cation.

To this it was answered—

Under the Sheriff's interlocutor of the 3d September, Robertson
 Co. had the option of removing their grain by finding caution, but hav
 chosen to continue their occupation of the premises after Whitsunday, t
 must be held liable for the rent for the whole year.

The Lord Ordinary having remitted simpliciter, Robertson and
 reclaimed.

LORD JUSTICE-CLERK.—If it could be demonstrated that the advocates
 maining in possession was compulsory, there would be a ground for the

but it was not so, as by the interlocutor of the Sheriff they were entitled to find No. 185.
 action and get out the grain. But they do not do that till July, 1831, and I con-
 sive their possession wilful, and that they must be liable in rent for that year. Feb. 22, 1834.
 Renny.

LORD GLENLEE.—I see no compulsion—neither is there any distinct allegation
 on record to enable us to proceed on the footing that the grain in the cellar at
 Whitsunday was the same as at the sequestration in August.

LORD MACKENZIE.—I am not satisfied that there was any compulsion to pre-
 vent them carrying away the grain; and a lease for a year was forced on the proprie-
 tor. I am therefore for adhering.

THE COURT accordingly adhered.

JOHN ROBERTSON, W.S.—JOHN WIGHT, W.S.—Agents.

WILLIAM RENNY, Petitioner.—*Christison.*

No. 186.

Ranking and Sale—Judicial Factor.—1. Circumstances in which the Court refus-
 ed to authorize the common agent in a ranking and sale, to sell subjects at Glasgow
 under a bond containing a power to sell there. 2. Question, whether the Court
 are power to authorize a judicial sale, in a process of ranking and sale, to be held
 anywhere but in Edinburgh.

MESSRS CLELLAND, Jack, and Burns, held a piece of ground in feu, Feb. 22, 1834.
 in the neighbourhood of Glasgow, which they disposed to the late James
 Fogo of Killorn. Fogo granted them a bond for the price, and a disposi- 1ST DIVISION.
 tion in security, containing a power of sale, by public roup, at Glasgow.
 The bond gave no power of sale except at Glasgow. After the death of
 Mr Fogo, his son, Captain William Fogo, made up titles to the estate of
 Killorn, but not to the feu near Glasgow. Captain Fogo's creditors
 sought a ranking and sale of his estates. Messrs Clelland, Jack, and
 Burns, in virtue of the late James Fogo's bond, led an adjudication against
 the estate of Killorn within three years of his death, and obtained a pre-
 sence. They recovered full payment of the bond from William Renny,
 W.S., common agent in the ranking of Killorn, and conveyed the bond
 and disposition to him. Upon valuing the estates falling under the rank-
 ing, with a view to fix upset prices for the roup, Messrs Andrew Clason,
 W.S., and Daniel Fisher, S.S.C., deposed as to the subjects contained
 in the bond and disposition, "that they conceived the only way in which
 the full worth can be obtained of the subjects under sale, is by exposing
 them to public roup at Glasgow, under the special power to that effect
 contained in the bond."

Renny presented a petition, stating that, as judicial factor, he was not
 entitled to sell any part of the estate except at Edinburgh, unless the
 Court should give him special authority; that the feuing-ground would
 not fetch an adequate price if sold anywhere else than at Glasgow; and

No. 186. therefore, under the peculiar circumstances of the case, it was expedient to grant authority to sell there, and it was competent to the Court to grant it: he therefore craved special authority to sell the feuing-ground at Glasgow, before the Sheriff, according to articles of roup approved by the Court, and in virtue of the power of sale contained in the bond.¹
 Feb. 22, 1834.
 Renny.

The petitioner referred to the case quoted below.

LORD BALGRAY.—I think that one part of the report of the case quoted, implies that the Court considered themselves to have power in point of competency, to appoint a sale in any part of the kingdom, and before any commissioner whom they should name. But the Court refused to exercise the power in that case, and ordained the sale to take place at Edinburgh in common form.

LORD GILLIES.—I doubt the power of the Court to authorize the judicial factor to sell, at Glasgow, under the ranking and sale. I also doubt the expediency of granting the application if it were competent. If once granted, the precedent would be followed by innumerable similar applications from all parts of the country, raising special cases of supposed expediency. If the sale be duly advertised, I do not see how the proceeds of the roup should be so much increased by its taking place at Glasgow.

LORD BALGRAY.—The question as to the power of the Court seems to be unnecessarily raised by the petitioner. He has onerously acquired right to the heritable bond: he is vested with all the powers conferred by the bond, and, as heritable creditor, can sell under it at Glasgow without the interposition of the Court; he can grant as good a title under that sale as his author, the heritable creditor could have done.

LORD GILLIES.—The common agent has a clear right to sell under the bond. Let him exercise that power, and sell under the bond if he thinks fit. But I do not think the Court should authorize him as judicial factor to conduct the sale at Glasgow.

LORD CRAIGIE was understood to be against allowing the judicial sale to take place at Glasgow.

The **LORD PRESIDENT** was absent.

W. Renny, W.S.—Agents.

¹ Creditors of Colquhoun, &c. Feb. 22, 1712 (18,320).

vs E. POOLE and MANDATARY, Pursuer.—*Rutherford—Penney.*

No. 187.

JOHN ANDERSON, Defender.—*Robertson.*

WILLIAM ANDERSON and Others, Defenders.—*Jameson—Whigham.*

Feb. 22, 1834.
Poole v. An-
derson.

visions to Children—Passive Title.—A father during his life conveyed his estate to his eldest son, under the obligation of paying his debts and certain provisions to his younger children, which provisions were not payable till after his death; the son having been infeft, thereafter granted an heritable bond over the estate, in favour of the younger children for their provisions, whereupon they were infeft; the father predeceased the father, who afterwards died bankrupt, and the younger children claimed payment of their provisions from a posterior creditor of the son, who held a conveyance in security—held that the children were liable, to the extent of the provisions so received, to the onerous creditors of their father.

late Robert Anderson of Stroquhan, being considerably advanced in years, executed in 1825 a disposition of his lands, in favour of his son James, now also deceased, declaring “that the said James Anderson shall be bound and obliged, by acceptation hereof, in the first place, to make payment of all my just and lawful debts presently owing; and, secondly, out of such reversion as shall remain after payment of my said debts, to make payment of the sum of £4200 sterling, to be divided amongst my younger children,” in the shares specially set out at the second term of Whitsunday after the father’s death; and declaring that he should be bound “to account to me for the amount of the whole of the reversion of my said estate, after payment of my said debts; and that, during my life, after deduction always of necessary charges and expenses attending his management of my affairs.”

Feb. 22, 1834.
2d Division.
Ld. Mackenzie.
R.

In virtue of this disposition, James Anderson took infeftment, and entered into possession of the property, and in 1826 he granted an heritable bond over it, in favour of his brothers and sisters, for the £4200 provided for them by their father in the disposition, under which bond the younger children were infeft. Thereafter James granted to the Bank of Scotland a conveyance of the lands, in security of money borrowed from them, and died in 1827 insolvent, having predeceased his father, who died in the spring of 1829, also in a state of insolvency. On this event the surviving children entered into an arrangement with the Bank of Scotland, whereby, in consideration of an assignation, with warrandice from fact and bond, to the bond of provision granted in their favour by James, the bank agreed to pay to them the amount of the provisions contained in the bond.

Thereafter Mrs Poole, executrix of the deceased Miss Lucy Finnan, claimed from Robert Anderson, the father, had been indebted in a sum of £4200, and raised an action for payment against the defenders, John Anderson and the other surviving children.

No. 187. In defence it was pleaded, that Robert Anderson having, while perfect solvent, (as was not disputed,) conveyed his estate to his son, under burden of the provision to the defenders; and these having been made real by infestment on the bond granted by the son, no personal creditor of the father's could compete with them.

Feb. 22, 1834.
Poole v.
Anderson.

To this it was answered—

The provisions made by Robert Anderson in favour of the defenders were mortis causa, and could never have competed with the onerous debts of the granter, supposing no conveyance had been made to the son, and no bond granted by him. But this conveyance and the bond truly makes no difference on the case. The conveyance was granted primarily for payment of the granter's debts, and the provisions to the children were payable out of the reversion; so that any security granted by the son, whatever effect it might have had in excluding his own creditors, could never affect the father's creditors any more than if such bond of provision had been granted directly by the father himself. The defenders therefore, having drawn these provisions, are liable to the extent thereof, as representing their father, in payment of his onerous debts.

The Lord Ordinary having decerned in terms of the libel, adding the subjoined note,* the defenders reclaimed. Before the cause was put out

* "The disposition by Mr Anderson, senior, to Mr Anderson, junior, proceeds on a narrative, that it was his duty to make a settlement of his affairs, and that, from infirmity, he was unable to attend to his affairs; and is a general disposition, not only of all that Mr Anderson, senior, had at the time of the disposition, but of all he was to have at the time of his death, with a nomination of Mr Anderson, junior, as executor. It does not bear to be granted in trust for his creditors or younger children, or under any real limitation in their favour, but it binds Mr Anderson, junior, to pay his father's debts out of such reversion as should remain, and, after paying these debts, to pay certain provisions to his wife and younger children after the father's death, and to pay to the father himself the profit arising from this residue during his life. The deed afterwards speaks of the son as having the management of his father's estate. It was while his father was still alive, and while he was acting under such a deed as this, that Mr Anderson, junior, thought proper, without having paid or secured all his father's debts, to grant heritable security to the younger children for their provisions; and after that, he dilapidated his father's estate, by granting rights over it for his own debts, and then died before his father, leaving part of his father's debts unpaid and unsecured. The Lord Ordinary thinks that part of his father's debt was, nevertheless, at the time of his death, as well as at the time of his father's death, preferable on the father's estate to the younger children's provisions, and that neither the father's creditors, nor the father himself, demanding payment of his debts out of his estate, could have been excluded by the security granted for these provisions. These were not granted as absolute gifts, but as children's provisions payable out of the reversion, after payment of the father's debts, and after his death; and whatever security the son might grant for them, to the effect of excluding his own creditors, yet, as in reference to the father and his creditors, they remained children's provisions, payable only after all the onerous debts of the father. This was their nature and express terms."

for advising, a minute was given in for John Anderson, the eldest surviving son, and who, as such, would have had right to succeed as heir to his father, stating that he repudiated the conveyance by his father to James, the eldest son, and the bond thereafter granted by him, and that he intended to raise action for setting the conveyance aside, as prejudicial to his interest as heir-at-law, and not the true deed of the granter; and on that separate ground he contended that he was entitled to be assolzied, whatever judgment might be pronounced as to the other children. No statement, however, to this effect having been made in the closed record, and it appearing from the documents in process, recovered under a diligence, that he had accepted from the Bank of Scotland the interest on his share of the provision under the bond, and granted discharges therefor, the Court refused the desire of his minute, and proceeded to advise the case on the merits as to all the defenders. In the meantime, however, the estate had been sold by the Bank of Scotland, but at a price considerably below the amount of the sum in security of which it had been conveyed to them; and the defenders therefore now further pleaded, that the payments drawn by them from the Bank being thus established not to have been part of the estate of Robert Anderson, but to have been truly payments at the expense of the Bank, the receiving of them could infer no liability on the part of the defenders as for debts due by their father, if whose funds it now appeared they had not participated.

To this it was answered, that the circumstance of the Bank having excluded themselves from relief, by acceptance of warrandice from fact and deed only, did not at all alter the character in which the defenders received payment, which was as the price of the bond of provision granted in implement of their father's deed.

LORD GLENLEE.—It is not very necessary to enquire whether the provisions were revocable or not. Revocation is not excluded, and unless it was so, they should be revocable. But it is not necessary to consider that point; for the mate-

not be taken away by the grant of an heritable security for payment of them by the eldest son, during his father's life. If such was the situation of things at the death of the eldest son, the subsequent death of the father shortly after, while nothing more had been done, could not make any change in the relative situation of his creditors and his younger children. The provisions to the younger children, then, indeed, were not only secured, but payable at a fixed term, but still they remained only provisions of children, payable out of the reversion of his property after payment of the father's debts. In short, this security was like an inhibition against the eldest son by the younger children during the father's life, valid against his acts and transactions, but of no avail against the prior debts of his father, which were, by the very deed granting the provisions, made preferable to these provisions. This being the case, the defenders, holding these securities for their provisions, and now stating themselves as willing to be considered in *pari casu*, as if they had actually received payment, must be liable as gratuitous successor of their father, to pay the pursuer's original debt, which is of an amount far less than the provisions."

No. 187.

Feb. 22, 1834.

Poult v.
Anderson.

No. 187. Feb. 22, 1834. *Alexander v. Bartram.* rial thing is, that, by the very words of the disposition, they are only payable on of the reversion, and also that they are not payable till after the death of the father and then he died bankrupt. The case is not more favourable for the children than if the father had made the provisions a real burden in the conveyance to the son for the bond granted by him was just substituting a security over the father's property. Now, it is well established, that where a provision is made to children, payable after the father's death out of the reversion of his estate, the time to take to see if there be any reversion, is his death. They are entitled to nothing, unless there be then a reversion. Then, as to the transaction with the Bank, if the defenders were threatened with a claim for repetition by the Bank, they might have something to say, but not as it is. I therefore agree in the interlocutor, except in so far as it decerns against them conjunctly and severally; for it should be against each to the extent of the sums drawn by them.

LORD JUSTICE-CLERK.—I have nothing to add. It was only out of the reversion the children were to be paid, in terms of the deed; and I am for adhering, with the variation proposed by Lord Glenlee.

LORD MACKENZIE.—I agree. The variation proposed by Lord Glenlee is correct in strict form, but I thought it unnecessary.

THE COURT accordingly adhered, with this variation, that decree should only pass against the defenders to the extent of their shares, and not conjunctly and severally, and that all claims of relief among the defenders themselves should be reserved.

J. FORRESTER, W.S.—J. HOPE, JUD. W.S.—D. WHIGHAM, W.S.—Agents.

No. 188.

JAMES ALEXANDER, Pursuer.—*A. McNeill.*
JAMES BARTRAM, Defender.—*Jameson—Ivory.*

Expenses.—A tender having been made by a defender, previous to the raising of an action, of the sum ultimately awarded,—found entitled to expenses, but subject to modification, as he failed in a defence pleaded against the full claim.

Feb. 22, 1834. *2d Division.* *Ld. Medwyn.* *T.* THE pursuer, Alexander, a land-surveyor, claimed from the defender, Bartram, as representing a brother deceased, an account ending in 1823, and amounting, with accumulations of interest, to £32. A trustee, under a trust-deed executed by Bartram, finding in the repositories of the deceased a settled account of business done down to 1823, refused to admit the charges prior to that date, but was willing to pay those subsequent thereto. Alexander refused to accept this; and, in 1832, more than three years from the last item in the account, raised this action against Bartram, concluding for the whole sum. Bartram pleaded prescription as to the whole. The Lord Ordinary sustained the plea, and absolved him as to all charges prior to 1823; but, in respect of his trustee's letters, decerned against him for the charges subsequent thereto, amounting to £6, 19s. 6d., with interest, and found him liable in expenses, subject to modification.

Bartram reclaimed, in so far as regarded expenses.

LORD GLENLEE.—I am very averse to interfere with Lords Ordinary as to expenses; but in this particular case, I think the defender, instead of being found liable in expenses subject to modification, should get them subject to modification, if the pursuer concludes for £32, and only gets £6 odds, which he was offered before he raised the action.

No. 188.
Feb 25, 1834.
Steel v. Baillie.

LORD MEADOWBANK.—I am of the same opinion. There was a tender here, and I would alter.

LORD JUSTICE-CLERK.—I feel equally averse with Lord Glenlee from interfering with a Lord Ordinary as to expenses; but this is a very clear case. A tender was made; and besides, it is only by an improper accumulation of interest that the sum was raised to such an amount as to entitle the action to be brought in this Court.

Their Lordships accordingly altered, and found Bertram entitled to expenses, subject to modification.

WM. FRASER, W.S.—GIBSON-CRAIG and WARDLAW, W.S.—Agents.

ANDREW STEEL, Suspender.—*D. F. Hope—J. Anderson.*
JAMES BAILLIE, Charger.—*Cunninghame—Patterson.*

No. 189.

Process—Expenses.—In an advocacy under 6 Geo. IV. c. 120, § 40, decree was pronounced without any appearance having been made for the respondent; interim extract was allowed, and diligence raised; a bill of suspension being presented, it was passed on caution, and on payment of the expenses incurred by the charger to the time the suspender might have been reponed, in terms of the A. S., with expense of extract.

BAILLIE raised an action against Steel before the Sheriff of Lanarkshire, for a sum above £70. A proof being allowed, an advocacy was brought by Baillie under 6 Geo. IV. c. 120, § 40. No appearance being made for Steel, the Lord Ordinary advocated the cause, and pronounced decree for the pursuer in terms of the libel. Steel afterwards intimated an intention to appear, and his agent borrowed up the process, and obtained a consent from Baillie's agent to have the interlocutor recalled on paying the expenses occasioned by his delay; but he did not avail himself of that consent, or take any farther step. The Lord Ordinary having allowed interim decree to go out for the principal sum, a large was given, and letters of caption were expedite. Steel presented a bill of suspension as of a decree in absence. The Lord Ordinary, "in respect that no reasons of suspension on the merits of the case are stated, and that no action of reduction has been raised, refused the bill; and and expenses due."*

Feb. 25, 1834.
1st Division.
Ld. Moncreiff.
Bill-Chamber.
D.

* "NOTE.—There is clearly no right to have the decree opened or the diligence stayed by suspension; and, under the circumstances, it seems to be by no means a very favourable demand; and the Lord Ordinary must say, that if it were allowed as a matter of course, it might bring the decrees of this Court into contempt, and lead to the evils mentioned in the answers. Certainly without both caution and payment of expenses, the Lord Ordinary could not think of passing the bill."

- No. 189. Steel reclaimed, and offered caution, and also the payment of the same expenses, as he would have been subjected to, in getting himself reponed as against an unextracted decree in absence. The Court remitted to the Lord Ordinary "to pass on caution, and on payment of the expenses incurred by the charger, to the time the suspender might have been reponed in terms of the A. S., with expense of extract."

Feb. 25, 1834.
Bruce v.
Robson.

F. HAMILTON, W.S.—J. CULLEN, W.S.—Agents.

- No. 190. JOHN BRUCE and MARGARET BRUCE, Claimants.—*Gordon*.
CHARLES ROBSON and WILLIAM RIDDEL, Raisers.—*Whigham*.

Trust—Presumption—Bona Fides.—A sailor, in the prime of life, suddenly disappeared at a sea-port town in England, about four months prior to his father's death; twelve years afterwards his father's trustees, acting under a deed of settlement, by which, in the event of the son's survivance, he had right to a share of his father's funds, paid a debt due by the son—held, that they were entitled to take credit for that payment in accounting with the father's residuary legatees, though there was no evidence that he survived his father.

- Feb. 25, 1834. THE Rev. Mr Bruce, at his death in May, 1795, left Charles Robson and others his trustees. He had two children, a son named Gilbert, and a daughter; the primary object of the trust was to make provision for them. Gilbert was commander of a trading vessel, and, in January preceding Mr Bruce's death, he suddenly disappeared at Plymouth, without any trace of him being discovered. As he was a man in the prime of life, and the trustees could obtain no proof of his death, they proceeded to act upon the footing that he, or his issue, might appear, and claim the interest provided for them by the trust, or that he might at least have survived his father, and left a settlement which should yet appear. In the year 1807, the trustees, by paying £100 to a creditor of Gilbert, obtained a discharge of a larger claim of debt. If Gilbert had survived his father, there were ample trust-funds to make the payment out of his share, and the payment was made in perfect bona fides by the trustees. But if Gilbert had predeceased his father, without leaving issue, there never were funds in the hands of the trustees, applicable to the payment of any of his debts.

1st Division.
Ld. Fullerton.
D.

A multiplepounding was afterwards raised in name of the trustees, and in a report by an accountant, drawn up in 1824, it was stated "that all parties interested appear inclined to have it held that Gilbert Bruce died without issue, and intestate, in January, 1795." Upon this basis, the report intimated an opinion, that the payment of £100 in extinction of the debt of Gilbert Bruce, which was made by the trustees in 1807, ought to be disallowed to them, because, if Gilbert predeceased his father, they never had funds applicable to any of his debts.

The trustees objected to the report, and pleaded that, in law, the legal presumption was, that Gilbert Bruce still lived. Even

lapse of time was not enough to presume death; and, so long as there was no proof of the death adduced, the presumption would remain, that he had at least survived his father, in which case the trustees had only paid the funds truly belonging to him, in satisfaction of a just debt. But, independently of this, it was enough that the trustees acted conscientiously and bona fide in the discharge of the trust, and had made the payment in the reasonable belief that it was their duty. If it should afterwards turn out to have been erroneously made, the claim of indemnification lay not against the trustees, but against the party receiving the payment.

John and Margaret Bruce, the next of kin of the truster, who had lodged a claim to the residuary estate, pleaded in support of the accountant's report, that, after the sudden disappearance of Gilbert Bruce at Plymouth, twelve years before, and no trace of him being since recovered, the trustees were not entitled to pay his debts out of trust-funds which never became his, if he predeceased his father; and, although the disappearance occurred only four months prior to his father's death, there was every reason for holding, if he was never again heard of, that the date of his death and his disappearance was the same, and consequently that he had predeceased his father.

The Lord Ordinary "sustained the objection, and found the trustees entitled to credit for the £100 paid on 28th May, 1807, with the interest thereon, out of the residuary estate."

John and Margaret Bruce reclaimed. The Court unanimously adhered, and allowed the trustees the expense of opposing the note.

LORD BALGRAY.—I have a clear opinion in this case. The trustees made the payment in perfect bona fides, and acting in the conscientious exercise of sound discretion. I have no doubt that the Court must protect them.

LORD GILLIES.—I am of the same opinion. Suppose that the payment had not been made, and that the creditor of Gilbert Bruce was here claiming payment, he would be entitled to the benefit of the presumption that Gilbert Bruce still survived. The parties claiming in this process may have arranged, inter se, to adjust matters upon the assumption that Gilbert Bruce died in January 1795, some months before his father; but a creditor of his is not bound to adopt any such hypothesis, and would be entitled to maintain not only the probability of the young man having survived his father, which would suffice for the creditor, but also of his not being dead at this time. I am satisfied that the trustees ought to be allowed credit for this sum.

LORDS PRESIDENT and CRAIGIE concurred.

J. GORDON, W.S.—DAVIDSONS and SYME,—Agents.

No. 190.

Feb. 25, 1834
Bruce v.
Robson.

No. 191.

— ALLAN and SON, Pursuers.—*W. Bell.*THOMAS MANSFIELD, Defender.—*Whigham.*

Feb. 25, 1834.

Allan v.
Mansfield.Williamson v.
Corrie.

Expenses—Auditor.—Objection sustained to the auditor's report, that he had struck off £2, 2s. from a fee of £3, 3s., sent to a senior counsel to advise whether the record should be closed,—no charge being made for a fee to a junior counsel and the cause being important.

Feb. 25, 1834.

1st Division.

In taxing the account of expenses in the case reported ante, p. 329, the auditor, proprio motu, struck off £2, 2s. from a fee of £3, 3s. which had been sent to Mr Skene to advise whether the record was ready to be closed. No other fee was charged as to this matter. The defender took an objection, which the Court unanimously sustained without requiring the counsel in support of the objection to be heard.

No. 192.

JAMES WILLIAMSON.—*D. F. Hope—Reid.*WILLIAM CORRIE.—*Pyper.*

Expenses—Auditor.—In a jury cause, where an agent in the country was employed, as well as an agent in Edinburgh, and the former was sufficiently acquainted with the cause to be qualified to precognosce witnesses—held that the Edinburgh agent precognoscing witnesses in the country, was only entitled to charge the opposite party at the rate which a precognition by the country agent would have cost.

Feb. 25, 1834.

1st Division.

SEQUEL of a jury trial, decided 30th December, 1833, and reported infra.* The pursuer obtained a verdict in his favour, and was allowed his expenses. The parties lived in Dumfries-shire, where the transaction took place which was the subject of trial. The pursuer had an Edinburgh agent, and also a country agent. The Edinburgh agent had precognosced witnesses in the country, and the auditor allowed him to charge only at the rate which a precognition by the agent in the country would have cost. The pursuer objected that this was unreasonable where the Edinburgh agent had bona fide performed the duty; and that it was contrary to the case of *M'Kersy*.¹ The defender answered, that a considerable account incurred by the country agent had been allowed by the auditor, the details of which proved that agent to be sufficiently acquainted with the cause; that he was thus qualified to take a precognition, and should have been employed to do so, there being nothing unusually important or intricate in the case; and, therefore, if the pursuer chose to take his Edinburgh agent to the country for the purpose, he should bear the extra expense.

The Court looked into the country agent's account, which was produced.

* See Cases decided at the Jury Sittings.

¹ Jan. 15, 1831 (ante, IX. 282).

LORD PRESIDENT.—The country agent, doing the acts stated in that account, No. 192. could not fail to become versant with the details of the cause, and the nature of the question at issue. He seems to have been quite competent, therefore, to conduct a precognition in this case, and I think the objection to the auditor's report should be repelled. Feb. 26, 1834.
A. B. v. Scott.

The other Judges concurred, and the objection was repelled with expenses.

MITCHELL, W.S.—Agents.

A. B., Pursuer.—*Sol.-Gen.-Cockburn—Steel.*
— SCOTT, Defender.—*D. F. Hope—More.*

No. 193.

Poor's Roll.—A lieutenant aged forty-three, who had a half-pay of £82, and a wife and five children, refused the benefit of the poor's roll.

A LIEUTENANT, on half-pay, raised an action of count and reckoning, Feb. 26, 1834. and applied for the benefit of the poor's roll. He was forty-three years of age, had an income of £82, a wife and eight children, five of whom were maintained by him, and the remaining three were supported in charitable institutions. He owed debts amounting to £71. After the usual remit, the lawyers for the poor reported a *probabilis causa*. 1ST DIVISION.

The defender objected to the pursuer being admitted to the benefit of the poor's roll, in respect that he was a party whose circumstances did not entitle him to that privilege.

The pursuer answered, that in every such application the true question was, whether the applicant's circumstances were such that, without the poor's roll, the Courts of Justice must be practically closed against him, on account of the expense of appearing there. Considering the smallness of his income, the number of his family, and the amount of his debts, he was evidently unable to pay the cost of a lawsuit; and if he was cut off from the poor's roll, that was to him a denial of justice, in a case where the lawyers for the poor reported he had a *probabilis causa*.

LORD PRESIDENT.—This is a painful case, and the question raised is of a very serious nature. It may be difficult for a Judge to reconcile his feelings to the act of refusing the pursuer the benefit of the poor's roll, for this will expose him to inconvenience and hardship; but it is not difficult to reconcile the judgment to this, and that is enough for a decision. If the Court were to permit the pursuer to get on the poor's roll, at what limit are they to stop? There are many officers connected with this Court, possessing the most slender income, which barely suffices for the sustenance of themselves and families. If these men get involved in a lawsuit, the expense of it is not only a grievance to them, but it may be incompatible with their decent subsistence. It would, however, be impossible for the Court, with a view to that prospective hardship and distress, to admit them to the poor's

No. 193. roll. I think the present pursuer has no better ground for his application persons, of the class I allude to, would possess.

Feb. 26, 1834.
Balfour v.
Robertson.

LORD GILLIES.—I am of the same opinion. I do not see at what point Court could stop if they granted this application, and, therefore, though it be useful to refuse it, I think it must be refused. The limits are very confined, within which alone the Court can sanction an application for the poor's roll. At sight it seems very reasonable to insist, that in all cases where it would appear an applicant's income is fully exhausted in affording a slender maintenance to self and his family, he should be allowed to get on the poor's roll in order to avoid the extra expense of a lawsuit, if he unfortunately is involved in one. But the rule would give a dangerous latitude to applicants. It may happen, and does happen, that individuals possessing a slender income, feel constrained by a sense of duty to their families to embark in litigation. A large succession opens, to which they have a probable claim. The expense of a protracted suit may be such as to prove utter ruin to them, even if they were parties possessing £100 or £200 annum; and if the rule were once admitted, which this applicant has contended for, then these parties might claim the poor's roll, because they are totally unable to bear the cost of litigation, and it may produce their destruction. I think every case of this sort must depend on its own circumstances, and not on any abstract principle; and I consider that, although the question is attended with considerable difficulty, the present application cannot be granted.

LORDS CRAIGIE and BALGRAY concurred.

THE COURT refused to admit the applicant to the poor's roll.

No. 194.

JOHN BALFOUR and COMPANY, Pursuers.—*Jardine*.
ROBERTSON and COMPANY, Defenders.—*D. F. Hope—Brodie*.

Discharge—Contract.—Circumstances in which the Court held that a debt claimed by one insolvent estate against another, fell under a previous compromise of debts between these estates.

Feb. 26, 1834.

1st Division.
Ld. Fullerton.
B.

JOHN BALFOUR and Company, and Robertson and Company, extensive grain dealers in Leith. Both firms became insolvent in October, 1829, at which time mutual claims existed between them, of a very complicated nature, and of very large amount. It appeared to the Court that a compromise between them would produce a speedy winding up of each estate under a private composition-act, and a sum of £3468, 1s. 9d. was paid by Robertson and Company to John Balfour and Company, in consideration of which a compromise was entered into. A composition-contract having been arranged as to the estate, John Balfour and Company claimed to rank for the composition upon a sum of £349, 16s. 6d., arising out of a special transaction with a London house, which they alleged did not fall within the compromise. Robertson and Company alleged that it did, and refused to pay.

John Balfour and Company raised action against them for the full sum, No. 194.
as in the case of a party failing to pay a composition under a private contract, and thereby causing the full debt to revive.

Feb. 26, 1834.
Gifford v.
Gifford.

THE COURT, by a majority, held, on considering the nature of the transaction with the London house; the other transactions between the two Leith companies; the states of affairs exhibited by each company to their creditors with a view to compromise; and the terms of the compromise, and of certain relative correspondence, that the claim was included within the compromise; and therefore their Lordships assoilzied, with expenses.

J. BALFOUR, W.S.—BRIDGES and KENNEDY, W.S.—Agents.

ARTHUR GIFFORD and MANDATARY, Pursuers.—G. G. Bell.
ARTHUR GIFFORD, Defender.—G. Napier.

No. 195.

Public Records.—In a reduction of a service in which the proceedings required to be produced, the Court granted warrant to transmit them to the clerk of process, but not to be delivered up by him to the parties, except on special application and on cause shown.

LORD MONCREIFF reported a petition incidental to the reduction, mentioned ante, 421, praying for a warrant to get up from Chancery, and lodge in process, the proceedings in the service under reduction, and stated, that the difficulty was as to which party,—the pursuer of the reduction, or the defender, who was called on to produce the proceedings,—should, as the party getting them up, find the necessary security to restore them.

Feb. 26, 1834.
2^d Division.
Ld. Moncreiff.

THE COURT, instead of appointing the proceedings to be delivered up simply on caution to restore, granted warrant, without requiring such caution, to transmit the proceedings to the clerk of process, but not to be delivered up to the agents, except on special application and cause shown.

T. RANKEN, S.S.C.—G. and W. NAPIER, W.S.—Agents.

No. 196.

J. JOHNSTON and OTHERS, Pursuers.—*Skene—Cunninghame.*JOHN SCOTT, Defender.—*D. F. Hope—Marshall.*Feb. 26, 1834.
Johnston v.
Scott.

Acquiescence—Property—River.—A proprietor, whose embankments on a stream were challenged by the owners of mills thereon, having averred that their authors saw the operations carried on without objection, but not alleging that they had remained silent after they found that injury was thereby done to them—held not entitled, on such averment of facts, to an issue of acquiescence.

Feb. 26, 1834.

2^d DIVISION.
Ld. Medwyn.
R.

THE pursuers, proprietors of certain mills on the water of Gogo, near Largs, which they had acquired in 1829, from the trustees of Brisbane of Brisbane, raised an action against Scott, who had, in 1815, purchased a considerable property on the same stream, concluding to have him ordained to remove certain breastworks, jetties, and embankments, made by him thereon for the protection of his own land, but which they alleged had proved injurious to their mills, inasmuch as, by narrowing the channel of the stream, and throwing the water with violence over against the opposite bank, in time of floods, it had occasioned the sweeping away of the banks and of a space of ground intervening between the stream and a mill-lead, whereby the lead was entirely destroyed. The operations had been commenced by Scott immediately on his acquiring the property; and no complaint appeared to have been made by the then proprietors of the mill, till 1828, when some damage having been suffered, a protest was taken by the Brisbane trustees; and Scott now pleaded, that the pursuers were barred by the acquiescence of their authors. His statement on this head in the condescendence was as follows:—"Shortly afterwards, the defender erected the house of Hawkhill, which stands about twenty or thirty yards from the river, in which space there are two roads and a clump of planting. He also formed and made a garden at the Heugh or flat, to which he was obliged to carry all the soil. He then formed an embankment along the side of the river, in order to protect his own property. This took place soon after he acquired his property, and was entirely acquiesced in by the pursuers' authors, and every other person; and no alteration has been made on the site of the embankments then formed. The pursuers saw these embankments when they made their purchase, and also acquiesced therein, and not the slightest change has since been made on the site thereof. But the defender from time to time has protected, after floods, his own property, by repairing his own banks, and keeping the proper channel of the river clear."

Issues having been ordered, with a view to a trial, Scott claimed to have an alternative issue, in these terms:—"Whether the pursuers or their predecessors and authors—proprietors of the said mills—agreed to, or acquiesced in, the operations aforesaid, or any of them?"

This being resisted by the pursuers, the Lord Ordinary reported the

utter verbally to the Court, issuing at the same time the subjoined No. 196.
ote.*

Feb. 26, 1834.
Johnston v.
Scott.

The defender contended that he was entitled to an issue as to acquiescence, on the principle of the decisions noted below,¹ while the pursuers maintained that these cases did not apply, and that there was no averment to raise a question of acquiescence, inasmuch as it was only alleged that the defender's authors witnessed the "operations," which were not necessarily and obviously injurious, but not that they remained silent or acquiescent for a moment after it appeared that injury actually resulted from them; and, on the contrary, it was admitted that, in 1828, when injury was suffered, a protest was instantly taken.

LORD JUSTICE-CLERK.—I do not think that there are sufficient materials to warrant an issue as to acquiescence. I am not disposed to deny that it is no defence for a party to say that the operations challenged have been in suo, if they injure his neighbour. In the case of Lord Glenlee v. the Catrine Works, the injury was done in suo, and it was not attempted to be stopped while the operation was going on; but the challenge was made as soon as the injury was suffered, and it was not permitted to stand. In the same way here, Scott was entitled to defend his own banks, and no one had any right to interfere, till by experience it was found injurious, and the parties injured were then only called on to object. Now, there is a total omission on the part of the defender to aver that injury was suffered from the

* "The defender acquired his property in 1815, and the pursuer complains, that since that period he has been making encroachments on the stream of the Gogo, and erecting bulwarks and jetties, of which he complains in this process. On 29th December, 1828, a protest was taken against the defender's operations by the then proprietors—the trustees of Brisbane—against the defender's operations. At March 1829, the pursuers acquired the property. The pursuers object to the alternative issue which has been proposed in trying the case, inasmuch as they state that there are no sufficient grounds for the plea of acquiescence.

"It was explained at the bar, that the terms agreed to or acquiesced in, were meant to apply merely to acquiescence, and that no special agreement was to be proved. Indeed, none such is alleged in the record. In this state of matters, it appears to the Lord Ordinary that the words agreed to should at all events be left out. But the more material question is, Whether there are circumstances in this case which can admit of the plea of acquiescence at all? Supposing the cases well decided in which such a plea was held valid, the present is very different from any of these. The operations here do not seem to have occasioned any great expense—they were performed on the defender's own property; they were performed not all at once, but successively, and their injurious effects, which alone gave a right to object, could not be ascertained a priori or immediately. The period too is very short, and is within the prescriptive period, which seems necessary for altering the rights of the parties as to their respective properties. Entertaining these doubts, the Lord Ordinary has thought it best to dispose of the objection, by reporting the point to the Court."

¹ Earl of Kinnoul v. Kinnear, January 18, 1814 (F. C.); Marquis of Abercorn v. Langmuir, May 20, 1820 (F. C.); Aytoun v. Douglas, July 1, 1800 (App. 1. Prop. No. 5); Aytoun v. Melville, May 19, 1801 (Ibid, No. 6).

No. 196. beginning, or that any flood occurred before the objection was taken, while the other side aver no injury was felt till 1828, which occasioned the protest then taken. This is a most material feature, and narrows the alleged acquiescence exceedingly, which, if allowed here, would be carrying the doctrine of acquiescence a great deal too far, and I do not think there are termini habiles for an issue on it. Then the averments cannot be mended now—the record being closed. I am therefore for refusing this issue.

Feb. 26, 1834.
Ure v. Anderson.

LORD GLENLEE.—It rather appeared to me, that the present consideration of this point was premature. Water is matter of common interest, and no heritor can affect it emulously, or otherwise than in his own defence. Suppose it admitted that the operations were entirely on the defender's own property, yet the pursuers may say they did not know that damage would be suffered, and therefore cannot be held to acquiesce. However, till the first issue is finally adjusted, there is not much room to consider the second. But at any rate, acquiescence is not a proper term to be sent to a jury—being a question of law, not of fact.

LORD MEADOWBANK.—Even had I thought the circumstances condescended on inferred acquiescence, I would not have sent that issue in terms, as we are not to enquire of the Jury a question of law. But I do not think the facts stated in the condescendence, if all made out, would infer acquiescence sufficient to go to a jury, for I should have doubted even if it were enough to have suffered injury. But certainly, upon finding the evil consequences, they cannot be barred because they did not object to the operation when going on, and before they could know it would be injurious; and, therefore, I am against allowing this issue.

THE COURT accordingly instructed the Lord Ordinary to refuse the alternative issue.

W. PATRICK, W.S.—HILL and THOMSON, W.S.—Agents.

No. 197.

JOHN URE, Pursuer.

DAVID ANDERSON and Others, Defenders.

Property—Clause—Bounding Charter.—A feu charter which contained a description of the feu as bounded by certain marches, and set it forth as of such a measurement, held not taxative, but only designative of the quantity, and did not preclude the feuar from maintaining a right under it to an extent greater than the specified measurement.

Feb. 26, 1834.

2d Division.
Jury Cause.
Lord Gillies.

THE pursuer Ure is proprietor of a feu in the village of Tillicoultry, called How-Dub. In the original feu-charter, granted to his father in 1775, it is described as follows:—"All and whole these houses and yard called the How-Dub of Tillicoultry, lying partly upon the north and partly upon the south sides of the highway going through Westertown of Tillicoultry, as the said subject is meithed and marched off, consisting in all of 52 falls 18 ells of ground, bounded as follows, viz.—By two march stones on the north and south-west corners on the west—by a line running from the said south-west march-stone, to another stone on the south-east corner, on the south—by a line almost straight from said south-

at march corner, to a march-stone on the north-east corner, on the east No. 197.
 and partly by the king's highway, and partly by the yard possessed by
 James Reid, smith, and partly by James Drysdale's corn-yard, on the F.b. 26, 1834.
 north part, from one to others, all lying within the parish of Tillicoultry, Ure v. Ander-
 and shire of Clackmannan, with free fish and entry thereto, and whole son.
 rights, privileges, and pertinents thereof."

On his father's death, in 1809, Ure made up titles by charter of novodamus and infeftment, wherein the property is thus described:—"All and whole that piece of ground in Westertown of Tillicoultry, consisting of one rood and thirteen falls, or thereby, Scotch measure, bounded on the west by the road to Alloa, along the burnside of Tillicoultry—on the south, by the property belonging to James and William Ritchie—on the east, by the Town-loan, and the house occupied by James Pye—on the north, by the yard belonging to the said James Pye's house; which piece of ground divided, in the direction of east and west, by the old road leading to Dollar, and a house has been erected on that part thereof lying upon the north of the said old road, and the remainder, being that part on the south of the said old road, has been converted into a garden, and surrounded by a stone wall, lying on the said subject, within the parish of Tillicoultry, and shire of Clackmannan."

Disputes having arisen between Ure and three neighbours, proprietors of the surrounding properties, as to whether certain narrow stripes of ground beyond his house and garden walls formed part of his feu, he raised against them an action to have his right declared. Issues were sent to a jury, setting forth the admission that the pursuer "is proprietor of certain portions of ground in the village of Westertown of Tillicoultry, as described in the title-deeds," above-mentioned, and enquiring whether the disputed stripes were within the description in the titles, or whether the pursuer had possessed them for forty years and upwards. These came to be tried before Lord Gillies at Stirling, at last autumn's circuit, and the pursuer's counsel having in his opening speech admitted that the pursuer possessed ground, independently of the disputed stripes, extending to the amount of 52 falls 18 ells, specified in the feu-charter, his Lordship "thereupon gave it as his opinion and charge to the jury, in point of law, without farther procedure in the case, that the charter was a bounding charter in regard to the measurement therein described, and that the pursuer was not entitled to claim more than the quantity expressed in the said charter."

The pursuer took an exception to this charge, "and insisted, 1st, That the pursuer was entitled to vindicate his right to the whole ground which lay within the limits of the march-stones, and specific boundaries pointed out and fixed by his said feu-charter, and to occupy and possess the same, as he had uniformly done, from the date thereof, which he offered to prove, and this, whether the said ground extended to more or less than the 52 falls 18 ells, mentioned in the said feu-charter. 2d, That, by the

No. 197. pursuer's charter, there was expressly conveyed to him 'free inh and entry' to his whole subjects, and that, even under the denomination of 'whole parts, privileges, and pertinents thereof,' the pursuer was entitled to the said spaces, as a means of access to the back walls and roofs of his said houses and garden-dike, for the purpose, inter alia, of repairing the same, as well as for an eaves-drop, for which purpose he had always used and enjoyed the same, otherwise it would be impossible for the pursuer, if now deprived thereof, to get his said houses repaired, or his subjects comfortably possessed or enjoyed."

Feb. 26, 1834.
Ure v. Ander-
son.

A verdict having been returned for the defenders, Ure tendered a bill of exceptions, and contended that the bounding character of the feu-charter consisted in the specification of the boundaries by march-stones, &c., and that the quantity by measurement was merely designative, not taxative, and could not possibly prevent his vindicating all within the boundaries, though exceeding the amount of measurement, the more especially if he proved immemorial possession thereof.

On the other hand, the defenders maintained that the specific quantity was a limitation of the title, beyond which Ure could not acquire right.

LORD JUSTICE-CLERK.—In determining whether the charge is well founded, we must take the statements on the face of the bill, and the admissions prefacing the issues. It is there stated that Ure is proprietor of the grounds, as described in the title-deeds set forth in the summons, and he is therefore as much entitled to found on the charter 1775, as on the charter of novodamus, 1809; and the Judge also refers to the feu-charter. Then it is therein set forth, that the feu consists of all and whole the ground mentioned, specially bounded by certain lines and march-stones. Now, it is necessary to attend to the procedure that took place at the trial, set forth p. 1 and 2 of the bill of exceptions. (His Lordship read the statement.) We must recollect that Ure undertook to prove forty years' possession within the bounds specified in the charter by march-stones, &c. At first I was disposed to think there was a good deal in the view taken by the learned Judge; but on attending to the argument and authorities, I have come to be of opinion, that the charge was erroneous, and that the exception must be allowed. The charge is put on this, that it is a bounding charter in regard to measurement. Now, I can find no authority for holding that a bounding charter is to have reference to the quantity of measurement. Stair, Erskine, and Bankton, all describe bounding charters in words exclusive of measurement. I consider the meiths and march-stones here mentioned to be the boundaries, and that the measurement is merely designative, and not taxative. The pursuer undertakes to prove immemorial possession of all within the march-stones, which are all existing, except one alleged to have been taken away by one of the defenders. Now, suppose he can establish that,—we could not for a moment, in a question with the superior, refuse to allow him to prove this, and limit him to so many falls; and his building his walls within his boundary lines cannot alter what would undoubtedly hold if the ground were unenclosed. It is not at all a case of feuing so many falls, at a certain feu-duty for each fall; for, in addition to the measurement, we have a special statement of bound-

ties, to which we must give effect. When we look to the principle regulating the No. 197.
 cases of *Douglas v. Lyne*, Feb. 2, 1630, (2262,) and *Rochead v. Borthwick*, Jan. 1, 1679, (2264,) they clearly apply to this, though the one was a question be- Feb. 26, 1834.
 tween landlord and tenant, and the other between superior and vassal. The same person.
 principles apply here, that the words are designative, and not taxative, and there-
 fore I am for allowing the exception.

LORD GLENLEE.—I agree. I am not at all certain that even if the matter had been more clear, it was, *hoc statu*, competent for the Judge to give this direction, there being an averment of immemorial possession. It was competent for the defenders to have said, you have no title to prescribe beyond so many acres. I do not say they would have been right, but it would have been competent for them to have objected. But they allowed an issue on the fact; and though perhaps the Judge might have reserved the objection to the title, yet, without proof, to direct the Jury to find opposite to the issue allowed to be tried, was going a great deal too far. There might be cases where the mention of a certain quantity of ground would limit the party. This, however, would not be a bounding charter, but a limitation in gremio of the party's own title. I am for allowing the exception.

LORD MEADOWBANK.—I am also for allowing the exception. The Judge seems to have read the charter leaving out the boundaries; and had it been so, there would have been a limitation in the title, so as to exclude proof of possession beyond; but it goes on to specify boundaries, so that if there is a bounding charter at all, it is in the teeth of the charge.

THE COURT accordingly allowed the exception.

Skene, for the pursuer, craved the expenses of the discussion.

Dean of Faculty.—Expenses are never allowed against a party maintaining the charge of a Judge.

Skene.—We think the practice is the other way.

The cause stood over for a day to enquire into the practice, when it was ascertained that hitherto the expenses of setting aside a verdict under a bill of exceptions against a Judge's charge, had not in any case been awarded independently of the issue of the cause.

LORD JUSTICE-CLERK.—I have not much difficulty in refusing to give expenses at present, though I would reserve them. I do not doubt the power of the Court to award them now, if we saw cause; but I think we should attend to the course of practice; and as there is no case in which we have given expenses, I do not think this a case for beginning a contrary usage.

LORD GLENLEE.—I am for reserving the question of expenses. To be sure, this is a necessary step to obtain justice; but if it ultimately turn out that the pursuer is wrong in the cause, that brings another element into consideration, which renders it proper to reserve the question; and it is analogous to our proceeding on a bill of suspension, the expense of which we have by A. S. prevented ourselves from giving on passing the bill.

LORD MEADOWBANK.—I am also for reserving. If there was no power to reserve, I would be diffculted. It is not enough to say that the point was raised

No. 197. by the Judge, as the party makes it his own by not saying, I do not plead it. E
the safest course is to reserve.

Feb. 27, 1834.
Goldie v. Bank
of Scotland.

THE COURT accordingly reserved the question of expenses.

WOTHERSPOON and MACK, W.S.—

—Agents.

No. 198. ALEXANDER GOLDIE (Common Agent in Ranking of Jarburgh), Object
—Maitland.

BANK of SCOTLAND, Respondents.—D. F. Hope—Walker.

Competition—Right in Security—Poining of the Ground.—After an heritable creditor had executed a poining of the ground, the debtor's estates were sequestrated under the bankrupt act, and the pointed effects were sold by the trustee, under arrangement of parties; thereafter the creditor obtained full payment of his bond partly under a ranking and sale of the heritable estate, and partly from the proceeds of the pointed effects paid to him by the trustee—held, in the circumstances that the creditor was not bound to account to the postponed heritable creditors, for the whole proceeds of the sale of the pointed goods, but was bound to assign them his claim of accounting against the trustee.

Feb. 27, 1834.
1st DIVISION.
Ld. Corehouse.
S.

THE Bank of Scotland were heritable creditors of Smith of Jarburgh, to the amount of £23,000, contained in a first security. The bond provided,—“Tertio, that if the said Governor and Company, or their aforesaid, shall choose to enter into any possession in virtue hereof they may enter to and relinquish and resume, and again relinquish and so forth, at any time or times any such possession, and may do, or omit thereanent or thereon, and as they find best for themselves, and they shall not be liable for any solvency or insolvency, risk, lawful act, or omission whatever, but shall only be accountable for what they shall have actually received, and they shall not be liable to impute towards this security unless what they shall expressly receive towards the same, or what shall be instructed, and not compensated, nor referable to any other account. There were several postponed heritable creditors.

On 3d July, 1829, Smith's estates were sequestrated under the bankrupt act. Recently before the sequestration, the Bank of Scotland had got a decree of poining of the ground under their bond, in virtue of which they executed a poining of crop, stocking, &c. to the appraised value of £1532. Bell, as trustee under the sequestration, brought a suspension and interdict of the sale under the poining, contending, that his right under the sequestration was not excluded by the diligence of the Bank. During the process, it was arranged between the parties, that the pointed effects should be sold by the trustee, and the price consigned in bank. The effects were sold, and the proceeds exceeded the appraised value by several hundred pounds. They were assigned, but a sum of £1649, 6s. was paid to the Bank, who prevailed.

in the process of suspension, and were found entitled to exclude the trustee.¹ No. 198.

Feb. 27, 1834.
Goldie v. Bank
of Scotland.

The heritable estates of Smith were for some time under the charge of the trustee; but as they were insufficient to meet the real burdens with which they were encumbered, the heritable creditors ultimately took them into their own hands, and a process of ranking and sale was raised. The Bank of Scotland claimed to be ranked, *primo loco*, for the bond of £23,000, under deduction of £1649, 6s. received from the sale of the poided effects. The common agent objected for the postponed heritable creditors, that the poided effects had actually yielded a surplus of some hundred pounds more than the sum credited, and that the Bank, whether they received the surplus, or allowed it to remain in the trustee's hands, must deduct the whole amount of it from their bond, and seek relief from the trustee, if he still retained it.

To this it was answered—

1. The Bank had used the poiding exclusively for their own behoof. But for it, the whole crop and stocking would have fallen to the personal creditors under the sequestration. It had benefited the postponed heritable creditors by realizing £1649, and diminishing *pro tanto* the first heritable security.

Besides, under the special terms of their bond, the Bank were liable only for what was actually received by them; and they had given credit for all that they received.

2. In the process of suspension, the trustee truly appeared, not merely for the personal creditors, but also for the postponed heritable creditors. At that time, the heritable estates were still under his charge. He having been allowed by consent of all parties to sell, it followed, that if any proceeds of the sale were still in his hands, the postponed heritable creditors, if they had a right thereto, must seek them from the trustee. The Bank was in no respect liable for him; and they were not even bound to grant an assignation to the postponed creditors, which, if it had any effect, would unjustly prejudice the personal creditors.

On the other hand, it was contended by the Common Agent—

1. Except for the diligence of the Bank, the other heritable creditors would have attached the crop and stocking, and excluded the trustee. So far as that diligence excluded them on the one hand, and realized actual proceeds available to the Bank on the other, the Bank were bound to apply the whole of these proceeds in extinction of their prior bond. The Bank therefore should be dealt with on the same footing as the actual holder of the poided effects, since their diligence tied up the hands of the postponed creditors, and produced proceeds, no part of which could, without the Bank's consent, have been withheld from them.

¹ Dec. 3, 1831 (*ante*, X. 100).

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2. The trustee only represented the personal creditors in the process of interdict. The postponed heritable creditors were no parties to the arrangement under which the trustee was allowed to sell the pointed effects, or to his being allowed to retain any of these proceeds in his hands, in place of consigning them.—At least, the Bank must assign to the postponed creditors its right to call the trustee to account for these proceeds.

The Lord Ordinary “sustained the objections of the common agent to the claim of the Bank of Scotland, and found him entitled to the expense of the present discussion.”

The Bank reclaimed.

The Judges were understood to express an opinion, that in the process of suspension, the trustee had appeared and acted, not only for the personal creditors, but for the postponed heritable creditors, and that the whole were therefore parties to the arrangement under which the trustee had realized the pointed effects. Their Lordships were unanimously of opinion, that the Bank having received full payment, were bound to assign in favour of the postponed heritable creditors.

The Court accordingly “altered the interlocutor, and sustained the claim of the Bank of Scotland, but found that the Bank was bound to assign to the postponed heritable creditors, or to the common agent for their behoof, but only with warrandice from fact and deed, any claim still competent to the Bank, against the trustee to account for the price of the pointed effects.”

A. GOLDIE, W.S.—H. DAVIDSON, W.S.—Agents.



No. 199.

JOHN BARKER, Suspender.—*D. F. Hope—More.*

NORTH BRITISH INSURANCE COMPANY, Chargers.—*Sol.-Gen. Cockburn*
—*Cuninghame—Marshall.*

Process—Proof—Jurisdiction—Jury Trial.—1. Under a remit from the House of Lords to ascertain and determine certain points, but which did not say whether this should be done by jury trial or otherwise—held, that it was discretionary with the Court to direct issues to be tried by jury or not. 2. Held, that the question whether the secretary of an insurance company, having taken a bill from their debtor, whose life was insured with the company, received it in payment of the premium, or for what other purpose, was a proper question for trial by jury.

Feb. 27, 1834.

1st Division.
Ld. Corehouse.

THE late James Lyon borrowed £2500 from the North British Insurance Company, and effected a policy with them on his life to that amount, which he assigned to them in security. John Barker, surgeon, was taken bound as surety and full debtor with Lyon for the principal sum, and also for the regular payment of the premium. On 24th June, 1827, after the lapse of the time fixed in the policy for payment of the premium, Lyon called at the Insurance Office, and left a bill for £140 in

John Brash, the secretary. The bill was dated 21st June, 1827, and was drawn at fifty days. On 25th September, Lyon died; and on the 29th, a party, stating himself as acting for the acceptor of the bill, went to the Insurance Office, and tendered payment of it, which was refused by the manager and secretary, unless on condition of the contents being applied, not in payment of the last premium, but in extinction pro tanto of the loan of £2500. The Insurance Company gave Barker a charge for payment of the bond for £2500. He presented a bill of suspension, alleging, that the policy had not fallen at the death of Lyon, and that the Company therefore held funds imputable to the debt in the bond. The Court sustained the reasons of suspension.¹ The Insurance Company brought the judgment under appeal, and, on 5th March, 1833, the House of Lords reversed it.² The interlocutor of reversal contained a remit “to the Court of Session to consider whether it is consistent with the law and practice of Scotland to examine John Brash in this cause; and if they find that it is so consistent, then to ascertain, by the examination of the said John Brash, and from such other legal evidence (if any) as they may find applicable to the case, for what purpose the bill for £140, in the pleadings mentioned, was received by him; and, particularly, whether the said bill was received as payment of the premium which fell due on 4th May, 1827, for the continuance of an insurance for £2500 on the life of James Lyon for one year, from and subsequent to the said 4th May, 1827, and which bill being dated the 21st of June, 1827, and payable fifty days after date, fell due at a period subsequent to the expiry of three months from the time at which the said premium was payable; and in case the said court shall find that such bill was received by the said John Brash as payment of the said premium, then the said court shall consider, and find whether the said John Brash had any, and what authority, so to receive such bill, and upon what instrument or evidence such authority (if any) is founded; and in case the said court shall find that the said John Brash had authority from the directors of the said Company so to receive such bill, then the said court shall consider whether, under the contracts or agreements and charter constituting the said Company, the directors had any authority to receive, or to authorize the receipt of such bill, as payment of the said premium; and in case the said Court shall find that the said John Brash cannot, according to the law and practice of Scotland, be examined in this cause, or shall find either that the said John Brash did not in fact receive the said bill as payment of such premium as aforesaid, or that the said directors had no authority to receive or authorize such receipt, or that the said John Brash was not duly authorized to receive the said bill as such payment, then, and in any of such cases, it is further ordered, that the said

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¹ July 2, 1831 (ante, IX. 869—which see).

² 1 Supp. 61.

No. 199. Court shall find the letters orderly proceeded, and do further in the cause as shall seem just and consistent with this judgment."

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This judgment was applied, and the cause remitted to the Lord Ordinary, who found, "that it is consistent with the law and practice of Scotland to examine John Brash in this case; and, quoad ultra," his Lordship reported to the Inner House the draft of proposed issues for a trial by jury. These were in the following terms: "It being admitted that the late James Lyon, writer in Edinburgh, received in loan from the defender the sum of £2500, and insured his life in their office for the said sum and paid the interest on the said sum, and premiums due on the said insurance, up to the 4th day of May, 1827:

"It being also admitted, that on the _____ day of _____, the said James Lyon put into the hands of John Brash, secretary of the said Company, a bill of exchange for the sum of £140, accepted by D. S. Ronaldson Dickson, and blank indorsed by the said James Lyon:

"1. Whether the said bill was received by the said John Brash, in payment of the premium which fell due on the said 4th day of May, 1827, for the continuance of the said insurance on the life of the said James Lyon for one year, from and subsequent to the said 4th day of May, or for what other purpose?

"2. Whether the said John Brash had authority for the said Company to receive the said bill in payment of the said premium?

"3. Whether, under the contracts or agreements, and charter constituting the said Company, the directors of the said Company had authority for the said Company to receive, or to authorize the receipt of the said bill, and did receive or authorize the receipt of the same in payment of the said premium?"

Barker insisted that these issues should be tried by a jury, as the proper mode of expiscating the points remitted for enquiry. The Insurance Company objected, that this would be inconsistent with the terms of the remit from the House of Lords.*

Pleaded by Barker—

1. Even if nothing but written evidence was to be adduced in support of the first issue, it would still remain a question proper for a jury to say what was the bona fide understanding under which the bill for £140 was placed by Lyon in the hands of Brash. But there was nothing to limit the evidence to documents; and there would be oral testimony adduced, including Brash himself.

* It was incidentally observed by Lord Gillies, that although a remit to the Jury Court by the Lord Ordinary was final (6 Geo. IV. c. 120, § 15), it still remained open, under the remit, to enquire whether there was any question in the cause which could fairly be the subject of a jury trial. The Dean of Faculty remarked, that it would be highly beneficial to parties, if this were to be understood as the construction which the Court put upon the statute.

2. The second and third points were only to be determined after the first had been disposed of, and, therefore, whether they were proper for a jury or not, the first issue must, in the meantime, go to a jury. But they were proper for jury trial. In both cases, the usage and practice of the directors, and of the Company, would form an important element in the enquiry. It was not a mere question of the technical construction of any written mandate to Brash, or of any contract of copartnery as empowering the directors. If these appeared to limit the powers of Brash or the directors, there arose the practical question, how far usage had modified or explained these powers, at least in every question with third parties contracting bona fide with the secretary or the directors.

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Pleaded by the Insurance Company—

1. By the terms of the remit, it was implied, that the Court were to "consider and find" as to the different subjects of enquiry. If they had been to do this through the intervention of a jury, it would have been expressly so directed in the remit, according to the practice in similar cases. Indeed, the enquiries were not adapted to jury trial, as they involved several successive points, seriatim, and must imply a succession of trials, if they implied any at all.

2. The second and third issues were unfit for the determination of a jury. The power given by the charter, or copartnery, to the directors, was not a jury question, neither was the power given by them to the secretary. The record in the cause contained no averment as to usage.

LORD GILLIES.—I do not think it at all decisive as to the question of recurring to jury trial, that the House of Lords has contemplated the expiscation of several points seriatim, and in a certain order. In a reduction on the head of facility, lesion, and circumvention, a pursuer must prove, not only that he was facile, but also that he suffered lesion, and that he was circumvented. But although these are several distinct points, all of which must be proved, they are often made the subject of a jury trial. Neither do I think there is any thing in the words of the remit to exclude a jury trial. It is true there is no express direction to try by jury, but there is no express order against it. The Court of Session now contains civil jury trial as a part of its own system; and when a general remit is made from the House of Lords, it is open to this Court to proceed, either by leading evidence in presentia, or on commission, or by obtaining the verdict of a jury. The Court has a discretionary power at common law to proceed to investigate, in whole or in part, according to any of these modes, and it would require express directions in the remit to cut off this power. It may be doubted whether the order of investigation of the different subjects, as presented by the House of Lords, is the simplest or best that could have been adopted; but certainly there is a prescribed order, in so far at least that we are first to ascertain for what purpose the bill for £140 was received by Mr Brash. It is to this that the first issue is directed, and I think it a proper jury question. It is a matter of fact, of which the jury will judge according to the evidence laid before them. If a proof on commission were taken as to this point, it might very possibly happen that some of the Judges, on considering the report of the commission, might take one view of the proof, and some might take another;

No. 199. but the verdict of a jury brings the matter at once to a definite conclusion one way or other. In regard to the second and third of the proposed issues, I am not at present prepared to decide whether they are fit for jury trial. But as the first issue is so, I think it ought to be made the subject of a jury trial. After a verdict is returned on that issue, the Court can determine as to the ulterior procedure.

Feb. 27, 1834.
L. B. v. C. D.

LORD PRESIDENT.—I at one time thought, that perhaps some further explanation of the terms of the remit from the House of Lords might have been requisite; but I am satisfied that the opinion now expressed is well founded, and that the first issue ought to go before a jury. I have the less hesitation as to this, because, if the verdict proves the bill not to have been received in payment of the premium, there is at once an end of the cause. If the verdict proves the fact to be the reverse, still it appears to be the proper mode of establishing that point which the House of Lords have said is to be preliminary to the other enquiries pointed out in their remit.

LORD BALGRAY concurred.

LORD CRAIGIE was understood also to concur.

THE COURT approved of the first issue; and, in the meantime, superseded as to the others.

CAMPBELL and MACK, W.S.—J. and C. NAIRNE, W.S.—Agents.

No. 200.

A. B., Pursuer.

C. D., Defender.

Administration of Justice.—A person who was not licensed to practise before the Court, having acted as agent in a cause, and affixed the name of a practitioner to a paper without his consent, the Court publicly censured him, and intimated that any similar offence would in future be visited with exemplary punishment.

Feb. 27, 1834.

1st Division.
A. Fullerton.

LORD FULLERTON reported, that, in this case, a person who held no license or authority to act as an agent in the Court, had adhibited the name of a Writer to the Signet to the defences; that the cause had been enrolled before him, and his attention having been called to this circumstance, his Lordship had felt it necessary to bring the matter instantly under the cognizance of the Court.

The person implicated was summoned before the Court, and examined in presentia. He admitted the facts, but pleaded in mitigation, that the defences had been lodged prior to the late Act of Sederunt, relative to agents practising without due authority, and that the only step subsequently taken in the cause was that of enrolment, which was regularly done by the pursuer's agent. The Writer to the Signet was also examined, and stated that his name had been used without his leave being asked.

Their Lordships delayed making any deliverance until after they should advise with the other Judges, which they did.

PRESIDENT.—A great irregularity has been committed by this person No. 200. upon himself to act as agent in the cause when he has no license or authority to practise before the Court. This is an offence of a very serious nature, and public safety requires that it should be strongly repressed. In our Courts sessions are daily agitated which involve the property and the character, the liberty or the life of the lieges. To the defence of these, the instrument of agents is essential; their office necessarily implies a high trust, and on them a corresponding obligation to the faithful discharge of their important duties. In this country, therefore, and, I believe, in every civilized state, the rule prevails, for the protection of the public interest, that no man shall be allowed to practise as an agent before the Court until his qualifications have been tried, and he is found fit for the office. The usurpation of the functions of an agent is an offence which the Court must severely reprobate, as one which could lead to the most mischievous consequences if not peremptorily

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And I regret to observe, that, in this instance, a farther irregularity has been committed in using the name of a regular practitioner without his leave. The consequence of such a proceeding might be highly injurious to the regular practice of the law. For if any trick or chicanery were practised in the conduct of such proceedings, and it is more likely to incur where a false name has been used, than in any other case, the Court would be called on to direct their censure against such persons, and they would, in the first instance, be led to express this against the individual whose name appeared as agent on the face of the papers. Such a proceeding gets speedy publicity, and it might produce the most grievous disinjury to the agent whose name had been fraudulently used, before it was possible for him to place himself right with the Court and with the public.

The Court is willing to notice any circumstance in the case which may be of a favourable nature, and may warrant the Court in adopting the very lenient course of expressing their strong censure and displeasure as I have now done. It is stated that the name was affixed to the paper before the late Act of 1833 was passed. But I cannot rest much on this circumstance, as the act of 1833, when it merely declared, the irregularity complained of. But there is a reason to which the Court is generally willing to listen when it can; this is the circumstance which has been brought under our notice, and we are inclined to think that the public infliction of censure may suffice for the sake of example, when it is coupled with the warning which it is now my duty to give, that no other case of this offence shall occur, it will be imperative on the Court to pronounce with a rigorous sentence.

The party was then dismissed from the bar.

No. 201.

JOHN WILKIE and CURATORS, Suspenders.—*H. J. Robertson.*Feb. 28, 1834.
Wilkie v.
Dunlop & Co.

WILLIAM DUNLOP & Co., and ANDREW ANDERSON, Chargers.—

Maitland.

Minor—Diligence.—1. A young man who was *majorennitati proximus*, having gone to an inn, and lived there for three weeks, as shooting quarters, held liable to the landlord for the account incurred by him for food and lodging. 2. Diligence on a bill accepted by a minor, who had curators, without their concurrence, and directed against the minor alone, without reference to the curators, suspended as irregular.

Feb. 28, 1834.

1st Division.
Ld. Fullerton,
B.

ON 12th August, 1831, two young men, named Wilkie and Irving, arrived by the stage-coach at the Carnwath Inn, bringing dogs with them, to shoot in the neighbourhood. They staid at the inn till 1st September, and incurred an account, amounting, at a moderate rate of charge, to £20. Anderson, the innkeeper, drew a bill upon them for that amount, and they both accepted. Wilkie was a minor, an English student of medicine at the University of Edinburgh, and having guardians in England. He did not come of age until the 22d of December following. Anderson indorsed the bill to William Dunlop and Company, who raised diligence upon it during Wilkie's minority. Irving paid one half of the bill, but Wilkie, along with his guardians, offered a bill of suspension, on the ground that he was a minor; and that the charge had been directed against himself alone, and not against his curators. They also alleged, that Wilkie had been duly supplied by his guardians with the means of maintenance in Edinburgh at his studies; and that the obligation contracted by him to Anderson was without the consent of his guardians, and to his great lesion, and was therefore invalid.

Besides the suspension, Wilkie and his guardians raised a process of reduction of the bill. It was arranged by minute of parties, "that all the pleas of parties should be discussed in the present suspension, as fully and completely as if the action of reduction had been remitted to and conjoined therewith, and that the issue of this suspension shall determine the said action of reduction in all respects."

The chargers pleaded that, as the bill consisted of an account for food and lodging, full value had been given to Wilkie; that Wilkie was not only *majorennitati proximus*, but had all the appearance of a person who was actually major; that he never stated himself to the innkeeper to be a minor; and that it would be permitting a minor to pervert a privilege, destined for his protection, into an instrument of fraudulent injury to others, if he were not to be held liable for the half of the bill remaining due to Anderson.

A special and separate question occurred as to the import of the minute of parties. The chargers admitted that their diligence had been irregularly raised, as the charge was directed against Wilkie, ~~as~~

to his curators ; but they contended that, in virtue of the minute, it was competent to them to state every plea which would have served as a defence against the reduction of the bill as a document of debt. The suspenders contended that, if the diligence was inept, it must be suspended ; and as the reduction was to abide the fate of the suspension, the whole case must, in that event, be decided in their favour.

The Lord Ordinary found, " that the bill charged on is not challengeable by the suspender on the ground of minority, and therefore, and in respect of the minute of the parties, agreeing that the issue of the suspension shall determine the action of reduction of the bill brought by the suspender, repelled the reason of suspension, found the letters orderly proceeded, and decerned, and found the suspender liable in expenses." *

The Court expressed a unanimous opinion that Wilkie was liable for

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* " NOTE.—In this case, the suspender, a man within four months of majority, lived for nearly three weeks at the inn kept by the charger, on a shooting excursion, longest with a friend. The amount of the charger's demand is in every respect reasonable and moderate, whether the mode of living be considered, or the rate at which the different items are charged. The bill under suspension was granted in payment of that account about a month afterwards, while the suspender was still a minor. The suspender's friend has paid one-half, so that the bill, as now insisted in, consists of the suspender's share of the account. It is not pretended, that either at the time of contracting the debt, or of granting the bill, the charger was informed of the suspender being under age. In these circumstances, the Lord Ordinary thinks, that the plea of minority on the part of the suspender, is truly a perversion of what was meant as a protection, into an instrument of fraud. The present seems exactly a case for the application of the principle *minoribus deceptis non decipientibus est subveniendum*. The objection in form, to the charge as given to the suspender before majority, and without any mention of tutors and curators, whatever difficulty it might otherwise have presented, must be held to have been waived. Before the bill of suspension was passed, an action of reduction was raised by the suspender, for the purpose of trying the merits of the case, i. e. the validity of the bill. It concludes for reduction of the bill, as having been granted during minority, &c., and without the consent of the suspender's guardians, and for reduction of the protest and diligence, on the single ground, that the ' nullity of the said bill necessarily infers the nullity of these writs.' The bill of suspension was allowed to be passed without answers, on the application of the suspender's agent intimating his opinion, that ' the question, as it appears to me, cannot be determined in the Bill-Chamber, being only competent in the reduction, the object of the suspension being merely to protect the person in the meantime.' Afterwards, parties seem to have thought that it would be more convenient to discuss the merits in the suspension ; and by the minute subjoined to the printed suspension, ' it is agreed that all the pleas of parties should be discussed in the present suspension, as fully and completely as if the action of reduction had been remitted to and conjoined therewith ; and that the issue of this suspension shall determine the said action of reduction in all respects.' The Lord Ordinary must, in sound construction, hold this to be a waiver of the objection to the form of the charge, because, on any other supposition, the merits of the case could not be reached in the suspension, and consequently the issue of the suspension could not determine the said action of reduction."

- No. 201. the half of the bill remaining due ; the Lord President observing, that a
 Feb. 28, 1834. minor could not go and live three weeks at an inn, and then come out
 Cumming v. without paying any thing for his maintenance. In reference to the shape
 Hay. of the case, as affected by the minute of parties, their Lordships observed,
 that the judgment to be pronounced should be framed precisely as if the
 reduction had been remitted to and conjoined with the suspension.

THE COURT pronounced this interlocutor :—" Recal the interlocutor, &c. ; find that the charge was irregular, and suspend the letters and charge simpliciter ; but, in respect of the agreement of the parties, assoilzie the charger from the action of reduction to the extent of one half only of the bill charged on ; and find the suspender liable in expenses to the chargers, but under deduction of the expenses of discussing the irregularity of the charge."

J. SHAND, W.S.—J. SONERVILLE, S.S.C.—Agents.

- No. 202. SIR W. G. G. CUMMING and JOS. GORDON, W.S., Raisers.—
D. F. Hope—Neaves.
 LIEUT.-COLONEL ALEXANDER HAY, Objector.—*Rutherford—Ivory.*

Trust—Process—Multiplepinding.—1. Trustees under two separate deeds, forming a general settlement, entitled to combine the affairs of both under one process of multiplepinding ; 2. Objections to a summons of multiplepinding to be treated as preliminary defences in an ordinary action ; and, when repelled, the party liable to be subjected in expenses, on intimating an intention to reclaim ; and, 3. A trustee who had taken infeftment under the trust, not entitled to withhold his name from proceedings necessary to the winding up, and obtaining the trustees denuded.

- Feb. 28, 1834. THE late Mrs Sophia Dunbar Brodie, shortly before her death, executed two trust-deeds of settlement of the same date, conveying by the
 2D DIVISION. one her moveable estate, and by the other her heritable estate to the
 Ld. Mackenzie, same trustees, viz. Sir William Gordon Cumming, Joseph Gordon,
 R. W.S., Lieut.-Colonel Hay, and another party who did not accept. In the deed regarding the heritable estate, there was an express provision declaring a majority of the surviving acceptors to be a quorum, which was omitted in that regarding the moveable estate. Colonel Hay, along with Sir William Cumming and Mr Gordon, accepted under both trusts, and they were infeft in the heritable property, Colonel Hay signing, with his co-trustees, a charter of confirmation in their own favour, and a resignation ad remanentiam to consolidate the property and superiority of one of the estates ; but, after some time, he tendered a resignation of his office of trustee in regard to the heritable estate. A shortcoming of moveable funds having appeared, and questions having arisen how far certain claims wherewith the moveable estate was burdened

able estate which was directed to be entailed, Sir William Cum- No. 202.
 and Mr Gordon raised a summons of multiplepoinding in name Feb. 28, 1834.
 selves and Colonel Hay, as trustees, under both trusts, for the Cumming v.
 of having these questions determined. To this summons Colo- Hay.

gave in objections, contending,
 at the trusts being separate, it was incompetent to bring the dis-
 of them into Court in one process, and by one act.

at as to the moveable trust, no quorum being specified, his consent
 essary to authorize the action ; and,

at as to the other trusts, the raisers were not entitled to use his
 ithout his authority, and in face of his resignation ; and that he
 itled to a restriction of his instance in the summons, to the move-
 st, as to which only he remained a trustee.

ie other hand, it was contended, that the raisers, being the majo-
 the accepting trustees, were entitled to institute this process for
 ement of the questions arising under both trusts, which were neces-
 ixed up together ; and that Colonel Hay having taken infestment
 eritable estate as trustee, was not entitled to withhold his name
 oceedings adopted by the trustees for winding up the trust, and
 themselves denuded.

Lord Ordinary pronounced this interlocutor, adding the subjoined
 —“ The Lord Ordinary having heard parties’ procurators, and
 er considered the revised objections and the revised answers
 , and whole process ; and being of opinion that the objections ought
 pelled, appoints the cause to be enrolled for that purpose, and the
 r to come prepared to say whether he intends to submit this judg-
 when pronounced, to the review of the Inner-House.” His
 ip thereafter repelled the objections ; and, on Colonel Hay inti-
 his intention to reclaim, found him liable in expenses.
 nel Hay accordingly reclaimed ; but the Court adhered.

GORDON and STUART, W.S.—T. M’KENZIE, W.S.—Agents.

ie Lord Ordinary considers the objections here to have been, and to have
 ted, heard, and decided upon as dilatory defences, and that being the case,
 s himself bound, by section 27th of the statute, and section 47th of the Act
 runt, to proceed in regard to these defences as in other cases of dilatory
 . The Act of Sederunt providing, that the objections in a multiplepoinding
 taken as defences, sanctions these objections being taken, either dilatory or
 lory, according to their nature. And it seems to the Lord Ordinary to be
 , that in case of the former, these dilatory defences are to be proceeded
 such, i. e. in the ordinary statutory way, with a finding of expenses in case
 ming. But the Inner-House seem to be less tied up by section 5 of the
 The Lord Ordinary believes, that besides the case of the trustee of Taylor’s
 s, there have been other cases in the Outer-House of a similar nature.

No. 203.

ARMSTRONG'S TRUSTEES, Pursuers — *M'Neill—De Maria.*LEITH BANKING COMPANY, Defenders.—*Shene—Anderson.*

Feb. 28, 1834.

Armstrong's
Trustees v.Leith Banking
Co.

Process—Expenses.—Where a case involves questions of importance and intricacy, the Court will allow a charge for the Edinburgh agent going to London to be present at the examination of a principal witness, though taken on interrogatories previously adjusted.

Mar. 1, 1834.

1st Division.

IN taxing the expenses of the case, which was tried by a jury, before the Lord President,¹ the auditor allowed a charge of sixty guineas, made by the Edinburgh agent of the defenders, for going to London to be present at the examination of Scot, under a commission and adjusted interrogatories. Scot was expected to be the most important witness in the case. The questions in issue involved the character of the Leith Bank, and opened up an examination of the state of large transactions at some of their agencies. The pursuers objected to the allowance of the charge, contending that an agent ought to have been employed in London, especially as the interrogatories were previously adjusted. The defenders alleged, that it would have cost as much to pay a London solicitor to make himself master of the case, as it had cost to send up an agent from Edinburgh; but separately pleaded that, from the importance of the case, they were entitled to charge for sending up an agent, especially as the Lord President had a discretionary power of putting questions, after written interrogatories, so that it was essential to have an agent present who was acquainted with the case.

LORD PRESIDENT.—Every question of this sort depends on its own circumstances. This was a cause involving questions of intricacy and importance, and it was the expense of sending up the Edinburgh agent was reasonably incurred, so as to form a fair charge against the opposite party.

LORD CRAIGIE.—It would be very improper, in the general case, to allow a charge of this nature. But there are exceptions to every rule; and, in a question of circumstances, the Judge who presided at the Jury trial, out of which this question arises, should be best qualified to determine.

THE COURT repelled the objection, and approved of the report.

J. ROBERTSON, S.S.C.—J. BISSET, S.S.C.—Agents.

¹ Ante, p. 440.

BUCHAN or M'LAWS, Pursuer.—*Sol.-Gen. Cockburn—Wilson.* No. 204.
 THOMAS RISK, Defender.—*Christison.*

Mar. 1, 1834.
 Buchan v.
 Risk.

Id and Wife.—1. A wife, with consent of her husband, disposed heritage in
 of her husband's debt; but refused to execute a ratification; held, that
 was not reducible on the ground of non-ratification, unless force, fraud, or
 fluence by the husband, was proved. 2. Question as to the effect of a clause
 te warrandice, an obligation to infeft, &c., inserted by a wife, with consent
 sband, in a disposition by the wife.

322, Joseph M'LAWS, flax-dresser, granted a bond to Thomas Mar. 1, 1834.
 altster, for a debt of £60. M'LAWS was married, and his wife was
 or of a house and plot of ground inherited from her father. In 1st Division.
 1, immediately after the obligation of repayment by the husband, L.J. Moncreiff
 allowed this clause:—"And for the greater security and more sure D.
 t of the said sums, principal, interest, penalty, and termly failures,
 me, Mary Buchan, daughter of the late David Buchan, dyer in
 rie, and spouse of the said Joseph M'LAWS, with consent of my
 band, to have sold and disposed, as I the said Mary Buchan, with
 foresaid, and I the said Joseph M'LAWS, for my interest, and as
 surden on me for my said spouse, and we both of one consent, by
 resents, sell, alienate, and dispone to and in favour of the said
 Risk, and his foresaids, heritably, but under reversion, in manner
 mentioned, all and whole that tenement of houses and yard thereto
 ing: But always under redemption, in manner after mentioned;
 in real security, and for payment to the said Thomas Risk and
 aids, of the said principal sum of sixty pounds sterling, interest
 ne due thereon, liquidate penalty, and termly failures aforesaid, if
 l. In which subjects above disposed, I, the said Mary Buchan,
 sent foresaid, bind and oblige myself and foresaids, to infeft and
 e said Thomas Risk." The deed contained an obligation of war-
 in these terms:—"Which subjects above disposed, with this
 d disposition of the same, and infeftment to follow hereupon, and
 to be made in virtue of the power hereinafter granted for that
 if the same shall take place, and disposition to be granted by me,
 quence thereof, I, with consent foresaid, and I the said Joseph
 s, for my interest, bind and oblige us, and our foresaids, to war-
 the said Thomas Risk, and his foresaids, to be free of all encum-
 and grounds of eviction, at all hands and against all mortals."—
 ve consent to the registration hereof in the books of Council and
 or others competent, that all necessary execution on a charge of
 may pass on a decree to be interponed hereto in common form."
 d contained a precept of sasine and procuratory of resignation by

No. 204. **Mrs M'Laws.** The deed declared, "that if we shall fail to make ment of the sums that shall be due by the personal obligation b written, within three months after a demand of payment is intimated or our heirs or successors personally, or at our dwelling-places, or if of the kingdom, at the market-cross of Edinburgh by a notary-public witnesses, then and in that case it shall be lawful to the said Thomas and his foresaids, immediately after the expiration of the said months, and without any other intimation or process of law for that e to sell and dispose of the foresaid subjects."—"And we bind and o ourselves and our foresaids, to ratify and confirm any sale to be mad consequence hereof, and to grant absolute and irredeemable disposi to the purchaser, his heirs and assignees, and to execute and delive other deeds and writings necessary for rendering the rights complete

Upon the back of the deed, the usual formula of an act of ratifica was written, for the purpose of being signed by Mrs M'Laws; but refused to execute the ratification when asked to do so. Sasine follo upon the disposition. After the death of her husband, Mrs M'Law 1831, raised a reduction of the bond and disposition and sasine.

Pleaded by the pursuer—

1. The want of ratification is fatal to the deed.¹
2. In the special circumstances, as the deed was granted solely for husband's behoof, and she had expressly refused to ratify it, out o presence, it must be presumed to have been obtained through u influence on his part, and therefore to be reducible.²
3. The deed contains personal obligations against the wife, suc the clause of absolute warrandice, the obligation to infeft, and the cor to registration for summary execution. These are null as again married woman,³ and they are so interwoven with the deed as to in date the whole of it.
4. The deed is substantially a cautionary obligation by the wif the husband. It has suffered the septennial prescription. Separate is revocable as a donation between husband and wife.⁴

¹ 1481, c. 83; Balf. Pract. c. 8, p. 94. ² 1 Ersk. 6. 35; Bell's Princ. § 16

³ 1 Ersk. 6. 25; Wood, June 12, 1611 (5957); Douglas, Feb. 3, 1616 (5 Shearers, June 14, 1715 (5991); Greenlaw, March 24, 1626 (5957); Matthew, 19, 1626 (5959); Mitchelson, Jan. 30, 1635 (5960 and 6073); 1 Brown's Supp and 357; Irvine, July, 1725 (5961); Birch, Jan. 14, 1663 (5961); Fisher, Ja 1665 (5963); A. v. B., July 5, 1676 (5965); Duncan, Nov. 15, 1705 (5966); son, Feb. 11, 1707 (5969); Menzies, Dec. 8, 1761 (5974); Watson, Dec. 10, (5977); 5 Brown's Supp. 474; Hailes, 508; Harvie, Feb. 21, 1791 (5980); Cases, 255; Lennox and Co., May 19, 1821 (ante, I. 19).

⁴ Scott, Aug. 10, 1776 (6108 and Appx. Husb. and Wife, No. I.); M'Nell, I 1829 (ante, VIII. 210); M'Kenzie, July 17, 1677 (3 Supp. 166); Crighton, 1612 (2074); 3 Supp. 333; Doul, Dec. 9, 1695 (2077).

Pleaded by the Defender—

No. 204.

1. It is competent for a wife, with consent of her husband, to dispose her estate in security of her husband's creditor, just as much as it is competent to her to sell it, although thereby the whole price would fall under the *jus mariti*. It would, indeed, often be most injurious to a wife if she was disabled from relieving her husband's embarrassments, by selling or burdening her property. Ratification is not essential to the validity of the deed; and the want of it forms no ground of reduction, unless force, fear, fraud, or undue influence exercised by the husband, be proved.¹

Mar. 1, 1834.
Buchan v.
Risk.

2. The deed contains a valid dispositive clause, with a precept of sasine, and procuratory of resignation, which of themselves are sufficient. But the clauses of warrandice and obligation to infeft are necessary accessories of the power of disposing; and unless it is to be held that a married woman has no power to sell or burden her heritage, she must be capable of undertaking the necessary relative obligations.²

3. No personal obligation of cautionry is contracted by the pursuer, and the disposition in security does not fall under the septennial prescription. It is an onerous and irrevocable deed, quoad the creditor.³

The Lord Ordinary found, "that though the pursuer, as a married woman, could not grant any personal obligation, on which diligence could proceed, she had power, with her husband's consent, and if of sound mind, and not induced thereto by force, fear, or fraud, to dispose her heritable estate effectually to a third party, absolutely, or under reversion: that such a disposition to a third party requires no ratification to validate it, unless it can be shown that the wife, in granting it, acted under force or fear, or the undue influence of her husband: that the statutory limitation of cautionary obligations does not apply to such a disposition in security as that here sought to be reduced: therefore, that there are not sufficient grounds, in the facts admitted on the record, for reducing the disposition and infeftment, held by the defender and now challenged."* His Lord-

¹ 1 Ersk. 6. 33 and 36; 1 Bankt. 5. 76; M'Kenzie, vol. II. p. 287; Johnstone, June 29, 1708 (16511); Stuart, Jan. 27, 1681 (7762); Clark, Jan. 24, 1826 (ante, IV. 388); Harvey, Feb. 21, 1791 (Bell's Cases, 255).

² Hope, Feb. 3, 1617 (5978); 1 Ersk. 6. 27; Ridpath, Jan. 21, 1674 (5996); Anderson, July 27, 1775 (6081); Elleis, Dec. 15, 1665 (5987); Ker, June 14, 1715 (5991).

³ 1 Ersk. 6. 35; Brown, Dec. 3, 1830 (ante, IX. 136); Clark, Jan. 31, 1717 (5996).

* * * NOTE.—The pursuer is very poor, and her counsel seemed to intimate that they did not wish to go into a trial, but that they thought they had sufficient ground for obtaining reduction, on the law arising from the admitted facts. The Lord Ordinary has therefore thought it proper in this case to give his judgment on the abstract points of law, without foreclosing the pursuer on the other points involved in the disputed facts. He does this the more readily, because he thinks the case a hard one, and, in one point at least, not free from doubt; and because, notwithstanding the opinion which he has found himself obliged to form, he thinks that the Court

No. 204. ship, in reference to certain averments on the record which were denied, appointed the pursuer to state whether she craved a remit to the jury roll.
 Mar. 1, 1834. Buchan v. Risk.

The pursuer reclaimed. The Court ordered a minute of authorities from each party. Thereafter, they requested the opinion of the other Judges, "Whether the deed in this case challenged is good without the ratification of the wife." The following unanimous opinion was returned: "Understanding that the meaning of the question put to us is, whether the want of ratification by the wife renders the deed null as to her, we are of opinion, that according to the law, as we have understood it, and as it is laid down in the authorities referred to, the circumstance of the deed not having been ratified does not render it null; and that though

may perhaps see sufficient ground for reducing the deed, without requiring farther proof.

"On two of the points to which the interlocutor applies, the Lord Ordinary thinks that there can be no doubt, viz. 1. That the deed of a married woman cannot be reduced, merely because it has not been ratified before a magistrate, unless there is some evidence of the exertion of force, fear, or undue influence by the husband; but certainly, in such a case as the present, and where the ratification was asked and refused, very slight evidence would be sufficient; 2. That the septennial limitation of the act 1695 cannot be applied to a disposition in security with infestment, where there is no personal obligation of cautionry contracted. The only thing approaching to this is, that the bond, in giving the power of sale, declares, 'that if we shall fail to make payment of the sums that shall fall due, by the personal obligation before written, within three months after a demand of payment is intimated to us or our heirs or successors, &c., it shall be lawful to sell,' &c. But if it was competent to grant the security at all, the Lord Ordinary does not think that this, which creates no personal obligation against the wife on which diligence could proceed, can materially alter the nature of the deed in this point. It is settled law, that the act does not apply to bonds of corroboration, and still less will it apply to a simple disposition in security.

"The case, however, may be more doubtful, on the more general ground, that this is a deed by a married woman, which, though it relates solely to her separate estate, implies in it various personal obligations. Her estate is to be sold, unless, in default of her husband, she pays the debt. She is taken bound, in absolute warrantice, on which action and diligence might proceed; and she is taken bound to grant all other deeds that may be necessary for carrying the disposition into effect. It is quite clear that no adjudication could proceed against a married woman's estate, even on an heritable bond, granted stante matrimonio—*Watson v. Robertson*, December 10, 1772 (5976), and the cases there quoted; and, perhaps, it may be doubted whether the intimation to her personally, which, under a bond in the form here used, must precede a sale, is not of the nature of diligence; but though there may be doubt in the question, the Lord Ordinary is at present unable to come to so serious a conclusion, as that a married woman cannot grant an effectual heritable bond, even for her husband's debt. He observes, that in *Mr Robert Bell's report* of the case of *Harvie and Others against the Trustees of Chessels*, February 21, 1791, where the deed was simply a personal obligation of cautionry, *President Campbell* says, that the man of business who advised the transaction might be liable for granting it in that null form, adding, they ought to have bound the estate, and then the security would have been effectual."

the deed may be reducible on proof of special facts, the mere want of ratification does not by itself constitute such a defect or ground of objection as to infer reduction."

On resuming the cause, the Court pronounced this interlocutor:—"Find, in terms of the opinions of the consulted Judges, that the non-ratification, by the wife, of the deed, in this case, is not a sufficient ground for reducing the deed; refuse the reclaiming note, and adhere, &c.; and remit to the Lord Ordinary to proceed, &c., reserving all questions of expenses."

Mar. 1, 1834.
M'Laren v.
Ramsay.

W. MERCER, W.S.—W. RENN, W.S.—Agents.

ROBERT M'LAREN, Suspender.—*D. F. Hope—Cunninghame.*
JAMES RAMSAY, Charger.—*Skene—J. Anderson.*

No. 205.

Title to Pursue—Bankrupt—Poinding.—1. A party presented, in his own name only, a bill of suspension and interdict of diligence affecting goods which he alleged to belong to his son—held, that he had no title to close. 2. A creditor ranked on a bankrupt's estate, used a poinding as of goods subsequently acquired by the bankrupt; the poinding was reported, and warrant of sale obtained; the bankrupt got his discharge, under § 61 of the bankrupt act—Question, whether the poinding remained entire, notwithstanding the discharge?

THE estates of Robert M'Laren were sequestrated under the bankrupt act, in July, 1831. James Ramsay was ranked as a creditor; and in December, 1832, he executed a poinding of goods alleged to belong to M'Laren, and to have been acquired by him subsequently to his sequestration. The poinding was reported to the Sheriff, and warrant of sale granted, but the sale was stopped by an interdict from the Sheriff, obtained by the son of M'Laren, alleging the poinded goods to be his. A record in the process of interdict was made up, and parties were allowed a proof. In the meantime, a second poinding of other goods was executed by Ramsay, in October, 1833. It was reported, and the poinded goods were advertised for sale, when an interdict was again obtained by M'Laren's son, alleging the poinded goods to belong to him. In November, M'Laren obtained a discharge, not in virtue of composition-contract, but under § 61 of the bankrupt act. He then presented, in his own name only, a bill of suspension and interdict of the poindings used by Ramsay, alleging that the whole poinded goods belonged to his son; and that as both the poindings were merely in cursu, at the date of the discharge, his liability for any debt prior to the sequestration was extinguished, and therefore the diligence could not be followed out to the effect of selling the goods in payment of that debt.¹

Mar. 1, 1834.
1st Division.
Ld. Moncreiff.
Bill Chamber.
B.

¹ *Parkers*, Feb. 5, 1783 (2868); *Tullie*, June 18, 1817 (F. C.); *Samson*, May 15, 1822 (ante, I. 407).

No. 205. To this it was answered—

Mar. 1, 1834.
M'Laren v.
Ramsay.

1. That if, as the suspender alleged, the effects belonged to his son, he had no title to apply for interdict. Besides, the question as to the son's right to the goods was depending in the processes at the son's instance in the Sheriff Court.

2. On the supposition that they belonged to the suspender, the discharge did not form any bar to the poinding. A creditor may, notwithstanding the existence of a sequestration, attach goods subsequently acquired by the debtor; and even a poinding four months after its date is not thereby affected. In this way a creditor may get full payment of his debt, and not a mere dividend or composition. The discharge, therefore, could not be intended to apply to such a case. But, independent of this, the suspender was barred from pleading on the discharge. The poindings were duly executed² and reported before the discharge, and would have been followed out to sale, had it not been for the interruption of the suspender, on the false allegation that the goods were his son's, and by raising processes of interdict in his son's name.

The Lord Ordinary, "in respect, that in so far as the complainer alleges that the poinded goods are not his property, but the property of his son, the bill is presented without any legal title; and is further unnecessary—the question being sub judice in the Sheriff Court, and an interdict against the sale, of date the 8th January, 1834, in full force; and in respect that in so far as it may be maintained or established that the goods are the property of the complainer, the poinding duly executed on goods admitted by the complainer not to have fallen under the sequestration of his estate, but to have been subsequently purchased or acquired—the said poinding having been executed before the complainer had obtained any decret of discharge by this Court, must be valid and effectual as a security in any question between the complainer and the respondent; and, farther, in respect that no caution is offered, refused the bill, and found expenses due."*

¹ 2 Bell, 409.

² 2 Bell, 64 and 458.

* "NOTE.—The first part of this interlocutor requires no farther explanation, and perhaps is sufficient for disposing of this bill. As to the second, the cases quoted have evidently no application to the matter; for here the funds (as admitted upon oath by the complainer, No. 94 of productions) were acquired, if at all, posterior to the sequestration, and the poinding was used before the discharge, and there is no competition of diligence. In this state of the case, the material doctrine laid down by Mr Bell (p. 454), that property which falls to the bankrupt after the date of the application, but before the date of the interlocutor of Court, will be attachable by the creditors by ordinary diligence, or by a supplementary sequestration, is not at all adverse to any of the decisions quoted, and necessarily supports that poinding duly executed on such property before the discharge is obtained, must be effectual: that it was prevented from being carried into full effect by a sale, in consequence of the interference of the son, cannot surely hurt the effect of the poinding with this complainer, if it turns out that the goods are his property."

The suspender reclaimed.

No. 205.

LORD GILLIES.—I do not feel any difficulty in disposing of this case. The suspender explicitly avers, that the goods attached by both poindings were the property of his son. He founds upon this as the leading ground of his suspension. Mar. 1, 1834.
Fullarton v.
Brand.

His son is not here, and the suspender does not appear as administrator for son. He comes here in his own name alone, to complain of a diligence attaching property in which he disclaims having any interest. The proper party before is not here, and the suspender has no title to appear. The Lord Ordinary states, as the first ratio for refusing the bill, that it is presented without any title, and his Lordship observes in a note, that this alone was perhaps sufficient for disposing of this bill. I think it was quite a sufficient ground of itself, that it would therefore be better not to go into any ulterior question, which is necessary for disposing of the cause, and which involves matter deserving of serious consideration: I mean the effect which the discharge under the sequestration has upon the poinding. The decree of the Court declares the bankrupt fully discharged of all debts prior to the sequestration, and, therefore, finally discharged of the debt on which the charger was using diligence. I am not prepared present to determine the effect of this discharge upon the diligence of the charger; and as that part of the Lord Ordinary's interlocutor which bears on this subject is unnecessary, I would propose to recal it, and rest the judgment of the Court upon the suspender's want of title.

LORD CRAIGIE was understood to observe, that the goods acquired subsequently to sequestration were open to the attachment of the creditors of the bankrupt by diligence.

LORD BALGRAY.—I think there is clearly a want of title in the suspender upon his own showing. He states that the poinded effects were not his, and, if they belonged to any third party, whether the suspender's son or not, the suspender has no title to appear on his own account.

LORD PRESIDENT.—I am of the same opinion.

THE COURT accordingly recalled the interlocutor, and refused the bill, in respect of the suspender's want of title.

G. HILL,—M. LOTHIAN, S. S. C.—Agents.

JOHN FULLARTON, Pursuer.—*A. Wood.*
J. BRAND and R. Low, Defenders.—*G. G. Bell.*

No. 206.

Cessio Bonorum.—Circumstances in which the benefit of cessio refused in hoc case.

THE pursuer, Fullarton, merchant in Dundee, in February, 1832, Mar. 1, 1834.
2^D DIVISION.
R. held a meeting of his creditors, and laid before them a state of his affairs, showing debts due by him to the amount of £1372, 10s., and owing to the amount of £2430, thus leaving a reversion in his favour of £1057, 10s. On the faith of this being a correct statement, the creditors agreed to accept instalment bills, at six, twelve, and eighteen months, and

No. 206. allowed him to proceed with the realization of the funds. Fullarton having failed to pay his instalment bills, and having been incarcerated, it turned out that the state formerly laid before his creditors was greatly exaggerated, and in some respects fictitious, in regard to his alleged funds; and with respect to one item, viz., a lease of a bleachfield, valued at £1000, it appeared that previously to the meeting of his creditors in February, 1832, he had sold one-half of it to a partner, and that shortly thereafter he had conveyed to him the remainder, whereby his partner became entitled to compensate his own claims, leaving to the creditors a claim against him for the balance, payable by instalments, at long intervals, extending to the year 1841. After lying a few months in prison, Fullarton raised this process of cessio, in which he was opposed by the defenders, two of his creditors, in respect mainly of the circumstances above stated.

Mar. 1, 1834.
Anderson v.
Pott.

Mackintosh v.
Ashburton.

THE COURT refused the benefit of cessio in hoc statu.

J. WATSON, W.S.—LEVEN and ALISON, W.S.—Agents.

No. 207. ANDERSON, CHILD, and CHILD, Pursuers.—*Greenshields*.
POTT and M'MILLAN, Defenders.—*Forsyth*—H. J. Robertson.

Mar. 1, 1834. *Expenses*.—Conclusion of the cause mentioned ante, VII. 499, X. 534, XI. 778, and XII. 301. The Lord Ordinary, on the question of expenses, found the defenders liable therefor, down to the date of the judicial reference, with the exception of the expense of making up the record, and found no further expenses due to either party. Both parties reclaimed.

2D DIVISION.
Ld. Mackenzie.

THE COURT altered, so far as to find the defenders entitled to the expenses of discussing the meaning of the award, but quoad ultimum adhered.

WM. PATRICK, W.S.—ANDREW GRAY, W.S.—Agents.

No. 208. JOSEPH MACKINTOSH, Pursuer.—*D. F. Hope*—*Neaves*.
LADY ASHBURTON, Defender.—*Sol.-Gen. Cockburn*—*A. A. Macconochie*.

Process—Proof.—After a remit to a man of skill to report as to the work for which a tradesman claimed payment, the Court refused to allow a jury trial.

Mar. 1, 1834. THE late Lord Ashburton employed the pursuer, Mackintosh, a builder, to execute some mason work on his house of Rosehall, in the county of Sutherland. In September, 1821, Mackintosh gave in an account, charging £1627. This Lord Ashburton objected to, and, by his desire, agent, Mr Mowbray, who was at Rosehall at the time, made mess

2D DIVISION.
Ld. Medwyn.
R.

ments of the work done, and, calculating the amount according to these, No. 203.
 the sum brought out was only £1301, to which £92 was afterwards added
 for an item omitted. Lord Ashburton had paid Mackintosh in all, during
 the progress of the work, £1420; but it did not appear that there had ever
 been a final settlement between them, and his Lordship died in 1823.
 In 1826, Mackintosh raised this action against Lady Ashburton, his
 Lordship's widow and executrix, concluding for £268, as the balance
 alleged to be due, and founding on a measurement made subsequently to
 that of Mr Mowbray's, by two tradesmen, called Rose and Mackenzie,
 and, as he alleged, by authority of Lord Ashburton. Lady Ashburton
 denied that Lord Ashburton had authorized this second measurement, or
 that it was correct, and stated her conviction that Lord Ashburton had
 ill satisfied Mackintosh's claims, and pleaded prescription. On this
 last plea, however, her ladyship did not insist for an immediate decision,
 and the Lord Ordinary, before answer, remitted to Mr Black, a pro-
 visional man, to compare the measurements of Mr Mowbray, and those
 of Messrs Rose and Mackenzie, with the original specifications and esti-
 mates, which had been recovered under a diligence at the instance of
 Mackintosh, and to report how far the respective measurements differed
 or agreed with these specifications and estimates. Mr Black found that
 the specifications and estimates were not at all so full and complete as to
 enable him to come to any satisfactory conclusion, and he proceeded to
 Joseph Hall for the purpose of taking the measurements of the work done.
 He thereafter returned a report, which the Lord Ordinary found "did
 not afford the means of deciding on the pursuer's claim."

Mar. 1, 1834
 Mackintosh v.
 Ashburton.

Neither party reclaimed against this interlocutor, and Mackintosh was
 thereafter allowed to give in a minute, stating in what manner he propo-
 sed to establish his claim. He accordingly gave in a minute, suggesting
 remit to a person of skill, with power to examine witnesses as to the
 extent of work done. This the Lord Ordinary, by interlocutor of date,
 January 31, refused, in respect that Mr Black, who had been attended by
 Mackintosh, had reported that it was impossible to measure the work, for
 this, among other reasons, that much of it was for repair. Mackintosh
 thereupon craved a general proof prout de jure.

The Lord Ordinary on this pronounced a second interlocutor, of date
 February 20, refusing "to remit this cause to the Jury roll, with the
 view of allowing the pursuer to substantiate his claims by a parole proof;"
 and his Lordship added the subjoined note.*

* "It is only now, after being so long in Court, that the pursuer offers a proof
 prout de jure, all the previous modes of establishing his claim having been of a dif-
 ferent description, more likely to be satisfactory than a proof at large. These ha-
 ving failed, all at once the pursuer offers to resort to a proof by witnesses, without
 explanation how it is possible to expect that the workmen employed under the
 order can more distinctly point out what work was done, being in a great mea-

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THE COURT refused the benefit of cessio in hoc statu.

J. WATSON, W.S.—LEVEN and ALISON, W.S.—Agents.

No. 207. ANDERSON, CHILD, and CHILD, Pursuers.—*Greenshields*.
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 2D DIVISION. XI. 778, and XII. 301. The Lord Ordinary, on the question of expenses,
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THE COURT altered, so far as to find the defenders entitled to the expenses of discussing the meaning of the award, but quoad ultra adhered.

WM. PATRICK, W.S.—ANDREW GRAY, W.S.—Agents.

No. 208. JOSEPH MACKINTOSH, Pursuer.—*D. F. Hope*—*Neaves*.
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ments of the work done, and, calculating the amount according to these, the sum brought out was only £1301, to which £92 was afterwards added for an item omitted. Lord Ashburton had paid Mackintosh in all, during the progress of the work, £1420; but it did not appear that there had ever been a final settlement between them, and his Lordship died in 1823. In 1826, Mackintosh raised this action against Lady Ashburton, his Lordship's widow and executrix, concluding for £268, as the balance alleged to be due, and founding on a measurement made subsequently to that of Mr Mowbray's, by two tradesmen, called Rose and Mackenzie, and, as he alleged, by authority of Lord Ashburton. Lady Ashburton denied that Lord Ashburton had authorized this second measurement, or that it was correct, and stated her conviction that Lord Ashburton had fully satisfied Mackintosh's claims, and pleaded prescription. On this last plea, however, her ladyship did not insist for an immediate decision, and the Lord Ordinary, before answer, remitted to Mr Black, a professional man, to compare the measurements of Mr Mowbray, and those of Messrs Rose and Mackenzie, with the original specifications and estimates, which had been recovered under a diligence at the instance of Mackintosh, and to report how far the respective measurements differed or agreed with these specifications and estimates. Mr Black found that the specifications and estimates were not at all so full and complete as to enable him to come to any satisfactory conclusion, and he proceeded to Rosehall for the purpose of taking the measurements of the work done. He thereafter returned a report, which the Lord Ordinary found "did not afford the means of deciding on the pursuer's claim."

No. 209.
Mar. 1, 1834.
Mackintosh v.
Ashburton.

Neither party reclaimed against this interlocutor, and Mackintosh was thereafter allowed to give in a minute, stating in what manner he proposed to establish his claim. He accordingly gave in a minute, suggesting a remit to a person of skill, with power to examine witnesses as to the extent of work done. This the Lord Ordinary, by interlocutor of date, January 31, refused, in respect that Mr Black, who had been attended by Mackintosh, had reported that it was impossible to measure the work, for this, among other reasons, that much of it was for repair. Mackintosh thereupon craved a general proof prout de jure.

The Lord Ordinary on this pronounced a second interlocutor, of date February 20, refusing "to remit this cause to the Jury roll, with the view of allowing the pursuer to substantiate his claims by a parole proof;" and his Lordship added the subjoined note.*

* "It is only now, after being so long in Court, that the pursuer offers a proof prout de jure, all the previous modes of establishing his claim having been of a different description, more likely to be satisfactory than a proof at large. These having failed, all at once the pursuer offers to resort to a proof by witnesses, without any explanation how it is possible to expect that the workmen employed under the pursuer can more distinctly point out what work was done, being in a great mea-

No. 208. Mackintosh reclaimed against both these interlocutors.

Mar. 4, 1834.
Wilkie v.
Jackson.

LORD JUSTICE-CLERK.—On two points my mind is made up,—1st, That it would be inexpedient and contrary to justice to allow a jury trial; and, 2d, I think that Mr Black's report affords sufficient elements for deciding the cause, and I am not for a remit for further proof, though Mr Black should have had power to lead further evidence.

The cause having stood over for a day—

THE COURT adhered to the Lord Ordinary's interlocutor, in so far as a Jury trial was refused, but quoad ultra, remitted to his Lordship to hear on the report by Mr Black, and take such steps for further investigation as he should deem necessary, and judge of the whole cause.

ANDREW FRASER, W.S.—MOWBRAY and HOWDEN, W.S.—Agents.

No. 209. JOHN WILKIE and CURATOR, Pursuers.—*G. G. Bell.*
JAMES JACKSON, Defender.—*Jardine.*

Process—Record—Res Noviter—Proof.—1. Circumstances in which the Court allowed a defender, on paying such expenses as the Lord Ordinary should deem just, to produce documents, after closing the record, though they were found in his own house;—the pursuer having long allowed his claim to lie over—the documents being of old date, and having belonged to a predecessor of the defender—and the defender having made a diligent, though unsuccessful, search, before closing the record. 2. Competent for the defender to adduce the members of his own family, if necessary witnesses, and his law-agent, to prove that the documents were noviter venientes et notitiam, he bearing the whole expense of such proof, and paying such other expenses as the Lord Ordinary should award.

Mar. 4, 1834.
1st Division.
Ld. Corehouse.
D.

WILKIE and his curator raised an action against Jackson, as representing his late uncle, and being therefore liable to pay certain provisions due to the pursuer in right of his grandmother. Jackson pleaded, inter alia, that his uncle had made pecuniary advances to the late father of the pursuer, to an amount exceeding these provisions, and accordingly, that the pursuer's father had made no claim for them, though he lived for twenty years, during which time the defender's uncle was perfectly able to satisfy the claim if it had been due.

A record was closed, after which the defender craved leave to produce

sure repairs, than the pursuer himself, who was unable to point out on the spot to Mr Black. In these circumstances the Lord Ordinary does not think himself bound to involve the parties in the expense of a jury trial, in which, if the pursuer failed, the defender might not be able to recover her expenses, merely because now, near the close of this litigation, and after exhausting other modes of proof, he, as a last resort, offers a proof which he might have competently done at first, and which would have been allowed, as it could not then be supposed that it would prove unsatisfactory, but which he probably did not do at that time, from a conviction that it would not establish his claim with a due regard to the justice of the

new documents, alleging that they fell under the head of *res noviter* No. 209. *Wilkie v. Jackson.* Mar. 4, 1834. He was allowed to state in a minute the circumstances under which these documents were found, and he accordingly alleged, that he had succeeded to his uncle in 1823; that his uncle had left no regular repositories for his papers, which were allowed to lie in every corner of the house; that he (defender) was instructed, by his legal advisers, before closing the record, to make a diligent search for any papers which might be extant, tending to prove the advances by his late uncle; that he accordingly made a strict search among his uncle's papers without success, and, having notified this to his agent in Edinburgh, the record was closed; that, a few weeks afterwards, while looking through some old repositories for another purpose, he accidentally discovered some letters from the pursuer's father to his uncle, of old dates, and other relative documents, which proved the receipt of considerable pecuniary advances. The defender offered to prove these facts by his legal advisers, and by the members of his family, respectively, as being necessary witnesses.

The pursuer, without admitting the defender's averments, but in the meantime assuming them, answered, 1st, that the documents being in the house of the defender, who had succeeded to his uncle in 1823, he was bound to know what papers were there, or, if he did not, he must pay the penalty of his negligence, and the negligence was sufficiently proved by the admitted fact, that the papers were within the house; and that the rule by which the production of such documents after the record was closed was prohibited, was intended equally to apply whether the documents were important or not, and, if it were not so applied, it would be of no practical use; and, 2d, that the proposed witnesses were inadmissible.

The Lord Ordinary reported the minute and answers, and the Court requested the Opinion of the whole Judges. The consulted Judges returned this unanimous Opinion. "We are of opinion, that, in the peculiar circumstances of this case, and where it is the defender who takes to make the production, the documents now proposed to be produced may be received and their effect considered, on the Lord Ordinary ascertaining (if it shall be disputed) that they came to the knowledge of the defender, and were recovered by him in the manner and at the time set forth in the minute: And we are further of opinion, that, in this enquiry, the members of his own family, (if necessary witnesses,) as well as his agent, may be examined on the part of the defender, to prove the truth of his averment, that, *de facto*, they are *noviter venientes ad notationem*, he bearing the whole expense of such proof: And further, that the documents are only to be received into process on payment of such other expenses as to the Lord Ordinary shall seem just."

The cause being resumed by the Judges of the First Division, their Lordships pronounced an interlocutor in terms of the above Opinion.

No. 210.

Mar. 4, 1834.
A. B. v. His
Creditors.

A. B., Pursuer.—*Sol-Gen. Cockburn.*
His CREDITORS, Defenders.—*Robison.*

Cessio.—An officer, having a wife and four children, with half-pay of £82, and whose debts were £180, found entitled to the *cessio*, on assigning £18 yearly.

Bain v. Lord Duffus.

Mar. 4, 1834.

1st Division.

AN officer in the army, having a half-pay, amounting to £82, was married, and had a wife and four children to maintain. His debts amounted to £180. After an imprisonment of nine months, he pursued a *cessio*, and offered to assign £18 of his income to his creditors. The Court found him entitled to the benefit of the process.

LORD GILLIES observed, that it was not without some hesitation that he sanctioned the assignation of so much, lest it should deprive the pursuer of the means of subsisting without contracting new debt.

No. 211.

HARRY BAIN and OTHERS, FEUARS in WICK, Pursuers and Claimants.
D. F. Hope—Moir.

PROVOST and MAGISTRATES of WICK, Claimants.—*D. F. Hope—Moir.*

WILLIAM HORNE, Compeerer and Claimant.—*D. F. Hope—Neaves.*

LORD DUFFUS, Defender.—*Skene—Buchanan—Mylne.*

Commonty.—1. A process of division of commonty having been raised, and a defender having established that it was his sole property—action dismissed. 2. Question as to the effect of a dispositive clause, with all and sundry mosses, &c., and parts and pertinents, in conferring a right of property in part of a common.

Mar. 4, 1834.

1st Division.
Ld. Fullerton.
D.

IN 1813, a summons of division of the alleged commonty known by the name of the Hill of Wick, and Mosses of Hayland, Bronzie, and others, was raised in name of Lord Duffus, then Sir Benjamin Dunbar, and some feuars in the town of Wick. In 1818, Lord Duffus, who stated that his name had been inserted as a pursuer by mistake, and without authority, was allowed to withdraw his instance, and to sist himself as a defender. His lordship lodged defences, claiming the whole grounds in dispute as his exclusive property, and included, per expressum, in his titles. A proof was led, on considering which, the Lord Ordinary found, "that the parties now appearing as pursuers, have not a title to insist in the present action." His Lordship sustained the defences for Lord Duffus, and assoilzied, but found no expenses due. The pursuers and claimants reclaimed; but the Court adhered.

One of the pursuers, Mr Horne, founded on titles, which, if coupled with the requisite exercise of acts of property, would have been sufficient (as the Court intimated) to instruct a right of property.

art of the alleged common. The titles conveyed the estate of Sibster, No. 211. 'with all and sundry mosses, muirs, meadows, pasturages, or grazings, ^{Mar. 4, 1834.} fish-ponds, &c., annexis, connexis, dependencies, tenants, tenandries, and ^{Napier v. Lang.} services of free tenants, parts, pendicles and pertinents, whatsoever of the said lands, used and wont." The Court, however, did not think the exercise of unequivocal acts of property to be sufficiently proved.

J. Gordon, W.S.—Horn and Rose, W.S.—H. Macquay, W.S.—Agents.

DAVID NAPIER, Advocate.—*Cunninghame—Cowan.*
JAMES LANG, Respondent.—*D. F. Hope—A. McNeill.*

No. 212.

Settled Account.—A party, at a meeting for settlement of accounts, received a sum in cash, considerably within the balance claimed by him as due, and docqueted the account as "settled per stamp," but without specifying the amount paid in cash, or the mode of settlement; and a few days thereafter, transmitted a stamp receipt, containing an acknowledgment for the cash paid to him, but as a partial payment only, and a notandum, objecting to the counter claims in respect of which the other party had retained the balance, and the accounts for which counter claims had not been rendered him; and the receipt so qualified was accepted, and retained without objection; held that there had been no settlement of accounts to bar the ascertainment of the justice of the counter claims.

In November, 1823, the respondent, Lang, shipbuilder in Dumbarton, ^{Mar. 4, 1834.} entered into a contract with the advocator, Napier, engineer in Glasgow, ^{2d Division.} for building a steam-vessel, according to a certain specification, at the ^{Ld. Medwyn.} price of £7 per ton, register measure. The vessel having been completed, Lang, in October, 1824, rendered Napier an account, in which, in addition to £1613 (being the amount of the stipulated price per ton), he charged a variety of items, as extra, and not included in the specification, amounting in all to £147, 7s. 11½d., thus making the whole charge £1760, 17s. 11½d. Lang had also another account against Napier, for a small boat for another vessel, amounting to £51, 6s.; while Napier claimed from Lang deduction of the amount of certain accounts paid by him for work done on the steam-vessel, which he contended Lang ought, under the contract, to have executed, and also deduction of certain items, charged by Lang as extra work, which Napier alleged fell under the contract. A meeting, with a view to a settlement of accounts, was held on the 29th November; but it did not appear that Napier had previously to this furnished to Lang the accounts which he alleged he had to state against him. Partial payments had been previously made by Napier to the extent of £1100, leaving a balance claimed by Lang, on the steam-vessel account, of £660, 17s. 11½d., besides the £51, 6s. above mentioned. At this meeting, Napier paid Lang £390; and Lang docqueted and signed the account, simply in this form—"Settled per stamp, J. LANG"—without stating what payment had been made in cash, or how the set-

No. 212. tlement had been effected. No receipt was at this time given; and on the 13th December, Lang transmitted to Napier a stamp receipt, in these terms :—
 Mar. 4, 1834.
 Napier v.
 Lang.

“ Mr DAVID NAPIER,

	To JAMES LANG,	Dr.
“ To account rendered of the Superb steam-boat,		£1760 17 11
“ - - - - - additional boat and oars,		18 0 0
“ - - - - - the Eclipse steam-boat,		51 6 1
		<hr/> £1830 4 0

Feb. 21. By cash,	£500 0 0
April 29. By ditto,	600 0 0
Nov. 29. By ditto,	390 0 0
	<hr/> 1490 0 0

£340 4 0

“ The above balance of £340, 4s. sterling, Mr David Napier has retained off the above account, on pretence of having paid the whole sum on my behalf. The said accounts must be immediately rendered to me.
 (Signed) JAMES LANG.

“ Glasgow, November 29, 1824.”

This was enclosed in a letter of the following tenor :—

“ Mr D. NAPIER, *Dumbarton*, 13th December, 1824.

“ I have every day since I saw you in Glasgow been expecting to have received the accounts which you have against me in your possession; but it appears by yours of the 11th instant, that you decline remitting them to me.

“ As you have retained off me the amounts of the said accounts, I consider that I am justly entitled to have them in my own possession, and which I hope you are aware of. The original accounts I must have, and will not accept of any copies, and upon no pretence will I admit of any delay of them not being sent; which, I trust, you will comply to this request, and remain, &c.
 (Signed) JAMES LANG.

“ P. S. Enclosed you have a receipt for the money you paid me.”

Napier retained this receipt, without any observation, but never communicated to Lang the accounts required by him; and in March, 1825, Lang raised an action before the Sheriff of Lanarkshire, concluding for payment of £340, 4s., as the balance still due him. Napier pleaded in defence, that the docquetted account constituted a settlement, alleging that, on the occasion of its being docquetted, the deductions claimed by him for work executed by him, which Lang ought to have performed, and for articles improperly charged as extra, had been admitted by Lang to the extent of the amount now claimed, and that the cash then paid

of the balance brought out. He resisted, however, production No. 212. receipt, and other documents connected with the settlement; but were recovered, and the report of an accountant obtained, the concerned against Napier for within a few shillings of the sum con-

Mar. 4, 1834.
Napier v.
Lang.

then brought an advocation, and after the unsuccessful attempt the record opened up, mentioned ante, 153, the Lord Ordinary said this interlocutor, adding the subjoined note: * " Finds, that settlement took place between the parties at the meeting on 29th Mar. 1824, but that the claim of the respondent was then reduced by payments to the sum of £340, 4s., subject to deduction of any amount due on the contract for building the Superb, which the advocator can prove to be left unfinished by the respondent, and which the advocator was under the necessity of getting finished by other tradesmen; and also the omission of any of the articles charged in the account No. 11, which were his own, either not to be extra articles, or which were not executed by the respondent; and appoints the cause to be called, in order to ascertain in what manner these matters of fact are to be ascertained." The parties reclaimed, but the Court adhered.

WILLIAM PATRICK, W.S.—J. CULLEN, W.S.—Agents.

The Lord Ordinary cannot help viewing the conduct of both parties in this case as inconsistent with their pleas. If there was no settlement at the meeting on 29th March, 1824, but merely a payment to account, and a large sum retained for the satisfaction of counter claims, of which no account was produced, it was very strange that the respondent should himself have written at the bottom of the account, 'I, the respondent, do hereby certify that the sum of £340, 4s. is the sum paid as a partial payment merely, and the receipt sent thirteen days after the date of the account, representing the sum paid as a partial payment merely, looks very like a receipt. But, on the other hand, the advocator retaining the receipt as his own, and not instantly disclaiming it, his unwillingness to produce the documents which were to prove the settlement, and his being unable to show the items which compose the sum of £340, 4s. retained, make his statement extremely improper in supporting the legal inference from the documents. Still it is competent to show that the respondent's claim is not well founded; and the first consideration is, what was incumbent on the respondent under his contract, in particular, whether it included painting, plumber and glazier work. It appears, from the respondent's letter of 22d June, 1824, that the advocator was obliged to employ workmen to execute some of the wright work in the repair department. It must be competent to the advocator to show what he was entitled to by the permission, or of omissions on the part of the respondent under the contract. In the ordinary case, the respondent would be obliged to establish a claim for extra work; but after retaining the account so long without objection from the other circumstances of the case, the Lord Ordinary thinks the expenses of proving these should fall on the advocator. The claims for furnishings and repairs, which are said to have been included under the contract, are, of course, contained in the report, p. 6, as stated by the advocator himself."

No. 213. DAVID ANDERSON and OTHERS, Petitioners.—*Robertson—Sandford.*
CHARLES CLARK, Respondent.—*A. Murray.*

Mar. 6, 1834.
Anderson v.
Clark.

Title to Pursue—Bill of Exchange—Expenses.—1. A bill was drawn by a pursuer on a defender to account of the amount of a decree against which the defender had appealed; the bill was protested for non-acceptance; held, on the decree being affirmed, and the pursuer having died, that an indorsee of the bill had no title to be sisted as pursuer, and to have the judgment of affirmance applied. 2. Executors confirmed of a law-agent, entitled to crave the Court to apply the judgment of the House of Lords, to the effect of allowing a decree for the expenses of this Court to go out in their names.

Mar. 6, 1834.
1st Division.

THE late James Sim raised an action against Clark, as liable for a sum of £200, and certain interest; for which he obtained a decree, with expenses, which Clark brought under appeal. Sim then drew a bill on Clark for £400, "being to account of the sums decerned for in the process before the Supreme Court at my instance against you." He indorsed the bill to David Anderson, who protested it for non-acceptance. The House of Lords affirmed the decree, and, after the death of Sim, Anderson presented a petition, craving the Court to sist him in the process, to apply the judgment, and to allow decree to be extracted in his name as in right and place of Sim.

David Shepherd and others, the executors confirmed, of Sim's law-agent Shepherd, prayed in the same petition to allow decree for the expenses to go out in their names.

Clark objected to the title of Anderson, in respect that the bill indorsed to him would not have entitled him to take up the action even had Sim been alive, and still less now that he was dead.

LORD GILLIES.—I do not think Anderson is in titulo to make this application.

The other Judges concurred, and the Court pronounced an interlocutor in these terms:—

"Apply the judgment of the House of Lords so far as respects the expenses found due; approve of the auditor's report thereon, and decern for payment of £117, 4s. 4d., with the expense of extract; and allow the decree to go out and be extracted, ad interim, in the name of David Shepherd, &c.; and refuse the petition quoad ultra, and find the petitioner, David Anderson, liable in the respondent's expenses, incurred in defending against his application."

II. Tod, W.S.—J. FERGUSON, W.S.—Agents.

Mrs LAING and OTHERS, Petitioners.—*D. F. Hope—More.*
 Mrs DICK and Mrs MANUEL, Respondents.—*Speirs.*

No. 214.

Mar. 6, 1834.
 Laing v. Dick.

Sequestration of Land Estate—Judicial Factor.—After a confirmation of certain titles as executors dative, qua next of kin, and a general service as heirs-portioners a deceased lady, and possession by them of the moveable estate and of the title-deeds, other parties, who alleged that she had executed a deed in their favour, had destroyed it while insane, and that they had raised a summons of proving tenor—found not entitled to have the estate sequestrated, or the superiors interdicted from granting precepts of clare constat, &c.

Mrs LAING and others presented a petition, stating, that the late Miss Mary Bell died on 14th September, 1833; that she had been in a state of continued mental derangement since the middle of January preceding; that, as late as the month of February, there were still extant in her possession, two deeds of settlement in favour of the petitioners, but these had since been lost or destroyed by her, while wholly incapable of performing any legal act whatever; that the petitioners had raised a summons declarator and proving of the tenor of these deeds, and they prayed that, in the meantime, the whole heritable and moveable property of the deceased should be sequestrated, a judicial factor appointed during the pendency of the action, and an interim interdict granted against the superiors from granting any precept of clare constat, or other deed, to the said, affecting the rights of the petitioners.

Mar. 6, 1834.
 1st DIVISION.
 R.

Answers were lodged for Mrs Dick and Mrs Manuel, who had been confirmed executors dative qua next of kin, notwithstanding opposition by the petitioners, and had also, along with others, expedited a general service as heirs-portioners. They had been put into possession of the personal effects of the deceased, in virtue of an order obtained from the Sheriff; and they had received delivery of the title-deeds, also under an order from that judge. They denied that Miss Bell had been affected with insanity; and pleaded, that there were no termini habiles for sequestration, as they had not only a valid legal title, but also had got actual possession; while the petitioners had nothing to found upon except unsupported allegations.

LORD GILLIES.—The petitioners admit that the deed on which they found, has, at present, no existence. But they undertake to rear it up by a proving of the tenor; and farther, to show that it must regulate the succession of the deceased, by their proving that it remained uncanceled till she became insane, which was several months before her death, and that she continued insane till her death. I do not think the Court can proceed to sequester on the footing of a non-existing deed, especially in these circumstances. There must be a proving of the tenor, ante omnia; and, in the meantime, the petition should be refused, with expenses.

The other Judges concurred; and the Court refused the petition, with expenses.

No 215. DOWNE, BELL, and MITCHELL, Pursuers.—*D. F. Hope—Buchanan.*
ARCHIBALD MACKINLAY and Others, Defenders.—*L' Amy.*

Mar. 6, 1834.
Downe v.
Mackinlay.

Reparation—Contract.—A shipping company having unwarrantably broken a contract with wharfingers in London, whose wharf they had bound themselves exclusively to frequent—held, that in estimating the damage thereby suffered, and for which the shipping company was liable, the loss of profit on the cartage by the company, in delivering the goods landed at their wharf, fell to be taken into account.

Mar. 6, 1834.

2^d Division.
Ld. Mackenzie.
T.

OF date 11th October, 1809, the Edinburgh and Leith Shipping Company entered into a contract with the pursuers, Downe, Bell, and Mitchell, wharfingers in London, and proprietors of a wharf there, called Downe's Wharf, whereby, on the one hand, the Shipping Company bound themselves, that for seven years, or until expiration of twelve months after notice, to be given subsequent to September, 1815, all their vessels trading between Leith and London should exclusively resort to Downe's Wharf, for the purpose of being loaded and unloaded, according to the practice of the trade, and that Downe, Bell, and Mitchell should be entitled to collect all their freights, while Downe, Bell, and Mitchell, on the other hand, bound themselves that they would receive all such vessels at their wharf, and exclude therefrom the vessels of any other company trading between the Forth and Thames. The remuneration stipulated for to Downe, Bell, and Mitchell, was a commission at the rate of 4 per cent on the freights collected at London, and at the rate of 2 per cent on the freights collected at Leith. Besides this commission, Downe, Bell, and Mitchell drew a very considerable profit by the cartage of the goods landed at their wharf, which they forwarded by their own carts to the parties to whom they were addressed. In February, 1814, the Shipping Company, on very unwarranted pretences, suddenly withdrew their vessels from Downe's Wharf; in consequence of which, Downe, Bell, and Mitchell raised against the defenders, Mackinlay and Others, Directors of the Company, an action of damages for breach of contract. A very voluminous proof was taken by commission; upon advising which, the Lord Ordinary found, that no circumstances had been established to justify the breach of contract, and that damages were due; and to his Lordship's interlocutor the Court adhered. Thereafter, on hearing parties as to the amount of damages, his Lordship pronounced this interlocutor, adding the subjoined note: * " Finds, that the libel and conclusions thereof

* " Vide the terms of the conclusions of the libel. The Lord Ordinary gives damages, (1.) For the immediate *lucrum cessans* during two years and eight months which he thinks may fairly be taken to be £1800 the first year, and £1000 per annum during the remaining one year and eight months, when time had been

re sufficiently broad to include the damages to which the pursuers can be entitled on account of the breach of contract libelled on itself, but not to include any damages claimed on account of any false or injurious statements by which that breach of contract is now stated to have been accompanied or followed; and finds that the penalty libelled must be modified to the just amount of damages of the former kind, and cannot be sustained and decerned for to any extent on account of the latter: finds that there is due to the pursuers by the defenders, in name of damages for breach of contract libelled, and penalty libelled, the sum of £3250 sterling, and modifies and decerns accordingly: finds the pursuers also entitled to legal interest thereon from the date of the present action until payment, and decerns: and finds them entitled to expenses from the defenders."

No. 215.

Mar. 6, 1834.

Downe v.

Mackinlay.

Both parties having reclaimed, the Court pronounced this interlocutor:—"Before further answer, remit to Donald Lindsay, accountant at Edinburgh, to examine the books of the petitioners, Downe, Bell, and Mitchell, in process, and to report, first, the amount of the nett yearly profits of the pursuers' whole business as wharfingers, and as agents in the collection of freights for the period from 11th October, 1809, to 11th February, 1814, and distinguishing (provided these books enable him to distinguish) what portion of these annual profits was derived from the trade of the Edinburgh and Leith Shipping Company: Secondly, The nett profits of the whole wharf business from 1st February, 1814, to 11th October, 1816, distinguishing (provided these books enable him to do so) what portion of these profits was derived from vessels trading between the rivers Forth and Thames; and, thirdly, a similar report for the year from 11th October, 1816, to 11th October, 1817, or otherwise for the entire year, 1817; and to report generally, what appears from the books to have been the amount of the actual loss and damage sustained by the pursuers through the breach of their contract with the Shipping Company."

A report was accordingly returned, in which, without making any allowance for the permanent injury after 1826, in consequence of the sudden withdrawal, in respect of which, the Lord Ordinary, in his note, stated that he allowed £500, the accountant calculated the actual loss of profits for the period which the contract had to run, at £3672, whereof about one-fifth was estimated to be the amount of the profit which would

given to find other business to occupy the pursuers' wharf; (2.) The Lord Ordinary thinks damages due for the more permanent injury resulting to the business of the wharf continuing after 1816, from the sudden withdrawing of so large a portion of its business, without any time to provide new business, as might and probably would have been done at the proper expiry of the contract, and the consequent exhibition of a deserted wharf, and ruined or half-ruined business, which might, in 1816, have been prevented; but the Lord Ordinary sees no evidence to show this was large. For this he allows £500."

No. 215. have arisen from the cartage of the goods landed at the wharf. W
this report came to be advised, the Shipping Company contended,

Mar. 6, 1834.
Downe v.
Mackinlay.

1. That the loss in regard to the matter of cartage was not of nature of direct damage arising from the breach of contract; and,

2. That, at all events, nothing was due for alleged permanent injury after 1826, and, therefore, that the £500 allowed by the Lord Ordinary on that account should be deducted.

To this it was answered—

1. The profit arising from cartage was a part of the profits of the pursuers' business of wharfingers, of which they were deprived by the breach of contract; and,

2. The Lord Ordinary does not decern for a special sum of £500 damage on account of permanent injury, but only states in his note such was the ground on which he made up the whole sum decerned. The decerniture, however, is general, and it is enough to support decerniture if it be clearly established that the amount decerned was truly due, although the Court may come to the same conclusion on different grounds; and the accountant's report clearly proves, that damage to an extent exceeding the sum awarded by the Lord Ordinary has been sustained, independent of any allowance for permanent injury.

LORD JUSTICE-CLERK.—The cartage was part of the business. The pursuers must have known the way it was carried on, and the pursuers were deprived of this as a benefit they had under the contract. It is very satisfactory, that, after investigation, the Lord Ordinary's interlocutor is so entirely supported by the accountant's report, and I am for adhering.

LORD MEADOWBANK agreed.

LORD GLENLEE.—The profit of the cartage was a fair advantage these pursuers had under the contract. And damages having been found due, as this would have been part of the benefit they would have enjoyed had the contract not been broken, they are entitled to have it included in the estimate of indemnification.

LORD JUSTICE-CLERK.—As to the plea about the allowance in respect of permanent injury, the Lord Ordinary has decerned for a general sum, and I am satisfied that sum is due, although we may differ as to the grounds, we will adhere to the same amount.

THE COURT accordingly, in respect of the accountant's report, modified the damages to the sum found due by the Lord Ordinary.

JAS. IRVINE,

—PRIN and PITCAIRN, W. S.—Agents.

WILLIAM BELL, Petitioner.—*R. Bell.*

No. 216.

Curator Bonis.—Authority refused to the commissioner of a curator bonis of a lunatic to invest a portion of the lunatic's funds in the purchase of an annuity, although said to be necessary for his maintenance, and the curator had gone abroad without communicating with the commissioner, and his residence was unknown; and Observed, that one of the nearest relations of the lunatic should apply to have the existing appointment recalled, and a new curator named.

Mar. 7, 1834.
Bell.

In 1828, Ludovic Grant was appointed curator bonis to his brother John Grant, a lunatic. William Bell, W.S., became cautioner for the curator, and was appointed sole factor and commissioner for him, with power to act in all respects with the whole powers of the curator. The curator went abroad without communicating with Mr Bell, and some time thereafter Mr Bell presented a petition, stating that the lunatic was boarded for a sum of £40; that this was in arrear; that the funds realized only amounted to £797, which, at bank interest, would yield something less than £16 per annum; that a part of the capital, if applied in the purchase of an annuity, would provide for the permanent maintenance of the lunatic, and leave some surplus; and that if it was not so applied, the lunatic must, after the lapse of some years, have consumed the whole capital, and be in a state of destitution. He farther stated that the residence of the curator was not known to him; but, as the case was one of necessity, he craved the Court “to authorize a portion of the funds to be invested in the purchase of an annuity, from any respectable insurance office in Edinburgh, upon the life of the said John Grant, to the extent of £40 per annum, or to such other extent as your Lordships shall think proper.”

Mar. 7, 1834.
1st Division.
B.

LORD PRESIDENT.—The applications made to the Court for granting extraordinary powers to curators have of late become very numerous, and it is necessary to exercise great caution in disposing of them. There is an amount of property, I believe not less than £8,000,000 sterling, in the hands of this Court, through the medium of curators appointed by us. In the present case, I do not think the prayer of the petitioner can be granted. The curator bonis has been for some time abroad, and apparently has abandoned the office to which he was appointed. In these circumstances, any of the nearest relations of the lunatic in this country, should present a petition to have the appointment of Ludovic Grant recalled, and a new curator named in his place. That is the first step to be taken, as I do not think the petitioner entitled to insist in the prayer of this petition, whatever might be done with it, if duly presented.

His Lordship was understood to add, that, by the curator's leaving the kingdom, the mandate to his commissioner became unavailing

No. 216. **LORD GILLIES.**— This is a painful case. The Court must feel strongly inclined to grant the application, if it be possible, but I am doubtful of this. I should be doubtful, even if it were a petition by one who was regularly served before a jury, in place of a person holding an appointment of a more temporary character, such as a curator bonis named by this Court. But this petition is not even presented by the curator bonis. He has gone abroad, and, though he has left a commissioner here, delegatus non potest delegare; I think the petitioner not entitled to appear.

Mar. 7, 1834.
Dougal v.
Marshall.

His Lordship was understood to concur with the Lord President, that when the curator went abroad the petitioner's commission fell.

LORDS CRAIGIE and BALGRAY concurred.

THE COURT, "in respect that the curator bonis has left Scotland, and that he had no power to delegate any part of his authority to a factor, refuse the desire of this petition, and decern."

W. BELL, W.S.—Agent.

No. 217.

— **DOUGAL and Others, Pursuers.**—*More.*

— **MARSHALL, Defender.**—*Cuninghame.*

Expenses—Auditor's Report.—Held, after consultation of the whole Judges, that the Court cannot award, as part of the expenses of process, charges for taking the opinion of counsel as to raising the action.

Mar. 7, 1834.
2D DIVISION.

THE COURT having repeatedly of late sustained objections to the reports of the auditor on accounts of expenses, in so far as he disallowed charges for consulting counsel preparatory to raising an action, the auditor made a special report on such a charge in this case, for the purpose of calling the attention of the Court more particularly to the point. For definitely settling the matter, their Lordships consulted the other Judges; and the Lord-Justice Clerk this day stated the opinion of the whole Judges, in conformity to the view of the auditor, that the Court had no power to award the expense of consultation, as not being part of the expenses of process, but incurred before the process commenced, and that in future no such charge was to be allowed.

Their Lordships accordingly disallowed the charge.

MAJOR A. NICOLSON MACDONALD, Pursuer.
HUGH CRAWFORD, Defender.—*Miller*.

No. 218.

Mar. 7, 1834
Macdonald v.
Crawford.

Exchange—Sexennial Prescription.—Held by the Lord Ordinary, and in, that letters after the lapse of six years from the time of payment of change, admitting the constitution of the debt, but alleging that it had elapsed, barred the sexennial limitation, and that the alleged counter be established by the debtor.

fender Crawford, in 1814, granted to the late Patrick Nicol- Mar. 7, 1834
omissory note for £100, which passed by indorsation into the 2d Division
he pursuer, Major Nicolson Macdonald, who represented Mr Ld. Mackenz
and admitted himself to be in the same situation with him in F.
this note. In 1822, Major Macdonald having demanded pay-
from Crawford, the latter wrote him in these terms, of date
nber, 1822:—"Sir, I am so far to bleam, in respect to Mr
bill, that I should have sent a copy of his account with me
rich in a few days I will. Mr John Nicolson rendered me an
our cash transactions some time ago, from which I stand in-
Mr P. Nicolson, £47, 3s. 6d., charging the £100, without in-
either sides; and against the said sum I have an account from
801 to a considerable amount; so that if you intend charging
your bill, I expect to have the same recourse. Still I think
e better to settle the whole without it, as these resent dates
ment the sum considerably. Would you have goodness to let
your opinion, and immediately I shall render a copy of all our
is."

ter, of date 5th December, he wrote another letter on the sub-
s tenor:—"Sir, I wrot you sometime ago, to which I refer
rished for your answer. At the same time you may consider
or ought to be a settlement of all transactions with the family,
used the delay; and finding that my account against them
to upwards of the bill, and all other claims they head against
e reale cause of its not being looked after in due time. Your
expect, and will immediately forward a copy of accounts agree-
ur orders."

lement having been made, Major Macdonald in 1827 raised
t action, concluding for payment of the promissory note, and
n the letters above quoted, as eliding the sexennial limitation.
, Crawford contended that the letters were intrinsically quali-
he statement of the bill being compensated, and he produced
t holograph of Mr Nicolson's agent, and rendered to him in

No. 218. 1819, which admitted counter claims, reducing the debt in the bill to £47, 3s. 6d., and further offered to prove additional claims compensating that balance.

Jan. 7, 1834.
Macdonald v.
Crawford.

The Lord Ordinary pronounced this interlocutor:—" Finds, primo, That the pursuer does not plead that he has any higher right than the original grantee of the note would have had if alive, and remaining in right of the said note: Finds, secundo, That the promissory note libelled has fallen under the sexennial prescription: Finds, tertio, That by the letters libelled, it is proved, as by the writ of party, that the said note was originally valid, and was never paid or extinguished directly or expressly: Finds, quarto, That the said letters do, however, contain statements that the said note was compensated by value given in account; but finds, that the said statements are not intrinsic to the admissions therein contained, but are of such a nature that they must be proved by the party founding on them: Finds that the account admitted to have been holograph of and to have been sent to the defender by the agent of the late Mr Nicolson, is, in the circumstances of this case, competent and sufficient evidence to instruct compensation against the said note to the amount of the articles properly contained therein, with interest on the same, but not of the article without a date that is added thereto, apparently in different ink, and at a different time, viz. of £8, 4s. 6d.: Finds, that in the circumstances of this case, the pursuer ought not to be allowed the benefit of the triennial prescription against the other articles of compensation alleged by the defender, but that the defender may still be allowed to prove the same prout de jure; and ordains the cause to be enrolled for farther procedure."

This interlocutor was acquiesced in, and a proof allowed, on advising which, the Lord Ordinary, being satisfied on grounds to which it is unnecessary to advert, that there was no evidence of any of the counter claims other than those admitted in the account holograph of Mr Nicolson's agent, decerned in favour of Major Macdonald, "for the sum of £49, 7s. 4½d. sterling, as the balance of the debt libelled, with legal interest of £47, 3s. 6d. thereof, being principal," and expenses of process subsequent to the interlocutor above recited.

Crawford reclaimed, but the Court adhered.

M. N. MACDONALD, W.S.—J. MACKENZIE,—Agents.

ARCHIBALD WIGHT, Pursuer.—*Robertson.*WILLIAM EWING, Defender.—*Jameson.*

No. 219.

Mar. 8, 183

Wight v.
Ewing.

Pursue—Expenses—Process.—The pursuer of an action of damages, from whom an interim decree was issued for a sum of expenses during the course of the cause, and against whom an execution of search was returned, is entitled to proceed to trial in *hoc statu*, although he offered to surrender

he raised an action of damages against Ewing, in the preparation of which Wight was “found liable in all the expenses incurred by reference to the two grounds of action which have now been decided.” The account of these expenses was taxed at £57, 19s., and the interim decree was allowed to go out.

Mar. 8, 183

1st Division

Wight having afterwards given notice of trial, Ewing moved to have the interim decree discharged, unless Wight should either pay the expenses awarded, or find caution for them; in support of which he stated that he had sent a messenger to apprehend Wight, but that he had not obtained an execution of search, bearing that he was not to be found. Wight answered that he would be present in Court at the trial, or would surrender himself instantly to the defender; but he was not to be deemed to have abandoned pursuing an action of damages, even if he were incarcerated for his expenses.

GILLIES.—It often happens, where there is a sequestration, and the trustee is obliged to assist himself, that the bankrupt is not allowed to pursue without caution for expenses. It may be said that, in such a case, the trustee's assistance raises a presumption against the action, which does not hold. But take this case as if it were one in which a jury trial was not to be had, but which could be disposed of in this Court without the intervention of a jury. If a pursuer, in such a case, had been subjected in expenses under an interim decree, I apprehend it would be necessary for him to make payment of those expenses before proceeding farther with his action. But the necessity of this is just so much greater where a jury trial is impending, because the expense in which the pursuer would thereby be involved is just so much more heavy. I am not prepared to sanction the pursuer in forcing on the jury trial.

PRESIDENT.—After the interim decree for expenses, I think the pursuer is placed in a situation somewhat analogous to that of a party who is repudiated of paying certain expenses, and who cannot proceed until he pays them. Here is at least enough in the objection taken, to induce the Court to adjourn the trial at present. It is impossible to allow the trial now to proceed without deciding the point, that a party, in the situation of this pursuer, has a right to proceed, though he should neither pay nor find caution for the expenses decreed. I am not prepared at present so to decide. But if the Court merely adjourns the trial, this does not definitively settle the point against the pursuer. I

No. 219. think the order for trial should be discharged, and the case, quoad ultra, superseded in the meantime.

Mar. 8, 1834.
Brown v.
Syme.

LORDS CRAIGIE and BALGRAY concurred, and the Court discharged the order for trial in the meantime, and superseded quoad ultra.

J. ADAM, W.S.—J. BURNES, S.S.C.—Agents.

No. 220.

PETER BROWN, Pursuer.—*D. F. Hope—Cunninghame.*
J. H. SYME, Defender.—*Shene—Rutherford.*

Sale—Fraud—Jury Trial.—The acting director of a joint-stock company, and who was also a partner thereof, raised an action to compel a third party to accept a transfer of shares alleged to have been purchased by him on the employment and for behoof of this party, though by arrangement with them taken in his own name; and the purchaser pleaded in defence, that he had been led into the transaction by false representation and by concealment on the part of the directors, whose property he alleged the shares to have been—held that he was entitled to an issue whether he had been induced to purchase by fraudulent “concealment,” as well as by fraudulent “representation.”

Mar. 8, 1834.

2d Division.
Lord Medwyn.
R.

THE pursuer, Brown, merchant in Edinburgh, raised an action against the defender, Syme, brewer in Alloa, setting forth, that on two different occasions, in the months of May and June, 1829, Syme had applied to him to purchase on his behalf shares in the Edinburgh, Glasgow, and Alloa Glass Company, to the extent of 50 on each occasion; that he had purchased these shares at the price of £350, which Syme had paid him, but that he took the transfers to them in his own name, by desire of Syme, who was then a sequestrated bankrupt undischarged; that subsequently, however, Syme had refused to accept a transfer, in consequence of which, he (Brown) had been subjected in the several calls made on these shares; and concluding that Syme should be decerned to accept a transfer, and free and relieve him of his responsibilities as nominal holder of the shares in question. In defence, Syme alleged, that Brown was an original partner of the company, and a director, perfectly acquainted with its affairs, and had been, in 1827, appointed manager, under the name of acting director, in consequence of which he had removed from Edinburgh, and taken up his residence at Alloa, where the works of the company were carried on; that on the two occasions set forth in the summons, he had agreed to purchase from Brown the two quantities of 50 shares each, but that these were Brown's own property, and that he had not employed Brown to acquire them for him from others, though it was arranged that they were to remain in Brown's name; and that he had been induced to enter into these transactions by false representations on the part of Brown as to the state of the company's affairs, or at least by concealment of circumstances regarding them known to Brown, and in particular, the circumstance that fictitious reports as to

ny had been made up and laid before the partners; which cir- No. 226.
s would have shown the company to have been insolvent.

use having been remitted to the jury roll, an issue was taken Mar. 8, 1834.
Brown v.
Syme.

, whether Syme "wrongfully fails to take delivery" of the
ile Syme craved an alternative issue, in these terms:—"Whe-
he false and fraudulent representations, or fraudulent conceal-
he pursuer, as to the credit and solvency of the said company,
ler was induced to purchase the said shares, or any of them?"

terms of this alternative issue, it was objected by Brown, that
not entitled to an issue on the point of alleged fraudulent
ment," at all events, in so far as regarded all shares which it
n out had not been his own property, but had been bought by
e employment and for behoof of Syme; and he contended, that
es so purchased, he was under no obligation to make any com-
n to Syme of circumstances known to him as director or ma-
the company, and which he could not have communicated with-
h of duty to the company; that the averment of concealment,
was irrelevant; that there was no implied fraud in such con-
and fraud was not directly alleged as to concealment on the
id therefore that no issue as to that should be allowed.

ord Ordinary gave out the subjoined note,* and reported the
issue to the Court.

JUSTICE-CLERK.—I have great difficulty in refusing this issue, taking
facts alleged. Brown was a partner and manager of the company, and
iew this case as that of a private mandatary unconnected with the com-
to "representation," it is of no consequence whose the shares were.
"concealment," it is a delicate question; but this party being a partner
npany, and materially interested in disposing of the shares of stock, to

6th and 7th statements of the defender charge the pursuer with false re-
ons, to induce him to purchase shares in the stock of the Alloa Glass
; and further state, that the shares so purchased belonged to the pursuer
Statement 10 further avers, that the defender entered into the transaction,
the pursuer's representations. These statements fully warrant the issue
t of the defender, in so far as it bears that he was misled by the false and
representations of the pursuer. The statement as to concealment by
r from the directors of certain bill transactions (statement 11) is plainly
The charge in the last statement (12) is, that, to deceive the de-
id others, fictitious transfers of stock were made by certain of the
and office-bearers, and that the pursuer was a party to certain of the
as there set forth, and that these were concealed from the defender,
aid by whom, and not averred that it was by the pursuer. In so far as
de these transfers, which are not said to have been known to the pursuer,
tion is irrelevant: and the averment quoad him seems not sufficiently
b admit of being introduced into the issue, that the defender was in-
purchase the shares in question by the fraudulent concealment of the

No. 220. get as many partners involved as possible, and it being alleged that he knew of the fictitious reports as to transfers, &c., I think he was not entitled to conceal these circumstances for the fraudulent purpose of inducing Syme to buy. These are the facts alleged, and therefore I would allow the issue.

Mar. 8, 1834.
Laidlaw v.
Smith.

LORD GLENLEE.—I am of the same opinion. I was a little puzzled at one time by the defender's allegation, that the whole shares belonged to the pursuer. That fact may make a difference as to whether there was fraudulent concealment or not; but though not his own, he was a partner, and had a motive to conceal. Whether it will be fraudulent will depend on the circumstances of the case, but I see no reason for refusing the issue.

LORD MEADOWBANK.—I am entirely of that opinion. It is said that Brown could not tell, without betraying the confidence of the company; but he had the alternative of declining the mandate.

THE COURT accordingly directed the Lord Ordinary to allow the issue.

MACKENZIE and MACFARLANE, W.S.—JAS. ROY—Agents.

No. 221.

ROBERT LAIDLAW, Pursuer.—*Russell.*

JOHN SMITH, Defender.—*Ivory.*

Process—Lis alibi Pendens.—A pursuer before enrolment entitled to abandon his action by letter, and raise a new summons, containing in gremio an abandonment of the former, without giving the defender an opportunity by enrolment of getting expenses awarded him.

Mar. 8, 1834.

2D DIVISION.
Ld. Mackenzie.

THE pursuer, Laidlaw, on the dependence of an action against Robert Dunlop, W. S., used arrestment of funds belonging to him in the hands of the defender, Smith. Having obtained decree against Dunlop, he raised, in May, 1833, a summons of forthcoming against him and Smith, which was called and taken out to see for Smith, who returned defence, pleading, inter alia, an objection in point of form, that, in the Will, the word "defender" was inserted, instead of "defenders." On Smith refusing to waive this objection, Laidlaw declined to enrol the summons, and intimated, by letter on the 10th June, that he abandoned it, and thereafter he raised a new summons of forthcoming, containing in gremio an express abandonment of the former.

As a preliminary defence, Smith pleaded that the calling of the first summons rendered it a depending action; that, being a depending action, it was incompetent to abandon it, except by some judicial proceeding therein, or to repeat a new summons, while it remained undisposed of by a sentence of the Judge, and that a pursuer was not entitled by this mode of proceeding to cut out the defender of his claim for expenses, which he would obtain if the cause were enrolled, but which the present mode would not nearly satisfy.

To this it was answered—

So long as a process is not enrolled before the Judge, the pursuer may abandon it, and he cannot be compelled to enrol it. The only remedy assessed by the defender is to put up protestation, and if the dues be insufficient, however good a reason that may be for increasing them, it affords no ground for refusing to allow the pursuer to exercise the right competent to him by law to abandon the process without enrolling; and that he may abandon it in the manner done here, and without enrolment, as decided in the case of M'Gregor,¹ which was exactly the same with the present.

The Lord Ordinary pronounced this interlocutor:—"In respect of the abandonment of the former action, as stated in the present summons, as well as by letter before this action was raised, repels the preliminary defence, without prejudice to the complainer claiming his expenses of the former action in any competent form, and to the pursuer his defences thereagainst, as accords; and in respect the defender intimates his intention to reclaim, finds him liable in expenses."

Smith having reclaimed, the Court ordered minutes, on advising which the Lordships adhered.

WOTHERSPOON and MACK, W.S.—DUNDAS and WILSON, C.S.—Agents.

ROBERT M'FARLANE, Suspender.—*Rutherford—Christison.*

ALEXANDER and JOHN DOWNIE, Chargers.—*Shaw.*

No. 222.

Suspension—Partnership.—Circumstances in which a bill of suspension and liberation of diligence on a bill of exchange accepted by a Company firm, against an individual as one of the partners thereof, was refused to be passed on juratory decision.

The chargers, Alexander and John Downie, holders of a bill for Mar. 8, 1834.

£7, 9s. 7d., drawn by them upon and accepted by M'Intyre, Davie,

Co., calico-printers at Linside, near Paisley, on the 18th May, 1833, 2^d Division.

presented a charge of horning thereon, against the Company, and certain Bill-Chamber.

individuals, as the partners thereof, including, among others, the suspend- Ld. Moncreiff.

M'Farlane. No suspension was presented; and letters of caption T.

having been taken out, M'Farlane was incarcerated on the 29th August.

Immediately thereafter he applied to the magistrates for aliment, under the

protection of the Court; and in his declaration he made no statement as to his not

being a partner. The aliment was awarded; and after remaining in jail

some time, M'Farlane, in December last, presented a bill of suspension

and liberation, on the allegation that he was not a partner of the

Company. The chargers, besides referring to M'Farlane's conduct above

¹ Feb. 1, 1828 (*ante*, VI. 474).

No. 222. mentioned after being charged as a partner, in confirmation of his being so, further founded on his judicial declaration under the act of grace, and also upon a document signed by M'Farlane before witnesses, but not having the name of the writer inserted, acceding to a contract of copartnery previously entered into by the other partners. The Lord Ordinary passed the bill, "on caution, but not otherwise," adding the subjoined note.*

Mar. 8, 1834.
M'Farlane v.
Downie.

M'Farlane reclaimed, praying that at least the bill should be passed on juratory caution. With reference to this, minute and answers were allowed, from which it appeared that the only fund that M'Farlane could condescend on, was a legacy to which he was entitled under a trust-deed, but to which he had granted assignments in favour of his own law-agent, *ex facie* absolute, though said by him to be only in security of other debts, apparently sufficient, however, nearly to exhaust it.

LORD GLENLEE.—The first thing to be enquired into is the justice of the debt; for if there be no doubt about that, we should not pass the bill on juratory caution. Now, I can have no doubt whatever that this man was a partner of the Company. At one period we could not have interfered with executed diligence on juratory caution in any case. No doubt this *may* be done, but it should be limited to cases where there are serious and reasonable doubts of the justice of the debt, which I do not see here; and as the juratory caution offered is really worth nothing, in consequence of the assignments, I am on the whole for refusing.

The other Judges concurring,

THE COURT adhered.

W. Renny, W.S.—Bowrie and Campbell, W.S.—Agents.

* "For the abstract case of there being nothing but an averment of a man being a partner of a company, it would, no doubt, be unjust to require him to find caution for a debt of a company, before the fact of partnership was proved. But this is a matter which depends on the circumstances of the case. If there was any *prima facie* evidence of the fact, and strong presumptions in the conduct of the party, though the matter may still be sent to trial, it will only be on caution. In the well-known case of *M'Nair v. Fleming*, where the partnership in the material concern was entirely denied, caution to a very large amount was required. But it does not follow that, on repeated charges for other debts, the same thing will be done. In that very case of *Fleming*, caution was not found necessary in accumulated charges; and the same distinction was made (though in a different kind of question), in the latter case of *Fisher, &c. v. Stewart*. In the present case, what is asked is not to suspend diligence still in *cursu*, but to undo, in the first instance, diligence completed four months ago, and which has been acquiesced in for seven months. It is difficult to give credit to the excuses made for this, if the case really were as it is represented. But though there is certainly not conclusive legal evidence of partnership yet produced, the writings founded on, coupled with the complainant's conduct, gives enough of presumption to justify the demand of caution—completed diligence shall be disturbed."

No. 223.

Mar. 8, 1834.
Dingwall v.
Duff.

JOHN DUFF DINGWALL, Complainer.—*Rutherford—Moir.*
MRS CHARLOTTE DUFF, Respondent.—*Skene—Neaves.*

Liferenter and Fiar—Interdict.—Statement by the fiar as to a proposed cutting of wood under the judgment mentioned ante, 216, which not held to afford sufficient grounds for interdicting it.

AFTER the judgment, of date December 14 last, mentioned ante, 216, Mar. 8, 1834. which see, the respondent, Mrs Duff, on the 8th of January, gave notice to the complainer that she intended to cut 170 trees from a wood of about 60 acres of extent. The complainer thereupon presented a bill of suspension and interdict, on the ground that the cutting of these trees would be injurious to the estate. His statement on the point of alleged injury was in these terms:—"Before, however, taking any legal step, he has been at the trouble of getting the trees carefully inspected by his factor, Mr George Robertson at Balmanno, a land-surveyor, and a gentleman well acquainted with such matters, and is enabled to state to your Lordships that the trees, amounting to 170 in number, are taken from all parts of what is called the Old Glen Wood—a plantation of sixty acres in extent, and about the same number of years old—and that they are among the finest of the plantation, most of them being full or close topped; a few are dry, and a small number open topped, which might become dry within three or four years, but more than 130 of them are in the most thriving condition, and their being cut down would greatly disfigure the plantations where they stand, and most materially injure the estate."

2d Division.
Bill-Chamber.
Ld. Moncreiff.
T.

The Lord Ordinary reported the bill, with answers, to the Court, adding the subjoined note.*

* "At this period of the session, the Lord Ordinary thinks it expedient to bring a question of this kind immediately before the Court by whom the interlocutor, on the effect of which it materially depends, was pronounced.

"It is difficult to find a rule or measure for fixing a point like this, where the interests of the parties are so opposite, and the spirit of distrust or jealousy is apparently so strong. Both parties appear to go too far in their mode of treating the question. On the one hand, if the respondent is to have a power of cutting trees for sale at all, it is certainly no good ground for objecting to the proposed cutting, if which she has given notice, that, on the same principle, she may give notice of another cutting of similar or greater extent. The thing, from its nature, depends on degree; and the Court may interfere on successive proceedings, where they may not think it necessary upon one. The question must be, whether the proposed cutting of 170 trees is shown or averred to be injurious to the estate, so as to call for the interposition of the Court to control the discretion of the respondent and the executor. And in this view, the complainer's averments are certainly not very

No. 223.

Mar. 8, 1894.
 Dingwall v.
 Duff.

LORD GLENLEE.—I am for refusing the bill. This lady has a right to cut, so far as not injurious to the estate; and notice was allowed to be given, to enable the suspender to state specific objections to what should be proposed to be cut. But here there is no specific allegation that these particular trees being cut will injure the estate, and it just raises the general question formerly before us, and in respect there is no specific averment of damage to the estate, or to other trees, I would refuse the bill.

LORD MEADOWBANK.—I differ. The allegation is, that she is going to cut what, in the former bill, it was said would be injurious to cut. I consider that the object of the notice was to enable the heir to apply for the protection of the Court, and to get a professional person to report. The executor is in London, and he could not give the rational consent intended by the testator. Then if he does not act, we are to act for him; and the only way in which we can do so is to obtain the opinion of a qualified person, as to whether the cutting will be injurious to the estate. This lady has no unlimited right—she must not do any thing that will injure the estate, and must obtain the consent of the executor. The heir states that the cutting will be injurious, and the executor, whose consent is necessary, will not use the means which are requisite to enable him to give a rational consent, and I therefore think that we should have recourse to these means before allowing the wood to be cut.

LORD JUSTICE-CLERK.—There must be sufficient grounds stated to warrant us

strong or pointed, though he does make statements to this effect in general terms. If he means merely that the value of the estate to him will be lessened by the value of the trees in themselves, as articles of sale, the Lord Ordinary hardly thinks that this can be taken as the fair meaning of the testator, or even of the Court, in the interim arrangement, when the former interdict was removed. On the other hand, the plea of the respondent would decide the whole case, or take it as decided in her favour, according to her own construction of the power, and leave nothing to be tried on the expedite letters of suspension. The Lord Ordinary must suppose it to have been the intention of the Court that she was not, in the meantime, to make any cuttings which could be shown to be in themselves injurious to the estate, however advantageous they might be to herself; and he must observe, that he cannot hold her power to be at all commensurate with that of the deceased testator himself, or that what he might have done or contemplated is any fair test or criterion of what it is lawful for her to do, under the special power given. The testator having the whole interest both ways in himself, might do what he pleased, and in using his absolute discretion, might set the profit of an extensive cutting against any loss by immediate injury to the estate generally. But when he created two opposed interests, and provided that trees should not be cut to the injury of the estate, his power and discretion were necessarily limited by that quality. If, therefore, there were here any definite averment of injury to the estate in the proper sense, the right course would probably be, to remit to a person of skill to report to the Lord Ordinary on the Bills, in the vacation. But he doubts whether there is a sufficient averment. He can even conceive that both the wood and the estate might be improved by taking 170 trees out of a wood of 60 acres. Much depends on the nature of the timber, which is not explained, and on the question, whether there is any underwood or forest timber in progress. The Court will be able to judge better when they have counsel before them."

to interfere, and I do not see any sufficient allegation of damage to arise from this particular cutting. I therefore agree with Lord Glenlee. No. 223.

Mar. 11, 1834.
Russell v.
Wood.

THE COURT accordingly refused the bill, with expenses.

A. G. SUTHERLAND, W. S.—W. DUTHIE, W. S.—Agents.

THOMAS RUSSELL, Pursuer.—*J. M. Bell.*
MARION WOOD, Defender.—*Rutherford.*

No. 224.

Cessio.—The father of a natural child had contributed nothing towards its support, though it was about two years old; being incarcerated by the mother, he declared that he was neither able nor willing to support the child; after incarceration for nine months, he was found entitled to the benefit of the cessio only on condition of his father finding caution that he should not leave Scotland for the next eight years, and should pay one-fourth of his wages, during that period, to the mother of the child.

RUSSELL, who was 24 years of age, was incarcerated in June, 1833, by Marion Wood, who held a decree against him for the aliment of her natural child, and for expenses of process. In July he obtained aliment, under the Act of Grace, at the rate of 3d. per day. Though the child was above two years old, he had not contributed any thing towards its support; and, in his declaration under the Act of Grace, he stated, that "he was neither able nor willing to pay the incarcerator's debt." He also stated, that, for a year prior to incarceration, he had earned weekly wages, in the service of a carter, to the amount of 5s., besides bed and board, and that he had paid 3s. per week to his brother in extinction of a debt incurred in paying his expenses in the process of aliment. Russell was destitute of funds; and was the son of a small farmer with a family of seven children. His father offered a payment of £30 to the incarcerator for a discharge of the debt, which she refused. Russell pleaded that the Court had fixed, by a series of decisions, that, where the mother of the child was alimentering the prisoner, he was entitled to the benefit of the cessio;¹ that the lengthened imprisonment endured since the pursuer had declared his being unable and unwilling to pay her debt, took off the effect of that statement, and that he was now ready to pay to her whatever he could spare from the fruits of his industry, which was his only means of payment.

Mar. 11, 1834.
1ST DIVISION.

Wood answered, that, wherever a party had expressed a determination

¹ Houston, Dec. 13, 1828; ante, VII. 195; M'Fee, Jan. 20, 1832, ante X. 215.

No. 224. not to discharge a debt of this sort, the Court had refused the cessio;
 Mar. 11, 1834. that the pursuer's making payment of 3s. per week to his brother, for a
 Robertson v. whole year, and paying nothing to her, had evinced this determination in
 Hyndman. the strongest and most injurious manner; and that she had a right to con-
 tinue his confinement until she received some payment or security for
 payment of her claim; and she alleged that the pursuer's father or near
 connexions were wealthy, but this was denied.

LORD BALGRAY.—If the pursuer found caution not to leave the kingdom, and
 to pay a third or a fourth of his earnings to the defender, I should think the ar-
 rangement a very fair one for both parties.

The other Judges acquiesced in this view, and the pursuer having offered his
 father, as cautioner, that he should not leave the kingdom for the next eight
 years, and should pay one-fourth of his wages during that period to the
 defender, the Court pronounced this interlocutor:—"Find the pursuer
 entitled to the benefit of the cessio, on condition of Russell, father
 of the pursuer, subscribing and delivering to the clerk of Court a bond, ob-
 liging himself, that, for the next eight years after the date hereof, the said
 pursuer shall not leave the kingdom of Scotland, and that he shall pay monthly
 to the incarcerating creditor, or to Alexander M'Grigor, writer in Glasgow,
 for her behoof, one-fourth part of the wages that shall be earned by him
 during the said eight years; reserving to the incarcerating creditor, to op-
 erate on her decree, as to all future aliments falling due on account of the
 child, subsequent to the date of the present process."

ORR and MARTIN, W.S.—GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—Agents.

No. 225.

WILLIAM ROBERTSON, Pursuer.—*Fergusson*.
 JOHN BLAIR HYNDMAN, Defender.—*Jameson*.

Process—Jury Trial—Issue.—1. The Court refused to allow an issue as to the
 meaning of an obligation constituted by writing. 2. Circumstances in which as to
 a question regarding the working of coal, the Court preferred a remit to a man of
 skill, with power to take proof, to a Jury trial.

Mar. 11, 1834. THE late Mr Blair of Burrowland, in 1814, let to the pursuer Robert
 son, the coal in his lands for twenty-five years, at a rent of £50, or a lordship
 2D DIVISION. of one-eighth of the coal put out and carried away. Of date 25th March
 Ld. Medwyn. 1815, Blair gave Robertson a holograph obligation in these terms:—
 R. "Irvine, 25th March, 1815—You shall pay no rent for the coal for the

¹ A. B. Feb. 20, 1830 (ante, VIII. 571); Smith, July 2, 1831 (ante, VII. 183).

me you are sinking for and fitting up the main coal; and I shall bear No. 225.
 half the expense." In 1818, the defender Hyndman, who had succeeded
 Mr Blair, raised an action of removing against Robertson under the Mar. 11, 1834
 act of Sederunt, 1756, as in arrear of rent. In defence, Robertson Robertson v.
 produced the obligation quoted above, but it fell aside in the course Hyndman.
 of the litigation, and was lost; and, in a subsequent action in the Court of
 Session, Robertson being ordained to consign a certain amount of arrears
 of rent, and having failed, decree of removal was pronounced against
 him, and he was ejected accordingly in 1823. In the meanwhile he had,
 according to his own statement, expended a large sum of money in sink-
 ing for the main coal, subsequent to the obligation above mentioned; and
 relying on the allegation of its having been granted, and of his expen-
 diture on the faith thereof, he raised action against Hyndman for payment
 of £790 as the half of his outlay in sinking for the main coal. Hyndman
 denied that any such obligation had ever existed, but, in a proving of the
 tenor, the Court found the tenor proven as above set forth. (See ante,
 L. 775.) He also denied the alleged expenditure, and maintained
 certain pleas as to the import of the obligation, and as to how far Robert-
 son could avail himself of it in respect of his having gone on with his
 workings without notice to him that these were carrying on at his
 expense to the extent of one-half.

The Lord Ordinary remitted the cause to the jury-roll, adding the
 rejoined note,* and thereafter ordered the following issue to be tried:—

* "The Court having given decree in the proving of the tenor of the writ 25th
 March, 1815, and found it a genuine holograph document, effect must be given to
 however ill some of the statements in the pursuer's early correspondence accord
 with the interpretation now put upon it, and which indeed is the natural construc-
 tion of it. The tenant was to pay no rent during the time he was sinking for and
 fitting up the main coal, and the landlord was also to bear half of the expense. The
 question is, How long was he, de facto, employed in this operation, in terms of
 a letter, during which he was to pay no rent, and the landlord to bear half of the
 expense? The letter of 9th May, 1816, imports, that the pit was sunk between 2d
 July, 1815, and 2d January, 1816. The obligation founded on was granted imme-
 diately before this operation was begun, and of course in contemplation of it:
 could it be the intention of the parties that it was to have reference to any other
 , or to as many pits as the pursuer chose to sink? The pursuer, however, says
 was employed in sinking and fitting up the main coal at the landlord's expense,
 the time from his entry in the year 1815, till he was ejected in 1823; and the
 plea raised by the defender is, Was he entitled to go on during all that time with-
 out notice to the landlord, and more especially after November, 1817, that he was
 sinking in part at his expense? and is it true, as averred, that the pursuer always
 intended to the defender his intention to leave one pit before he began another?

† In order to ascertain these points by a general issue, or by special issues, the
 cause is remitted to the Jury Roll;—but the Lord Ordinary cannot avoid again

No. 225. "1. Whether, on or about the 26th day of March, 1815, it was understood and agreed between the said James Blair and the pursuer, that the pursuer should not pay rent or lordship while sinking for, and fitting up the main coal on the said lands, and that the said James Blair should pay one-half of the expense of the said sinking and fitting up ; and whether, under the said agreement, the defender is indebted and resting owing to the pursuer in the sum of £790, 12s. 5½d., or any part thereof, as one-half of the said expense ? "

Mar. 11, 1834.
Caledonian
Dairy Co.
v. Campbell.

Robertson reclaimed.

LORD JUSTICE-CLERK.—We cannot allow an issue as to the meaning of this written document. The Court will interpret it according to the construction of law ; and as to the disputed matters of fact, it appears to me that the best course would be to remit to a man of skill in that department, with power to take evidence ; but to send to a jury to enquire of them what is the meaning of a written document, is quite out of the question.

The other Judges concurring.

THE COURT recalled the Lord Ordinary's interlocutor ordering the issue to be tried, found that it was unnecessary to have an issue, and remitted to the Lord Ordinary to proceed accordingly.

R. MACFARLANE, W.S.—H. MACQUEEN, W.S.—Agents.

No. 226.

CALEDONIAN DAIRY COMPANY, Pursuers.—A. M'Neill.
MAJOR ROBERT CAMPBELL, Defender.—Keay.

Expenses—Auditor.—Unless required by the Lord Ordinary, the expense of furnishing his Lordship with a copy of documents in process, not to be allowed as a charge against the opposite party.

Mar. 11, 1834.

2D DIVISION.

IN taxing the pursuers' account of expenses in the cause mentioned ante, 394, the auditor disallowed a charge for making a copy of documents in process, for the use of the Lord Ordinary. The report was objected to by the pursuers, on the ground that this was a fair and proper proceeding, and greatly for the accommodation of the Lord Ordinary, instead of leaving him to read through the separate original documents themselves.

The Court, for the purpose of establishing a uniform rule of practice,

impressing upon the pursuer the hardship of not agreeing to the proposal made by the defender at the Bar, as to a settlement, considering that he is prosecuting his claim upon the Poor's Roll."

consulted the other Judges, and thereafter approved of the report, the opinion of their Lordships being, that unless required by the Lord Ordinary, the expense of furnishing him with a copy of the documents was not to be allowed. No. 226
Mar. 11, 18

LOCKHART, HUNTER, and WHITEHEAD, W.S.—A. DOUGLAS, W.S.—Agents.

GEORGE MORISON, Petitioner.—*Baxter.*

No. 227

Trust—Jurisdiction—Church.—A chapel trust-deed directed, that when the trustees were reduced to six, a seventh should be elected by the male members of the congregation, whom failing, by the remaining trustees; the Court, on the application of an only surviving trustee, remitted to the male members of the congregation to elect new trustees, and the election being reported to the Court, their Lordships confirmed it.

SEQUEL of the case reported ante, p. 307, which see. The interlocutor remitting to the male members of the Congregational Church to elect new trustees, and the relative procedure, were intimated from the pulpit of the church to the congregation on 26th January, 1834, and private notice was sent to four males of the congregation, who were absent. A meeting was at the same time called on the 29th of January, which was attended by a majority of the members—the whole number of males in the congregation being only eleven. At this meeting, James Melville and five others “were unanimously elected, assumed, and appointed new trustees, to act along with the said George Morison, in order to fulfil the purposes of the trust, as contained in the deed executed by the said John Morison, upon 11th March, 1803.” These proceedings being reported to the Court, and there being no contradictor, their Lordships pronounced this interlocutor: “In respect of the report of the election of new trustees made by the male members of the said church, confirm and approve of the nomination of James Melville, John Walker, David Ritchie, John Melville, William Thomson, junior, and the Rev. John Ramsay, as trustees to act along with the said George Morison, in fulfilling the purposes of the trust-deed within mentioned, and decern; and grant warrant and authority to the said George Morison for executing all necessary deeds in favour of himself and the said newly-elected trustees, in order to carry the said election into effect, and decern.” Mar. 11, 1834
1st Division

J. MORGAN, S.S.C.—Agent.

* The date of pronouncing the interlocutor was 8th March.

JURY SITTINGS.

WINTER SESSION. 1833—34.

No. 228.

JOHN DEMPSTER and MANDATARIES, Pursuers.—*Lord-Adv. Jeffrey—M'Neill—Monteith.*Nov. 25, 1833.
Dempster v.
Wallace.WALLACE, HUNTER, and Co., Defenders.—*D. F. Hope—Keay.*

Reparation—Agent and Principal.—An agent abroad drew bills on his constituent, for advances made by the constituent's directions; the bills were returned dishonoured, though the constituent was perfectly solvent; and the agent's credit and business were thereby destroyed—Question, whether such damages were consequential, and, on that account, could not competently found a claim for reparation.

Nov. 25, 1833.
Ld. President.

JOHN DEMPSTER of Halifax, merchant, raised an action against Wallace, Hunter, and Co., merchants in Greenock, setting forth that they had employed him to get a brig (Iris) built for them in New Brunswick, for the Jamaica trade; that he had done so, conform to their instructions; that a person duly authorized by them had taken the Iris off the pursuer's hands without objection, and that the pursuer had shipped a cargo in the vessel by instructions from the defenders, but that they, after honouring successive drafts of the pursuer, to the amount of £1600, had dishonoured his remaining drafts for the vessel and cargo, amounting to £1584, which were returned upon the pursuer, "whereby he suffered much inconvenience, and great loss, injury, and damage, both in his credit and circumstances." The pursuer stated the balance due to him, in account current, in respect of his advances on the ship and cargo, to be £2764; and he concluded, 1st, for decree against the defenders to pay that sum and certain interest; and 2d, "to make payment to the pursuer, of the sum of £2000 sterling, or such other sum as shall be ascertained to be the loss and damage which the pursuer has sustained by the failure of the said defenders to implement their bargain with the pursuer, in refusing to accept the pursuer's bills or drafts, and allowing them to be returned dishonoured and otherwise."

The defenders pleaded that the vessel was not built conform to order; that they refused the pursuer's drafts as soon as they ascertained this fact, and the pursuer must blame himself for the consequences; that the vessel was never definitively taken off his hands, and that they were ready to count and reckon with him on the footing of his liability to relieve them of the vessel, and of their advances on account of it, and of damage arising out of his failure to implement the mandate which he had u

The following issues went to trial:—"It being admitted, that in the month of November, 1825, the defenders employed the pursuers as commission-agents, to get a vessel built in New Brunswick, for behoof of the defenders,

No. 228.
Nov. 25, 1833
Dempster v.
Wallace.

"I. Whether the pursuers procured and delivered to the defenders, or a person or persons acting for their behoof, and under their authority, vessel called the Iris? and whether the defenders are indebted, and resting owing to the pursuers, in the sum of £948, 10s. 4d., or any part thereof, with interest thereon, as the balance of the price of said vessel?"

"II. Whether the pursuer made certain furnishings, and delivered certain goods, contained in the accounts, Nos. 14, 16, 19, 21, 22, 28, and 36, of process? and whether the defenders are indebted and resting owing to the pursuers, in the sum of £1648, 14s. 4d. sterling, or any part thereof, on account of the said furnishings and goods?"

"III. Whether in, or about the years 1826 and 1827, the pursuer drew certain bills of exchange upon the defenders, to the amount of £584, 9s. 1d., or about that sum, to account of the balance of the price of the said vessel and cargo? and whether the defenders wrongfully failed to accept and pay the said bills, or any of them, to the loss, injury, and damage of the pursuer?"

"Damages laid at £2000."

At the trial, after the evidence on the rest of the case was led, the pursuers were in the course of adducing proof to show that the return of the unaccepted bills upon Dempster had ruined his credit and thrown him out of employment. The defenders stated that they were ready to admit that his credit was thus ruined by the bills which were returned on him.

In charging the jury, the LORD PRESIDENT observed, inter alia, that he considered the vessel had been taken off the hands of the pursuer by a person duly authorized on the part of the defenders. Nothing was said at the Bar, or on the Bench, as to the relevancy of any of the grounds of damage embraced in the third issue.

The jury found for the pursuers on all the issues, and assessed the damages, under the third issue, at the sum of £1000. The defenders moved for a new trial, on the ground that these damages had been, for the chief part, asked and awarded upon an illegitimate ground. After deducting the re-exchange and charges, &c. on the bills returned, the rest was the damage suffered by the pursuer, in his credit, feelings, and business, was purely consequential, and therefore was of a kind which the defenders were not liable to repair. He could be in no more favourable position than any creditor whose debtor failed to make due payment. A legal reparation for not paying a debt at the proper time, was a liability for interest. Accordingly, in cases the most favourable for the debtor, such as those of cautionary obligations, a cautioner had no claim against his principal for more than the sum and interest paid on his ac-

No. 228. count, although the cautioner might have suffered the utmost inconvenience through the principal's failure, and might himself have been exposed to imprisonment and loss of credit before he was able to satisfy his obligation as cautioner.¹

Dec. 2, 1833.
Newlands v.
Shaw.

The Court expressed considerable doubt as to allowing the defenders to take up this plea, at so late a stage, especially as the ground on which the damages were awarded had been specifically stated by the pursuers from the outset. The case stood over, that the pursuers might be heard in answer to the argument above stated; but a decision was avoided, by the parties entering into a compromise.

A. MOWBRAY and J. HOWDEN, W.S.—D. GRANT, S.S.C.—Agents.

No. 229. *ALEXANDER NEWLANDS, Pursuer.—Sol.-Gen. Cockburn—Maitland.*
ROBERT SHAW, Defender.—D. F. Hope—Russell.

Reparation—Slander.—Under an issue, whether, at a meeting of heritors, where three persons were proposed as a committee for managing the poor's money, an heritor had stated, falsely, maliciously, and calumniously, "that he would not sit with such men; that they were a disgrace to any community, and that it would be a disgrace for any honest man to sit in a committee with such men," or words to that effect—verdict found for the defender.

Dec. 2, 1833. *ALEXANDER NEWLANDS*, portioner, Glasgow, raised an action of damages for defamation against *Robert Shaw*, portioner, there. The summons set forth, "That the pursuer, as one of the heritors of the barony parish of Glasgow, attended a numerous meeting of that body, which was held within the barony church, Glasgow, upon the 7th day of February last, or upon one or other of the days of that month, or of January immediately preceding, or March immediately following, for the purpose of electing certain persons who should act as a committee for the management of the poor's money: That on this occasion Mr Nathaniel Stevenson, present provost of the barony of Calton, proposed three individuals; while Mr William Hunter, portioner, Calton, proposed Messrs Peter M'Indoe and Thomas Smith, portioners, Calton of Glasgow, and the pursuer, as persons properly qualified for acting as a committee: That immediately upon this proposition being made by Mr William Hunter, Robert Shaw, portioner in Calton, merchant in Glasgow, and one of the bailies of the barony of Calton, defender, turned round to him, and in an angry tone of voice, and in the presence and hearing of the whole assembled heritors, and with reference to Peter M'Indoe, Thomas Smith, and the pursuer, collectively and individually, did falsely, maliciously, calumniously, and

Ld. President.

¹ *Dunlop*, 31st May, 1815 (F. C.); *Pitcairn*, July 27, 1775 (3187).

juriously assert, 'that he would not sit with such men; that they were a disgrace to any community, and that it would be a disgrace for any honest man to sit in a committee with such men;' meaning thereby to represent the pursuer to the meeting as a person of bad character, and unworthy to associate or act with honest men, or did use words to the foresaid effect, or of the aforesaid import and tendency, of and concerning the pursuer." In respect of the injury thereby inflicted on his feelings, character, reputation, and credit, the pursuer concluded for £500 damages.

No. 220.

Dec. 2, 1833.
Nowlands v.
Shaw.

The defender denied the use of the expressions alleged; but pleaded, that, even although these, or equivalent terms, had been used, he was protected by privilege, unless malice could be proved against him, because it was both his right and his duty to express his opinion as to the pursuer's character, at the time and place libelled.

The following issue went to trial:—

"Whether, on or about the 7th day of February, 1832, at a meeting of the heritors of the barony parish of Glasgow, held within the Barony Church, when the pursuer and others were proposed as a committee for the management of the funds of the poor of the said parish, in presence and hearing of the persons then and there present, the defender did falsely, maliciously, and calumniously say that he would not sit with such men; that they were a disgrace to any community, and that it would be a disgrace for any honest man to sit in a committee with such men—meaning to represent the pursuer as a bad man, and unworthy to associate or act with honest men; or did falsely, maliciously, and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?"

The pursuer called two witnesses. The first, Hunter, was the person who had proposed the pursuer and two others, as the committee. He deponed, that the name of the pursuer had been incidentally suggested to him only after he went to the meeting; that when he proposed the names, the defender rose and said to the chairman, "he was astonished any person would propose such men; it would be a disgrace to any honest man to sit in a committee with them;" at least, that the defender used words of that import.

The second witness deponed, that the defender said, "he would not sit with such men; they were a disgrace to any community."

It appeared that the assessment for the poor which required to be raised for the Barony parish was very large, amounting to between £6000 and £7000; that there was considerable labour and responsibility connected with the duties which would devolve on the committee; that there had been a fama, or clamour, among a number of the poorer parishioners against the pursuer, on account of a suspicion of wilful fire-bripping, which was not known to Hunter until after the meeting; and

No. 229. that Hunter had withdrawn the three names proposed by him, as it was desirable to have a unanimous appointment.

Dec. 2, 1833.
Newlands v.
shaw.

Before bringing his present action, the pursuer had preferred a complaint in the Justice of Peace Small Debt Court, concluding for damages to the amount of £5 ; but he had subsequently abandoned that complaint.

The defender led no evidence.

Dean of Faculty addressed the jury for the defender, and pleaded, that this was a privileged case. The heritors were a public, statutory body, engaged in discussing matters which were competently and properly before them, and each member of the body was privileged in delivering his sentiments, in the course of that discussion, upon every subject pertinent to it. Considering the duties and responsibilities of the proposed committee, acting in the management of the poor's money, the character and qualifications of any person named must have entered into the judgment which every heritor was called on to pronounce on the proposal, and it was therefore open to every heritor to discuss them freely; and indeed, unless the freedom of pertinent and bona fide discussion were permitted and protected, no effectual discussion could take place at all, and the meeting might as well be compelled to decide on the proposal in silence. On any ordinary and unprivileged occasion, a person who spoke what was false and injurious to another, necessarily became liable in reparation. But wherever a person, in the discharge of the duty belonging to a recognised office and character, such as that of heritor at this meeting, made observations on the character of another, he was protected by privilege; and although these observations might be both false and injurious, the legal presumption was, that, if pertinent, they were spoken from a sense of duty, and therefore they inferred no liability for reparation, unless they were proved to be also malicious. There was no evidence of previous quarrel or grudge between the parties in this case. There was nothing from which to infer malice, save the use of the words themselves; and as they were all pertinent to the proposal before the meeting, the legal presumption was, that no malice existed, and the jury must therefore find for the defender.

The defender separately contended, that, in a case of verbal slander, as the whole sting lay in the precise words which were used, there was not sufficient proof of the slander set forth in the issue. The only specific point in which both witnesses agreed, was, that the defender had declared he would not sit with such men. Only one witness stated words which could imply an imputation of dishonesty; and as to the general allegation, that it would be disgraceful to be connected with the pursuer, it was not enough to support the issue.

LORD PRESIDENT charged the jury. The first question is, whether the slander in the issue is proved. It is true that there is some discrepancy in the precise form and aggravation of the words deposed to by the two witnesses; and it

most, if not altogether, impossible that this should not be the case. Unless, No. 229.
 before, a proof of verbal slander, uttered at a public meeting, is to be rendered
 impracticable, it is impossible to reject this proof, merely on account of slight dis-
 repancies; and, indeed, it might create a degree of distrust if the witnesses tallied
 so exactly in the form of words to which they deponed, while such tallying would
 ot tend to confirm their accuracy as to the substance of what was spoken on the
 occasion libelled. The issue sets forth certain words, and the question is, whether
 these words, or "words to that effect," were uttered. I think that words of the
 same substance and import with those in the issue, are clearly proved to have been
 used; but this is a matter of fact for the consideration of the jury.

Dec. 2, 1833.
 Newlands v.
 Shaw.

The next question is, whether the words were spoken falsely, maliciously, and
 calumniously, or in the honest discharge of the duty proper to the occasion. I
 think there was a privilege, as to every heritor at the meeting, in stating his opi-
 nion regarding the character and qualifications of the parties proposed as the com-
 mittee. He was entitled to deliver his opinion, and to give his reasons for that
 opinion, if he acted bona fide and conscientiously in so doing, and did not abuse
 the opportunity by rendering it subservient to a malicious purpose. Accordingly,
 the issue is, whether the defender spoke the words maliciously, and the jury must
 require a proof of malice, which is neither to be presumed nor lightly inferred
 against any party who is accused of it. I think there is no proof of the defender's
 entertaining malice towards the pursuer. The words used by the defender were
 not applied especially to the pursuer, but to the whole three persons proposed as
 a committee. There is no trace of any previous quarrel or grudge between the
 parties. There could be no premeditated purpose by the defender to attack the
 pursuer's character on that occasion, for it appears that the nomination of the pur-
 suer was a merely incidental matter, in consequence of a suggestion made to
 Hunter after the meeting had assembled. There appears to have been a consider-
 able clamour, at one time, in part of this very parish of Barony, against the pur-
 suer, on account of an imputation of wilful fire-raising. And I think it a circum-
 stance, which is also fairly deserving of consideration, that the pursuer's own
 opinion of the wrong which he had sustained was not very great, at the time when
 it was most fresh and recent, as he then went to the Justice of Peace Court for
 redress, under a complaint concluding for damages to an amount not exceeding £5.
 In all the circumstances, I think that although the defender cannot be acquitted of
 some excess and indiscretion in the language which he used, the pursuer has
 entirely failed to prove malice, and if the jury concur with me in that opinion,
 there ought to be a verdict for the defender.

The jury found for the defender.

J. CULLEN, W.S.—A. DOUGLAS, W.S.—Agents.

No. 230.

ALEXANDER BELL, Pursuer.—*D. F. Hope—W. Forbes—Mylne.*
 WILLIAM MURRAY, Defender.—*Sol.-Gen. Cockburn—G. G. Bell.*

Dec. 16, 1833.
 Bell v. Mur-
 ray.

Proof—Process.—1. A pursuer, in his opening speech, not allowed to read to the jury a letter, which the defender objected to as inadmissible; but allowed to aver the object and substance of the letter, as that which he undertook to prove.

2. In an action of damages for adultery, a letter, written by the alleged adulteress after her husband's suspicions of her guilt were awakened, and addressed and despatched to the defender, but never received by him, and alleged to contain instructions to him as to the story which he ought to tell her husband regarding their conduct at certain interviews which they were proved to have recently had, held inadmissible against him, in respect that he never received it.

Dec. 16, 1833.

Ld. President.

ACTION of damages by Alexander Bell against William Murray for committing adultery with his wife, Bell obtained decree of divorce against his wife; after which the following issue went to trial in his action against Murray:—

“It being admitted, that Elizabeth Colville or Bell was, during the years 1828, 1829, 1830, and 1831, the wife of the pursuer,—

“Whether, during the months of April, October, and December, 1829, or prior thereto, the defender wrongfully alienated the affections of the said Elizabeth Colville from the pursuer, and wrongfully seduced her from her marriage vows and engagements; and did, in the house of the pursuer, at Dundee, on or about the fast-day preceding the dispensation of the Lord's Supper at Dundee, in the month of April, 1829,—and in the said house, on or about the 18th day of the month and year last aforesaid,—and in the said house, during the month of October in the said year,—and in the house or lodgings of Mrs Rutherford, in High Terrace, Leith Street, Edinburgh, on or about the 28th, 29th, 30th, and 31st days of December of the said year, and the 1st and 2d days of January, 1830,—or on or about any of the said days, at the said places respectively, as aforesaid,—wrongfully commit adultery with the said Elizabeth Colville, to the loss, injury, and damage of the pursuer?

“Damages laid at £2000.”

In his opening speech to the jury, the counsel for the pursuer stated, that all the parties lived at Dundee, and that several acts of adultery had been committed during a visit which Murray and Mrs Bell made to the house of a Mrs Rutherford in Edinburgh, in December, 1829, and January, 1830; that Mrs Bell returned from Edinburgh before Murray, and found her husband's suspicions of her guilt had been awakened, and she therefore wrote a letter to Murray, to put him on his guard, and to tutor him as to the story he should tell her husband on returning to Dundee; that she delivered this to the guard of a coach going to Edinburgh, with instructions to put it into Murray's hands, but that Murray had never received it, and that this letter had formed an important piece of evidence.

Bell in the action of divorce. The pursuer then proposed to read No. 230. letter to the jury.

Dec. 16, 1833.
Bell v. Mur-

Solicitor-General, for defender, objected, that this was not the time for putting ray. lence, and, when the time came, he meant to object to the admissibility of ter; it was therefore necessary to refrain from reading its contents to the the meantime, or the objection to its admissibility would be rendered prac- nugatory, however well founded.

Faculty, for pursuer.—It is competent at least to state the substance letter, because the pursuer is entitled to tell the jury what he expects to

But as he bona fide means to tender this letter in evidence, and expects it received, I submit that he is entitled to read it now. If afterwards excluded dmissible, the Court will tell the jury to dismiss it from their minds.

AND PRESIDENT.—The pursuer may state to the jury what he means and to prove, whether his proof is to be oral or written. He may therefore by way of averment, not only the fact that a letter was written, but also the and substance of the letter. But I cannot allow him to read a document is afterwards to be objected to as inadmissible.

ter proving, inter alia, the conduct of the parties in Mrs Ruther- lodgings, and putting in the extracted decree of divorce, and lead- vidence as to the handwriting of the alleged letter of Mrs Bell, the er tendered the letter in evidence, at the same time requesting the President to peruse it, which his Lordship did. It was addressed to ray, and was of the following tenor:—"Sir,—As Mr B. has been ng particular enquiry concerning my visit to Edinburgh, I was obliged ute the following circumstances:—'That I asked you to go with me to R.'s, where we had tea; after which I went to procure his old lod- s, which were engaged;—that you went to Mr N.'s; but his house s;—you returned to Mrs R.'s, and slept;—that on Wednesday was dining with a writer;—called at Mrs R.'s, and she entertained with the story of the Count till rather late for going home;—but I d seeing you on Thursday or Saturday morning. Mr B. is to be ng the coach to ask you in a sly manner to see if our story correspond. I him also you were so kind as take me to the College with your friend ——. Now I beg you will not seem confused or appear angry if should see him in Fife. Call on us as early as possible, to avoid iclon. I have kept up wonderfully, and shall never betray you- ember all the above, as our honour is at stake. Yours in haste,

(Signed) B. B."

fter his Lordship had privately perused the letter,

Solicitor-General objected to its being read to the jury. Even assuming the to be in the handwriting of Mrs Bell, it could not be admitted in evidence at Murray. It was not written until after Mrs Bell knew her husband had begun spect and accuse her of the crime of adultery; she had then not only an inte- but the strongest of motives to state or to invent any thing as to her own not, without regard to its truth; and though such statements might be used

No. 230. in evidence against herself, they could not be used against any third party what

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ay.

ever, without exposing that party to the risk of a conviction upon spurious evidence. The letter was inadmissible, in this view, just as the declaration of one of several pannels could not be used against the rest; and that was a principle, in the criminal law, which was essential to preserve evidence in that Court from the grossest contamination. But, farther, the letter had never reached Murray. If it had, then his conduct on the receipt of it, as testifying surprise and indignation, or conscious shame, might have been put in evidence, and the letter might also have been put in evidence, in order to explain his conduct. But as the letter never reached him, it was nothing else than a statement of Mrs Bell, not made in his hearing. If such statement had been made verbally, it could not have been competently tendered in evidence, by those who heard it made; and though the statement was in writing, its nature remained the same, and it was equally objectionable in point of evidence, though the fact of its having been made was offered to be proved in a written shape.

The Dean of Faculty answered.—The question in issue was, whether Murray and the writer of this letter had committed adultery. Whatever proved her to have committed adultery at the time and place libelled, was relevant as establishing an essential part of the case. Accordingly, the extracted decree of divorce had been put in evidence, though Murray was no party to the process in which it was obtained. But, farther, the whole conduct of both of the parties towards each other, in reference to the alleged acts of adultery, might legitimately be put in evidence. Proof had been led which brought them together to Mrs Rutherford's, in Edinburgh, the scene where alleged acts of adultery had been repeatedly committed; and the conduct of both parties whilst there had been put in proof. The letter was written by Mrs Bell immediately on her return to Dundee; it was addressed to Murray, and she placed it in the hands of a person charged to deliver it to him. This was not a mere statement, or declaration by her, but a part of her conduct in relation to Murray, and the Edinburgh visit, which ought to go before the jury. Though Murray never received the letter, still the fact that a letter of the tenor in question had been written and despatched, should be laid before the jury, and this could not be truly done without reading the letter to them. Had Mrs Bell herself returned to Edinburgh, and gone to Mrs Rutherford's to enquire for Murray, after she had been accused by her husband at Dundee, this might have been proved (even though she had not met Murray) as part of the *res gesta*, and behaviour of the parties to one another; but it was equally competent to prove that, in place of seeking him herself, she sent a letter to him to notify her husband's suspicions.

LORD PRESIDENT.—When an objection is taken to the admissibility of parole testimony, and the point raised is doubtful, the inclination of my mind always is to admit it, not only for the fuller expiscation of the truth, but also because, if erroneously rejected, it is liable to be lost before a new trial can be had; whereas if erroneously admitted, the error can be fully remedied at a second trial. But when a written document is tendered in evidence, which will remain of precisely the same fixed character after the trial as it is at present, I feel less hesitation in rejecting it, if I incline to think it inadmissible, because the remedy against any error which may thus be committed, remains entire and complete. In disposing of the present question, I think the letter tendered is inadmissible. What a person says or writes is good evidence against himself, but it is not evidence against a third party. The question how far the statement can be used in evidence against a

conversation is to be used against a third party, it must be proved to have taken place in his presence; and, on a similar principle, I think this letter cannot be used in evidence against Murray, as he never received it. Murray never had an opportunity of indicating by his conduct either an acquiescence in any thing implied in the letter, or a repudiation of it, and every thing contained in it. If he had ever received the letter, he might have declared, on the instant, that there must be collusion between the writer and her husband; that he had no story to tell; and that he would state the whole truth, and nothing else. I consider the letter inadmissible as a piece of evidence in a question with him.

No. 230.

Dec. 26, 1833.

Macdonald v. Baxter.

Armstrong's Assignees v. Leith Banking Co.

Thomson v. Handyside.

The pursuer then withdrew his action.

J. MARSHALL, S.S.C.—A. MILLAR, S.S.C.—Agents.

WILLIAM MACDONALD, Pursuer.—*Skene—Currie.*
JAMES BAXTER, Defender.—*D. F. Hope—Patton.*

No. 231.

Agent and Principal.—Question whether Baxter, the pursuer's factor, had let a farm without authority, and by deceitful concealment of facts from the pursuer, involved him in the expense of unsuccessful litigation with the tenant. The Jury found a verdict for the defender.

Dec. 26, 1833.

Ld. President.

GORDON and BURNETT, W.S.—TOD and ANDERSON, W.S.—Agents.

ARMSTRONG'S ASSIGNEES, Pursuers.—*D. F. Hope—McNeill.*
LEITH BANKING COMPANY, Defenders.—*Skene—Anderson.*

No. 232.

Reparation—Proof.—This case was tried of this date, but see it reported ante, p. 440, in reference to the bill of exceptions which was taken by the pursuers.

Dec. 26, 1833.

Ld. President.

J. ROBERTSON, S.S.C.—J. BISSET, S.S.C.—Agents.

MRS GRACE THOMSON, Pursuer.—*Sol.-Gen. Cockburn—Maitland—Forbes.*

No. 233.

JOHN HANDYSIDE and JAMES SUTHERLAND, Defenders.—*Robertson—H. J. Robertson.*

Landlord and Tenant—Citation.—1. Competent for the factor of a landlord abroad, to apply (as the landlord might have done) for an order against a tenant, who had taken his lease from the factor, to put furniture into his house, under pain of summary ejectment. 2. Circumstances, involving a question of domicile, in which it was held that a petition and warrant of ejectment were duly served upon a tenant.

ACTION of reduction and damages by Mrs Thomson, against John Handyside, factor for Captain Hepburn, and James Sutherland, City-

Dec. 27, 1833.

Ld. President.

No. 233. officer in Edinburgh. The following issues went to trial :—" It being admitted, that the pursuer took in lease from the defender Handyside, the house, No. 30, Hanover Street, Edinburgh, the property of Captain Francis Hepburn, from Whitsunday, 1830, to Whitsunday, 1831 :—

Dec. 27, 1833.
Thomson v.
Handyside.

" 1. Whether, on or about the 15th day of June, 1830, the said defender wrongfully applied for and obtained from the Magistrates of Edinburgh, a warrant to eject the pursuer from the said house, unless she furnished the same within twenty-four hours,—to the loss, injury, and damage of the pursuer ?

" 2. Whether, on or about the 22d day of June, 1830, the defender or either of them, wrongfully ejected the pursuer from the said house,—to the loss, injury, and damage of the pursuer ?

" Damages laid at £500."

It appeared that Handyside, whose constituent was abroad, had presented a petition to the Magistrates of Edinburgh, on 15th June, 1830, craving a warrant to eject Mrs Thomson from the house in Hanover Street, unless she furnished it within twenty-four hours. The prayer of the petition was according to the usual practice of the burgh in such cases. Sutherland was the officer who served the petition. He was with it repeatedly to the house in Hanover Street without being able to find Mrs Thomson, after which he served it by leaving a copy under the door of the house which she had occupied in Greenside Street prior to Whitsunday, and of which she had a current lease for the year 1830-31. She had left that house about thirty days before Whitsunday, owing to some temporary cause of disrepair; and it was not proved that she had returned to live in it. It was not satisfactorily proved how far she had occupied or resided in the house in Hanover Street. She had very little furniture in that house, the whole having been packed in one hand-barrow. The copy of the petition which was left for her, as above, did come into her hands, but, apparently, not till after the lapse of one day at least. No answers were put in to Handyside's petition, and, on 19th June, the Magistrates " ordained Mrs Thomson to furnish and plenish the house as ordered, and that within twenty-four hours after intimation hereof shall have been made to her in writing by an officer of Court; and failing her doing so, granted warrant to officers of Court to eject her," &c. This was a warrant in the usual terms, in regard to similar applications. Sutherland served this warrant as before. Three days afterwards it was enforced, not by Sutherland however, but by Pedie, another City-officer, who ejected Mrs Thomson.

The pursuer contended, 1. That the proceedings against her were illegal, because Handyside, a mere factor, had no power to prosecute removing.¹ 2. The service was irregular. She had left her house in

¹ York Buildings Co., 14th Nov. 1764 (1805)

Greenside Street thirty days before Whitsunday, and twenty-four days more had elapsed before the time of service. She had thus no domicile in Greenside Street; the copy should have been left at the house in Hanover Street, especially as it related to proceedings for ejecting her from that house, which therefore, in dubio, should have been treated as her dwelling-house. 3. If the service of the petition was irregular, the warrant following on it was irregularly granted and executed, and both Handyside and the officer were liable for the irregularity of the service; summary diligence had thus been irregularly done against her, to the great injury of her feelings and credit, and therefore both parties were liable in damages; and, 4. Though Pedie was the officer who actually executed the ejectment, it was not necessary to make him a defender, because the irregularity lay in the previous steps of procedure.

No. 233.
Dec. 27, 1833.
Thomson v.
Handyside.

The defenders pleaded, 1. That Handyside, factor for a constituent abroad, having let the house to the pursuer, was entitled to compel her to furnish the premises, in security of the rent, and, failing her doing so, he was entitled to employ the usual summary remedy of ejectment. 2. That the petition was regularly served, because the pursuer's domicile, up to Whitsunday, was undoubtedly in Greenside Street. She had a lease of it still current for the year in which the service was made, she had never truly occupied or possessed the house in Hanover Street; and, accordingly, the petition had been received by her. 3. That as the service was regular, and the prayer of the petition, and the warrant granted, were conform to the usual practice of the burgh, no party could be liable in damages for executing the warrant; and, 4. That Pedie, who executed the ejectment, ought to have been called, and Sutherland at least could not be made liable, as he did not execute it.

LORD PRESIDENT charged the jury.—Every landlord is entitled, at common law, to have a suitable stocking, conform to the nature of the subject, brought by the tenant into the premises, so as to secure him in payment of his rent. The rule holds equally in urban and in rural tenements. The landlord is entitled to insist, in an urban tenement, that furniture shall be brought into the house. There was no furniture at all corresponding to the extent of the house, or the amount of the rent, brought into the premises in Hanover Street by the pursuer. In regard to the first issue under trial, I am therefore clearly of opinion that you ought to find for the defender, Handyside, who alone is concerned in that issue. I think it clear that he did not wrongfully apply to the Magistrates, but, on the contrary, made a justifiable and reasonable application, consistent with law and practice. It is true that the term of twenty-four hours, allowed to the pursuer to furnish her house, appears to be very short notice; but it has been proved to be the usual time, according to the practice of the burgh, and the warrant which issued was according to common form. I think there is no ground whatever for subjecting Handyside in damages for asking and obtaining that warrant.

In regard to the second issue, in which both Handyside and Sutherland are defenders, the question is, whether the ejectment was wrongful? This is rested on the plea that the petition and warrant of ejectment were erroneously served at Green-

No. 233. side Street, in place of Hanover Street. I think the plea is not well founded. The pursuer had lived in Greenside Street prior to Whitsunday; and though she had quitted that house about thirty days before the term, she did so in consequence of a mere temporary cause—some repair which was then necessary. When the term of Whitsunday came, her connexion with the house in Greenside Street did not cease. She had it taken for the year ensuing, and was a tenant of the house at the time that service was made there for her. She is not proved to have entered to dwell and possess anywhere else, and, accordingly, the copy left for her at Greenside Street actually reached her. As she is not proved to have acquired a domicile anywhere else, and her connexion with the Greenside Street house as tenant still continued, I think the petition was sufficiently served, and that there is no ground for impeaching the mode of obtaining the warrant. If regularly obtained, there is nothing instructed to show any irregularity in its execution; and, therefore, there should be a verdict for the defenders on the second issue also.

Dec. 27, 1833.
Johnstone v.
M'Craw.

THE JURY found for the defenders on both issues.

J. DAVIDSON, S.S.C.—J. KNOX, S.S.C.—Agents.

No. 234. MRS CAMERON OR JOHNSTONE, and MANDATARY, Pursuers.—*Lord Adm. Jeffrey—Maitland.*

JOHN M'CRAW, Defender.—*D. F. Hope—Neaves.*
GEORGE SMITH and Co., Defenders.

Reparation—Diligence—Writ.—Circumstances in which no damages were found due to a person whose name was erroneously stated in the diligence under which she was apprehended and detained for a short time in custody of the officer.

Dec. 27, 1833. ACTION of damages by Mrs Johnstone, against M'Craw, town-officer of Leith, and Smith and Company, his employers, for the wrongous apprehension of the pursuer, as in meditatione fugæ, and the wrongous extortion of money from her thereby. The following issues went to trial:
L.L. President.

"1. Whether, on or about the 25th day of January, 1831, the defenders, or any of them, wrongfully apprehended and detained the pursuer, or wrongfully caused her to be apprehended and detained, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the said 25th day of January, 1831, the defenders, or any of them, by threats of executing a warrant, wrongfully extorted from the pursuer the sum of £5, 17s. 7½d., or any part thereof, as a debt alleged to be due to the defenders, George Smith and Company, and the sum of £1, 7s. 4d., or any part thereof, in name of expenses, or either of the said sums? And whether the defenders, or any of them, are indebted and resting owing to the pursuer in the said sums of £5, 17s. 7½d., and £1, 7s. 4d., or either of them?"

The damages were laid at £500.

It appeared that a misnomer had occurred in the warrant,

having been designed Mrs James Johnstone, in place of Mrs John Johnstone. She had been but a short time in the officer's custody, when her law-agent paid the debt and expenses, and got a receipt from the officer's employer, who was in the neighbourhood, and to whom a person was despatched by the officer to procure the receipt. It was not until after this that the misnomer was pointed out to the officer.

No. 234.

Dec. 27, 1833.

Johnstone v.
M'Craw.

The warrant had been read over to the pursuer before her agent arrived. She made no objection to its accuracy. The officer did not give back the money on the misnomer being pointed out to him.

No appearance was made for the officer's employers, Smith and Company.

The LORD PRESIDENT, in charging the jury, made, inter alia, the following observations: In regard to Smith and Company, whose inaccuracy in applying for the warrant occasioned the insertion of an erroneous name, I think they are liable in damages, and it is for the jury to assess them with temperate discretion. And even in regard to the officer, M'Craw, I apprehend that he cannot shake himself altogether free of liability. Every officer, in executing diligence against the person, is bound to see that his warrant applies to the individual whom he apprehends. If he does not himself know the individual, he should take persons along with him who do, or he should otherwise certify himself. It is at his own peril if he apprehends any person to whom his warrant does not apply. In this case, he had no warrant except against Mrs James Johnstone. The pursuer is Mrs John Johnstone, and I think the officer executed his warrant wrongfully in taking Mrs John Johnstone; it was an illegal apprehension. It is true that, when the warrant was read over to the pursuer, she did not object to it, and state that it did not apply to her; and if the jury think she had then noticed the misnomer, and refrained from pointing it out, for the purpose of misleading the officer, and entrapping him, I should think they could not consider her entitled to any damages at all. But if they think that, from her natural tribulation at the moment, or from being a woman unacquainted with business, she had not noticed the misnomer when the warrant was read over, they will of course consider how far her claim for damages is otherwise well founded; and, on that subject, I have already observed, that I think some small damages should be given against M'Craw on account of his having acted incautiously and irregularly in executing diligence against the person. His Lordship observed, that, excepting the misnomer, there was nothing in the case in which a claim of damages could rest.

THE JURY found for the pursuer as against Smith and Company, but for the defender, M'Craw, on both the issues.

W. MACFARREY, W.S.—M. SMILLIE and J. MURDOCH, S.S.C.—Agents.

No. 235.

ALEXANDER M'LEAN, Pursuer.—

WILLIAM M'LEAN and OTHERS, Defenders.—*A. McNeill.*

Dec. 27, 1833.

Ld. President.

M'Lean v.
M'Lean.Maclean v.
Richardson.Williamson v.
Corrie.

Fraud.—Action of reduction of a settlement, on the ground of facility, fraud, and circumvention, and lesion. The pursuer failed to make out his case, and the jury found for the defenders.

W. MARSHALL, W.S.—J. NAIRN, S.S.C.—Agents.

No. 236.

THOMAS MACLEAN, Suspender.—*Keay—Whigham.*JOHN RICHARDSON, Respondent.—*D. F. Hope—Ivory.*

Dec. 28, 1833.

Ld. President.

Interdict.—Maclean raised a suspension and interdict of certain proceedings, to which Richardson alleged that Maclean had consented. The question, whether Maclean had consented, was tried before a jury, under an issue, in which Richardson stood as pursuer, undertaking to prove the consent.

The jury found for the pursuer.*

W. STEWART, W.S.—R. WELSH, S.S.C.—Agents.

No. 237.

JAMES WILLIAMSON, Pursuer.—*D. F. Hope—Reid.*WILLIAM CORRIE, Defender.—*Keay—Pyper.*

Proof—Bankruptcy.—Under an issue between the trustee on a bankrupt estate, and a party alleged to have obtained an undue preference through the fraudulent conduct of the bankrupt, the defender (who pleaded, that the transaction was fair and bona fide, in the ordinary course of business) tendered the bankrupt to prove it—held that he was inadmissible.

Dec. 30, 1833.

Ld. President.

ACTION by Williamson, trustee on the sequestrated estate of Robert M'Turk, to reduce a sale or transference of 20 head of cattle by M'Turk to William Corrie. The action was laid, both on the stat. 1696, c. 5, subsequently extended by the last Bankrupt Act, in respect that the transference was completed by delivery within 60 days of bankruptcy, and was alleged to have been made in satisfaction or security of a prior debt; and also on the ground of fraud at common law, in respect that

* A bill of exceptions was tendered, in respect of the admission of parole proof, which Richardson argued was incompetent, inasmuch as the agreement related to heritage, and belonged to the class of innominate contracts, and implied a gratuitous promise. The Court (1st July, 1834) sustained the exception. ~~It was not~~ under date 1st July.

the transaction was a contrivance to give an undue preference to Corrie, No. 287. who was aware of M'Turk's insolvency at its date.

Corrie pleaded in defence, that the transaction was a fair and bona fide sale, in the ordinary course of business.

Dec. 30, 1833.
Williamson v.
Corrie.

The following issues went to trial :—

" It being admitted that the pursuer is trustee on the sequestrated estate of Robert M'Turk, who became bankrupt on the 24th day of February, 1829,—

" Whether, on or about the 26th day of January, 1829, and within 60 days of the said bankruptcy, the said Robert M'Turk did, contrary to the statute 1696, cap. 5, transfer to the defender 20 head of cattle, or any part thereof, for his satisfaction, or in security of a prior debt due to the defender, in preference to the other creditors of the said Robert M'Turk ?

" Whether, on or about the 26th day of January, 1829, the said Robert M'Turk fraudulently transferred the said cattle to the defender, to the loss, injury, and damage of his creditors aforesaid ? "

The defender tendered Robert M'Turk, the bankrupt, as a witness, to which the pursuer objected, that the second issue under trial was, whether the transaction was a fraud at common law, and that M'Turk was not admissible, in consequence of the interest which he had to clear himself of fraud. If he failed to do so, it might affect his discharge under the sequestration : and as he could only do so by defeating the present action, he was not admissible for the defender. In regard to the first issue, he was equally inadmissible, because, even if the defender did not know of M'Turk's insolvency, M'Turk himself must have been fully aware of it, and he could only acquit himself of the imputation of defrauding the rest of the creditors, by deponing in terms of Corrie's defence, that this was a fair sale in the ordinary course of business.

The defender answered, that the bankrupt had no patrimonial interest in the issue. If the defender lost the action, the value of the 20 cattle would be acquired to the estate, and an additional ranking, to a corresponding amount, would be the result. This affected the interests of the defender, and of the general creditors, but not of the bankrupt. As the bankrupt had the best means of knowledge of the transaction, and had no patrimonial interest, the defender had a right to the benefit of his testimony, even if it should be admitted cum nota. The fact, that M'Turk's character was concerned, did not render him inadmissible, any more than when an alleged paramour is called by the defender, in an action of divorce, to disprove adultery.

LORD PRESIDENT.—I think M'Turk is not admissible. The questions at issue are, whether he acted fraudulently in the transaction which is under reduction. He is not a competent witness to rebut the charge of fraud against himself.

No. 237. Objection sustained.

Jan. 6, 1834.
Taylor's Trustees
v. Forbes.

Verdict for the pursuer.

BRODIES and KENNEDY, W.S.—J. MITCHELL, W.S.—Agents.

Jaffray v.
Simpson's
Trustees.

No. 238.

LIEUT.-COL. TAYLOR'S TRUSTEES, Pursuers.
SIR WILLIAM FORBES and Co., Defenders.

Jan. 6, 1834.
Lord Justice-
Clerk.

AN appeal having been taken against the judgment mentioned V. 785, the House of Lords reversed it, and remitted to try the question of fact embraced by the following Issues, which were accordingly put to a jury:—

“Whether any, and what part of the £5000 transferred by John Taylor to a separate account in his own name in 1803, subsequently transferred in 1814, into the name of Patrick Taylor, and again in 1817, transferred into an account, called the separate account of John Taylor and Sons, had been received by the respondents in payment of a debt due to them from the firm of Taylor and Sons?”

“Whether, when the respondents received such money, they knew that it was part of the estate of John Taylor, and that Patrick Taylor was possessed of that money as executor of the said John Taylor, and that the said money was subject to the trusts declared by that will, and that the said trusts were not satisfied?”

The defenders had never disputed the matter of the first issue, and the pursuers failed in proving the second. The Jury, while they found for the pursuers on the first issue, found for the defenders on the second.

J. FORMAN, W.S.—CRANSTOUN and ANDERSON, W.S.—Agents.

No. 239. WILLIAM JAFFRAY and OTHERS, Pursuers.—*Keay—McNeill—Montgomery—Hamilton.*
SIMPSON'S TRUSTEES and OTHERS, Defenders.—*D. F. Hope—Scott—Cockburn—Rutherford.*

Jan. 8, 1834.
Lord Justice-
Clerk.

TRIAL of the Issues mentioned ante, 244. After the defence had been led, the pursuers gave up the case, and a verdict was pronounced for the defenders.

J. CAMPBELL, W.S.—DALLAS and INNES, W.S.—Agents.

¹ See a question as to the expenses prior to appeal, Feb. 6, ante, p. 468.

WILLIAM FAIR, Pursuer.—*D. F. Hope—Neaves.* No. 240.
 THOMAS BARCLAY and JAMES HOOPER DAWSON, Defenders.—*Sol.-Gen.* Feb. 2, 1834.
Cockburn—Brodie. Fair v.
 Barclay.

Reparation—Slander.—Circumstances under which one shilling damages awarded for a political libel in a newspaper.

WILLIAM FAIR, agent for the British Linen Company Bank, at Feb. 2, 1834. Jedburgh, raised an action of damages against Thomas Barclay, printer of the newspaper called the Kelso Chronicle, and James Hooper Dawson, the publisher. The summons set forth, that a letter had been published in the paper, containing a passage which charged the political supporters of Lord Maitland, in Jedburgh, with "having resorted to the most base and undue means to obtain a majority of votes on the ensuing election;" that among other instances of this, the letter stated, "A third person, who rents a few fields from a gentleman connected with the British Linen Company Bank, had also his choice either to vote for the son of the house of Lauderdale, or flit;" that the letter stated, that by the cajoling and threatenings of Lord Maitland's partisans, many voters would be "forced to declare in favour of a candidate whose political principles they loathe and detest;" that the pursuer was the person referred to and meant in the passage above quoted; and "that the statement contained in said letter, or pretended letter, in so far as regards the pursuer, is false and groundless, and is calumnious and injurious, and is calculated to hold up the pursuer to his constituents and employers, the British Linen Company Bank, and the public, as a person who has resorted to, or has lent himself to the most base and undue means to obtain votes, one or more, at the ensuing election, in support of a particular candidate, whereby the pursuer has been injured, and may be injured in his feelings, reputation, interest, and estate." The summons concluded for £1000 of damages against the printer and publisher. Lord Justice-Clerk.

The defenders pleaded, that the statement in the letter was substantially true, and was published without any animus injuriandi. They also pleaded, that as they had given up the author of the letter, it was vindictive to prosecute them in place of him.

The following issues went to trial:—"It being admitted, that the pursuer is, and prior to the 16th day of June, 1832, was, agent at Jedburgh for the British Linen Company's Bank, and that on the said day, and subsequent thereto, the defender, James Hooper Dawson, was proprietor and editor of a certain newspaper called the Kelso Chronicle, and that the defender, Thomas Barclay, was printer and publisher of the said paper;

"Whether, on or about the said day, there was printed and published

No. 240. in the said newspaper the following words, according to the meaning
 Feb. 2, 1834. hereinafter set forth; viz. 'The latter candidate,' (meaning a candidate for
 Fair v. the situation of the representation in the Commons' House of Parliament
 Barclay. of the burgh of Jedburgh and others,) 'owing to the close system, and
 direct influence over several corporations, has been the representative of
 this district of burghs for many years, galled to think that the chance of
 success is now against him, has resorted to the most base and undue means
 to obtain a majority of votes on the ensuing election. Out of many in-
 stances, I shall mention only a few, which has come under my notice in
 the burgh of Jedburgh. A very respectable grocer and spirit merchant,
 who happened to possess a shop and other premises under an anti, was
 waited upon the other day by his landlord, one of the emissaries of
 Maitland, and informed, that unless he pledged himself to vote for Lord
 Maitland, he must remove the first term.—Another person who rents a gar-
 den, &c. from a gentleman, somehow or other connected with the distribu-
 tion of stamps in this burgh, got a similar intimation, with this addenda,—
 "You, sir, shall have no farther employment from me, and I shall oppose
 you in every thing I can."—A third, who rents a few fields from a gentle-
 man,' (meaning the pursuer,) 'connected with the British Linen Com-
 pany Bank, had also his choice, either to vote for the scion of the house
 of Lauderdale, or flit.' (Meaning that the pursuer threatened to remove
 a tenant unless he would promise to vote for the said candidate; or that
 he, the pursuer, resorted to the most base and undue means to obtain a
 majority of votes for the said candidate on the said election.) And
 whether the whole, or any part of the said words, are of and concerning
 the pursuer, and are false and calumnious, and to the loss, injury, and
 damage of the pursuer?

"Or

"Whether, on a day between the 16th of March and the 16th June,
 1832, the pursuer informed David Murdie, a tenant of certain fields, the
 property of the pursuer, that he must either vote for the said candidate,
 or flit from the said fields?"

The Jury found for the pursuer; damages one shilling.*

A. DOUGLAS, W.S.—D. BROWN, jun. W.S.—Agents.

* The defenders agreed to pay the expenses in the same manner as if they had
 been found liable by the Court. The pursuer's account was taxed, and paid ac-
 cordingly.

ROBERT ORMISTON, Pursuer.—*Sol.-Gen. Cockburn—Thomson.*MISS ISABELLA RENNY, Defender.—*A. McNeill.*

No. 241.

Feb. 17, 1834.
Ormiston v.
Renny.

Process—Agent and Client.—Circumstances in which the Court refused to postpone a jury trial, though the defender offered to consign the sum in dispute, and to pay all the expenses occasioned by the delay.

Watson v.
Gardner.

ACTION by Ormiston, law-agent in Edinburgh, against his client, Miss Isabella Renny, for payment of his account. The defender moved, the morning of the trial, that it should be put off in consequence of a new agent and counsel having been taken into the cause the day before. He offered to consign the sum in dispute, and to pay all the expenses occasioned to the pursuer. The pursuer objected that delay had been repeatedly given to the defender, and, in particular, that a postponement of trial had been granted three weeks ago; and that there had been many changes among the defender's agents. He therefore insisted, that as he was fully prepared to go on and prove his case, he had a right to do so, and bring the discussion to an end by a verdict. The Court refused the defender's motion. Her counsel left the Court, and, after a proof was led by the pursuer, the Jury returned a verdict for him.

Feb. 17, 1834.
Lord Justice-
Clerk.

R. ORMISTON,

—Agents.

THOMAS WATSON, Pursuer.—*McNeill—A. McNeill.*JOHN GARDNER and JAMES DUNLOP, Defenders.—*D. F. Hope—Robertson.*

No. 242.

Reparation—Wrongous Imprisonment—Agent and Client.—A party was imprisoned for a debt of £21, after £7 of that sum had, with the knowledge of the creditor and his law-agent, been paid; the Jury, in an action of damages, awarded a sum of £20 against the creditor, and £30 against his law-agent.

ACTION of damages by Watson, shoemaker, against Gardner, leather-merchant, and Dunlop, a writer in the country, his law-agent, for wrongous incarceration. The pursuer had been incarcerated for a debt of £21, 19s. 1d., without restriction, although £7 had been paid to account, subsequently to the charge of horning, and this was known both to the creditor, Gardner, and his law-agent, Dunlop. The incarceration continued from 5th May to 5th November; and two of the pursuer's fellow-prisoners for debt, died of cholera in the interval. One of these had been confined in the same apartment with the pursuer. No evidence was adduced to show, that, if the debt had been restricted to the true balance, the pursuer could have paid it, and thereby obtained his liberation. The summons concluded for £1000, damages, as due conjunctly and severally, or severally, by the

Feb. 19, 1834.
Ld. President.

No. 242. defenders. The jury found for the pursuer, and awarded £20, damages, against Gardner, and £30 against the law-agent.¹

Mar. 12, 1834.

Jackson v.
Earl of Cassilis'
Representa-
tives.

C. FISHER, S.S.C.—M'LEAN and GIFFEN, W.S.—Agents.

Currie v. Mac-
donald.

JOHN JACKSON, Pursuer.—*D. F. Hope—Deas.*

No. 243. EARL of CASSILIS' REPRESENTATIVES, Defenders.—*Rutherford—Cowan.*

Master and Servant.—Verdict finding a contract of hire of a riding-groom or jockey, in England, for a year, proved, and that £150 of wages were due.

Mar. 12, 1834.

Id. President.

ACTION by Jackson, for payment of £150, being a year's wages for hire as a jockey, in the employment of the late Earl of Cassilis, formerly Lord Kennedy. Issues were taken, whether, at York, his lordship engaged the pursuer as a jockey or riding-groom for a year from and after 10th August, 1826; and whether £150 were due as wages. After the pursuer had adduced two witnesses, the defenders gave up the case. Verdict for the pursuer, £150.

J. RONALD, S.S.C.—HUNTER, CAMPBELL, and CATHCART, W.S.—Agents.

No. 244. MRS JOHNSTONE or CURRIE, and HUSBAND, Pursuers.—*Shene—Penny.*
WILLIAM MACDONALD and MISS MACDONALD, Defenders.—*D. F. Hope*
—*G. G. Bell.*

Proof—Homologation.—A decree in absence being brought under reduction, the defender pleaded, inter alia, that the pursuer had consented to it; in an issue whether the pursuer had so consented, the defender was held as pursuer under the issue; verdict for the pursuer under the issue.

Mar. 17, 1834.

Lord Justice-
Clerk.

MR MACDONALD of Powderhall, and Miss Duncana Macdonald, his sister, obtained a decree in absence, reducing a deed executed by Mr Currie of Greenhead, containing certain provisions in favour of his wife, Mrs Johnstone or Currie. Mrs Currie, with consent of her husband, having raised an action to reduce this decree, it was pleaded, in defence, inter alia, that it had been pronounced with her consent, and that she had homologated it. The following issue was therefore sent to trial: "It being admitted that, on the 7th day of March, 1827, a decree of reduction was pronounced, reducing and setting aside a trust-deed, dated 29th August, 1820, executed by William Currie, then of Greenhead, and wood-merchant in Glasgow—Whether the defender, Mrs Margaret Currie, wife of the said William Currie, agreed or consented to the said decree, or homologated and acquiesced in the same?"

The defenders were held to be pursuers in reference to this issue, and No. 244.
vice versa.

Mar. 18, 1834
Cogan v. Lye

THE JURY found for the parties pursuers under the issue.

J. COURT, S.S.C.—H. WATSON, W.S.—Agents.

HUGH COGAN, Pursuer.—*Sol.-Gen. Cockburn—Maitland.* No. 245.
GEORGE LYON and Others (CUMMING'S TRUSTEES), Defenders.—
D. F. Hope—A. McNeill.

Proof—Deathbed.—1. A proof was taken on commission in a previous process between the same parties, and relative to the same subject, which process was ultimately dismissed as incompetent; a witness formerly examined being again adduced—held incompetent to read the previous deposition to the witness. 2. In a reduction on the head of deathbed, the testimony of medical men, as to the nature of the disease, and the cause of death, admitted, although rested solely on the facts stated by unprofessional persons, neighbours and acquaintances of the deceased.

ACTION by Hugh Cogan, apparent heir of provision of the late Mrs Ann Cumming or Hunter, to reduce a deed executed by her, and alleged to have been made on deathbed. The defenders were the trustees, &c. of the deceased. The following issue went to trial: "It being admitted that the disposition, No. 10 of process, sought to be reduced, was executed by the late Ann Cumming, on the 4th day of November, 1812, and that on the 15th day of December, 1812, the said Ann Cumming died—Whether the said deed was executed by the said Ann Cumming on deathbed?"

Mar. 18, 1834
Lord Justice-
Clerk.

A proof had been led on commission, in the years 1814 and 1819, in the course of a previous process of reduction of the same deed, which had been raised also on the head of deathbed, but which was dismissed as incompetent, in consequence of the title being erroneously libelled. The depositions of the witnesses who were then examined on commission in that process, and had since died, were now put in and read to the jury. Upon adducing Susan Mitchell, a witness aged sixty-eight, the pursuer moved that the deposition formerly emitted by her before the commissioner should be read over to her. The defender objected, that this would be a species of tutoring of the witness, because the deposition went over the same ground with that which she was to go over in her present examination; that the witness must now speak from her own memory; and that as she had an undoubted right to have her previous deposition cancelled before she gave her evidence, the only reason for allowing it to be read to her altogether failed.

LORD JUSTICE-CLERK.—If the pursuer had instructed any established practice of the Jury Court in support of his motion, I should have been disposed to give

No. 245. effect to it. But he has not adduced a single authority or precedent, and I consider it irregular to allow the witness's previous deposition to be read over to her.
 ar. 18, 1834.
 gan v. Lyon.

The witness was then examined in common form.

The pursuer's proof, consisting of the evidence of neighbours and acquaintances of the deceased, established, *inter alia*, that she had been subject, for several years before her death, to a complaint which some witnesses deponed to have been a bloody flux; others called it a bowel complaint; another called it bloody piles, and said that this last disease was often spoken of as a bloody flux. Witnesses deponed to her having had the complaint in the interval between the date of the deed and her death, and also, as it appeared, not long before the deed. They spoke likewise to her having had a swelling in her legs, apparently not long before her death. Mrs Cumming had been a very corpulent person, and had remained corpulent at the time of her death, which was rather sudden at the last.*

The pursuer concluded his proof by calling Sir George Ballingall, Professor of Military Surgery in the University of Edinburgh, who had been in Court while the evidence was adduced. He was examined as follows:

Sol.-Gen.—Assuming that Mrs Ann Cumming's disease was a bloody flux, and that the disease was on her on the 4th of November, do you see any thing in the case which makes it at all improbable that that disease occasioned her death? *Ans.* No; it is quite possible that it did.

Quest. Some witnesses have called the disease "bloody flux," or "bowel complaint," and some have spoken to the swelled legs of the deceased; do you, on looking to the whole statements, see any evidence of the superinduction of a new disease, to account for the occurrence of her death? *Ans.* I see no such evidence. *Quest.* The deceased was of a corpulent habit, and the bloody flux often wastes a patient; does the existence of this corpulency make it improbable that she died of bloody flux? *Ans.* It is not a conclusive circumstance. If death were produced by a sudden aggravation of the complaint, there might be little wasting of the person; or if the complaint were confined to the lower part of the bowel, leaving the upper part, which supplies nourishment to the body in a healthy state, there might be comparatively little wasting. *Quest.* Is it the substance of your opinion that the disease in question can account for the death, and that there is no evidence of the intervention of any new disease? *Ans.* That is the substance of my opinion.

Cross-examined by defenders. Is it your opinion that the disease was bloody piles or bloody flux? *Ans.* I think it was a bloody flux. It has been

* No more of this evidence is noticed than may suffice to explain the examination of the medical witnesses. No attempt has been made to state how far the evidence showed the existence of disease on 4th November, the date of giving the medical evidence.

repeatedly called a bowel complaint by the witnesses. I think it was a No. 245.
 bowel complaint, accompanied with a bloody discharge. *Quest.* Would
 you, from the evidence, have expected an aggravation of the complaint Mar. 18, 1834.
 Cogan v. Lyon
 to occur? *Ans.* I see no evidence of any other complaint; and therefore
 I should consider that an aggravation had occurred.

By the Court. The age of the deceased was about eighty: does that
 circumstance influence your opinion as to the cause of death? *Ans.* It
 does, in so far, that a very slight aggravation of the complaint might be
 fatal.

After the defenders had adduced their witnesses, consisting of neigh-
 bours and acquaintances of the deceased, for the purpose of proving that
 she was not ill, on 4th November, of any complaint of which she after-
 wards died, they adduced the following medical witnesses who had been
 present during the whole trial excepting the examination of Sir George
 Ballingall.

Professor Christison, M. D. examined by defenders. *Quest.* Are you
 satisfied, as a medical man, of the nature of the complaint of which Mrs
 Ann Cumming died? *Ans.* Certainly not. I think it impossible to say
 what was the complaint of which she died. *Quest.* Are there facts enough
 in the evidence to satisfy you that she died of a bloody flux? *Ans.* No.
 I do not think it proved that she ever had the bloody flux, properly so
 called; that is, dysentery. (The witness stated the usual symptoms of that
 disease, and among others, emaciation, which he considered to be awant-
 ing.) *Quest.* Is there any evidence that, on 4th November, she was
 labouring under a disease, which continued till death? *Ans.* I think
 there is no sufficient evidence of that. I am not able to form any opinion
 that is satisfactory to my mind, as to the cause of death. I see no medi-
 cal grounds for forming such an opinion.

Dr Alison, examined by defenders. *Quest.* Is there any evidence that,
 on 4th November, Mrs Ann Cumming was labouring under a mortal
 disease? *Ans.* Certainly not.

The witness stated the reasons why there did not appear to be any
 bloody flux or dysentery, and added that he considered there was no
 evidence of her having had any bowel complaint on 4th November, which
 continued till the time of death; and that there was nothing in the proof
 to give any idea what the immediate cause of death might have been.

Dr Scott, examined by defenders, Deponed, that he had had many cases
 of dysentery or bloody flux under his charge; and that there were no
 facts in the case to satisfy him that Mrs Ann Cumming laboured under a
 mortal complaint on 4th November, or under any bloody flux that caused
 her death. After stating his reasons, the witness farther deponed, that
 he could not connect her death with any facts in the case of as early a
 date as 4th November; that he could not form any opinion as to the
 cause of death; and that there were facts in the case which were incon-

No. 245. sistent with her death being ascribable to any bloody flux or bowel complaint of as early a date as 4th November.

Mar. 18 & 19,
1834.

Johnston v.
Fergusson.

Grant v.
Coltart.

The LORD JUSTICE-CLERK, in charging the Jury, observed, that it was incumbent on the pursuer to prove that the deceased was, on 4th November, affected with the disease of which she afterwards died. The name of the disease was not material, but it was essential that the disease should have already begun at the date of the deed, and should have ended in death. It rested with the Jury to find for the pursuer if he had proved this, and for the defenders, if he had failed to prove it.

THE JURY found for the defenders.

CAMPBELL and MACK, W.S.—CARNEGIE and SHEPHERD, W.S.—Agents.

No. 246. WILLIAM JOHNSTON, Pursuer.—*D. F. Hope—Robertson—Houston.*
ROBERT FERGUSSON and Others, Defenders.—*Sol.-Gen. Cockburn—*
Rutherford—Handyside.

Property—Possession.—In a question between co-terminous heritors, whether the pursuer had enjoyed immemorial possession of certain lands—the Jury found for the pursuer.

Mar. 18 & 19,
1834.

Lord Justice-
Clerk.

MR JOHNSTON of Lathrisk was a co-terminous heritor with Mr Fergusson of Raith, in certain lands lying in the shire of Mid-Lothian, and he raised an action for the purpose of ascertaining the exact lines of march between the properties. The pursuer alleged immemorial possession of part of the lands, which was denied by the defender. An issue being taken to try the question, the Jury found for the pursuer.

R. BURN, W.S.—A. D. FRASER, W.S.—Agents.

No. 247. LUDOVICK GRANT, Pursuer.—*Sol.-Gen. Cockburn—Maitland.*
Rev. JAMES COLTART, Defender.—*D. F. Hope—Whigham.*

Mar. 20, 1834.

Lord Justice-
Clerk.

Reparation—Slander.—Action of damages by the manager of the Culcreuch Cotton Works, against the minister of the parish, on account of alleged false and calumnious defamation of the pursuer in letters to his employer, who was one of the elders (mentioned ante, p. 385). After the defender had led part of his evidence, an arrangement was made, under which a juror was withdrawn, each party paying his own expenses.

MACKENZIE and MACFARLANE, W.S.—A. M'CHRYNE, W.S.—Agents.

ADAM DAWSON, Pursuer.—*Robertson—Neaves.*
JOHN BOYD, Defender.—*D. F. Hope—M'Neill.*

No. 248.

Mar. 21, 1834.

Dawson v.
Boyd.

ration—Slander.—A party having falsely and calumniously applied to a rate the epithets of a liar, a known and infamous liar, or words to that effect, in the circumstances, assessed at £50.

MON of damages by Adam Dawson, provost of Linlithgow, against Mar. 21, 1834.
Boyd, writer there, for having defamed the pursuer, by falsely and
niously calling him a liar, a known liar, and an infamous liar. The Lord Justice-
Clerk.
e was, that the pursuer had made a false statement, on the occasion
d, and that the defender had merely asserted, with truth, that the
ent was false, which he had an interest to do, as it affected his own
sional reputation. The following issue went to trial.—“Whether,
about the 23d day of November, 1832, at Brown's Inn, Linlithgow,
presence and hearing of Captain Grant, residing at Greenpark;
Ross, farmer at Borrowston Mains; William Hutton, baker, Queens-
John Dudgeon, farmer at Ammond Hill, and John Dickson, farmer
itelands; or in presence and hearing of one or other of them, the
er did falsely and calumniously say that the pursuer was a liar, a
liar, and infamous liar; or did falsely and calumniously use or
words to that effect—to the loss, injury, and damage of the pursuer?”
ges laid at £1000.

words in the issue being proved, the defender, without leading
ce, contended that there were attendant circumstances which not
leviated, but wholly exculpated him.

jury found for the pursuer, and assessed the damages at £50.

CUNNINGHAMS and BELL, W.S.—THOMSON PAUL, W.S.—Agents.

CAN CAMPBELL, Pursuer.—*D. F. Hope—Robertson—G. G. Bell.* No. 249.
XANDER CAMPBELL and Others, Defenders.—*M'Neill—Stark—*
Milne.

ROBERT HUNTER, Defender.—*Wilson.*

ration—Partnership.—One of the partners of a distillery company having
and liable in excise penalties, in consequence of the other partners, and the
r, having, without his knowledge, engaged in illicit distillation, verdict in
of relief found against them.

Agency and Partial Counsel.—A person who had acted as agent for the
in a previous cause relative to the same subject, and who had also acted as
the cause then depending—rejected on the ground of agency and partial

*As part of the proof of fabrication of the books of a company, a profes-
sionist was examined to state his opinion, and the facts, consisting of
intermissions, incongruities of accounts, &c., on which it was rested.*

No. 249. **MR CAMPBELL** of Rockhill, raised an action against **Mr Campbell**, residing in Easdale, John Hunter, and others. The summons set forth that John Hunter was manager of the Easdale Distillery, of which the other defenders and the pursuer were co-partners; that the defenders had engaged in illicit distillation, which they kept concealed from the knowledge of the pursuer; that the smuggling was disclosed to the excise officers by Hunter, and that the company were exposed to penalties and expenses, amounting to £3256; that the pursuer was thereby under advance to the extent of £1171, and that he was entitled to be absolutely relieved by the defenders, as they alone were cognisant of the smuggling. He concluded against them as conjunctly and severally liable.

Mar. 22 & 24,
1834.
Campbell v.
Campbell.

Lord Justice-
Clerk.

Mr Campbell, Easdale, pleaded in defence, that the smuggling began without his knowledge; that the pursuer learnt the fact as soon as himself, and was aware of the smuggling without objecting to it; he had paid his own proportion of the penalties and expenses, and was not farther liable; besides, the pursuer's claim, on his own showing, arose out of an illicit transaction, and no action could be maintained upon it.

Hunter pleaded separate defences.

The following issues went to trial:—"It being admitted, that the pursuer and defenders, Alexander Campbell and Donald M'Andrew, and the late John M'Andrew, were partners of a company, for the purpose of distilling spirits, at Easdale, and that the defender, Robert Hunter, was brewer or distiller to the said company; and that on the 17th day of December, 1823, the said company were found liable in a penalty of £3000, as being guilty of contravening the Revenue Laws:—

"Whether the defenders, or any of them, were guilty of the said contravention of the said laws, whereby the said company were subjected in the said penalty, and obliged to pay certain expenses? And whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of £1171, 5s. 1d., or any part thereof, with interest thereon, as the balance of the said penalty and expenses?

"Or,

"Whether the said contravention of the said laws was with the knowledge of the pursuer?"

The sum of £1059, with interest from 18th February, 1824, was stated at the trial as the amount claimed.

The pursuer tendered Alexander M'Arthur, writer, as a witness. The defenders objected, that, besides having been employed by the pursuer to look after his interests at the distillery, and having acted as the pursuer's agent at the Exchequer trial, he had also acted as agent in this cause, and, when examined as a haver, had pleaded the privilege of an agent in refusing to make productions called for by the defender.

Objection sustained.

In order to prove that the distillery books, as now exhibited, were fabricated, the pursuer adduced Mr Horaburgh, accountant

ned them. He spoke to the mode in which the several accounts in No. 249. books were made up; the important erasures and additions, or inter-
 ations which they contained; the incongruities they exhibited; the Mar. 22 & 24, 1834.
 es of an ex post facto insertion of new paper, with new water-mark, Campbell v. Campbell.
 ritical places in the accounts; the appearance, occasionally presented,
 the books not being kept from day to day, but made up at one opera-
 , and seeming to be copies and not originals; and the marks of all
 leaves of some of them having been opened up and again re-stitched.
 comparing a memorandum, made up from the books at a former pe-
 , with the books in their present condition, he deponed that the books
 now exhibited, did not contain materials for making up the memoran-
 a, and did not correspond with it. He deponed that he was satisfied
 t the books, in their present condition, were not genuine.
 After a long deduction of evidence on both sides, and when the Lord
 tice-Clerk was delivering his charge, the jury intimated to his Lord-
 , that they were prepared to find for the pursuer on both issues, and
 t the sum due was £1059, with interest as claimed. This being in
 ordance with his Lordship's view of the case, it was unnecessary to
 ceed farther in summing up the evidence, and the jury found accord-
 ly.

C. McDOWALL, W.S.—MACLEAN and GIFFEN, W.S.—H. MACQUEEN, W.S.—
 W. MERCEK, W.S.—Agents.

CASES

DECIDED IN

THE COURT OF SESSION,

SUMMER, 1834.

No. 250.

May 13, 1834.
Girdwood v.
Wilson.

CLAUD GIRDWOOD and Co., Pursuers.—*Keay—Pyper.*
JOHN WILSON and Others, Defenders.—*Rutherford—Monteith.*

Title to Pursue—Heir and Executor—Process.—A decree for bypast rents in favour of an heir, reduced, in respect that the executor was the party entitled to it, and it had been taken parte inaudita.

Lease—Hypothec—1. Claim of hypothec over the machinery of a mill refused, in respect that the alleged tenant was not the tenant for the year in question. 2. Observed, that although the machinery of a third party lies for a term within a mill, yet, unless the mill be effectually let to a tenant, no hypothec can exist. 3. Question whether a lease, extended on stamped paper, but signed by neither party, would have been valid (but for special circumstances), in respect of possession having followed on it.

May 13, 1834.

1st Division.
Ld. Moncreiff.
S.

THE late James Wilson agreed to let a cotton-mill to John M'Leod for thirteen years, from Whitsunday, 1819, at a rent of £250. A lease was extended on stamped paper, but never signed by either party. M'Leod entered to possession, and having purchased a quantity of machinery from Claud Girdwood and Company, he placed it in the mill. His affairs got into embarrassment; and by an arrangement with his creditors, to which Wilson was not a party, Girdwood and Company reacquired the right of property in the machinery in July, 1819, which, however, they allowed to remain in the premises. The rent up to Whitsunday, 1820, was duly paid by Wilson. On 1st February, 1820, Wilson exchanged missives with Daniel M'Phail, for the purpose of letting the mill to him for thirteen years, from Whitsunday, 1820. Founding upon the missives, Wilson raised an action before the Sheriff of Lanarkshire, in April, 1820, setting forth, in express terms, that he had completed a

with M'Phail, and craving to have M'Phail ordained to implement it. No. 250.
 M'Leod was no party to this application. The Sheriff, in December, 1820, decerned against M'Phail, who brought an advocation, upon which Wilson allowed the decree in his favour to fall. Wilson afterwards let the mill to Campbell, as from Whitsunday, 1821. In the meantime, Girdwood and Company had left their machinery in the premises, with a view to its being purchased by M'Phail, and under a conditional agreement with him as to the terms of the purchase, if he should become tenant for a term of years. In May, 1821, Wilson presented a petition of sequestration to the magistrates of Glasgow to attach the machinery, on the footing that M'Leod was tenant till Whitsunday, 1821; that the machinery was his property; and that it was subject to the landlord's hypothec for the rent 1820-21. Warrant to sell having been granted, Girdwood and Company applied for an interdict, in respect that the machinery was their property, and not liable to the hypothec claimed.

May 13, 1834.
 Girdwood v.
 Wilson.

After much intermediate procedure, the Court, in an advocation, on 2d March, 1827, found the property of the machinery to be in Girdwood and Company, and ordained it to be delivered to them, "subject to the claim of the landlord, on account of his hypothec, if such shall be found to exist; and remitted the question to the magistrates of Glasgow, with instructions to hear the same, and proceed as they shall see cause." Under this remit decree passed, by default, in favour of the heir of Wilson, he himself having died.

Girdwood and Company raised a reduction of this decree, (in the course of which the executor of Wilson sisted himself as a defender,) on these grounds,—

1. The decree was obtained in absence, or at least by default, and they had not been heard.
2. Wilson's heir had no title to take decree, as the rent, if due at all, was long past due before the death of Wilson, and the executor alone had no title to uplift or pursue for it.
3. By Wilson's application to the Sheriff in April, 1820, he had judicially declared that the mill was let by him to M'Phail, from Whitsunday, 1820. The missives of set to M'Phail confirmed this; and farther proved, that, in the understanding of all parties, the previous unsigned lease to M'Leod was abandoned, and he was considered as a tenant for one year only, from 1819 to 1820, when M'Phail was to succeed him. M'Leod, therefore, was never liable for the rent of 1820-21, so that the decree, being rested expressly on the medium of M'Leod's alleged liability, must be reduced.

No. 250. The defenders answered—

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1. Although a party does not make appearance at some of the latter stages of a process, that is no ground for entitling him to open up a decree as proceeding *parte inaudita*.¹ At least the previous expenses ought to be paid, as a condition of opening up the decree.

2. The executor was ready, if necessary, to confirm every step taken by the heir; and as the proper parties were now sisted, they were entitled to defend their author's right of hypothec.

3. M'Leod's lease for thirteen years having been followed by possession, was binding though unsigned: and separately, it was binding for any one year in which M'Leod had begun to possess under it, or had failed to give notice of removal. Although James Wilson had attempted to complete a new bargain with M'Phail, this could not put an end to M'Leod's lease. But even if M'Leod was not liable for the rent, the machinery, having been allowed to remain in the premises, as furniture of the mill, must be subject to the hypothec, without regard to what party was the tenant.

The Lord Ordinary found, "that the decree sought to be reduced, passed by default *parte inaudita*; found it admitted that James Wilson, the original party proprietor of the subjects in question, died during the former dependence of the cause in this Court: found that the application, after the remit by the Court, in the names of John Wilson, junior, and John Wilson, senior, as his administrator, and others as trustees for them, was inept and incompetent, in respect that the rent which is the ground of the claim of hypothec, was rent long past due at the death of the said James Wilson, and belonged to his executors, and that it is admitted that the said John Wilson, junior, was not his executor, and other parties have been sisted in this process as the executors confirmed of the said James Wilson: therefore, reduces the decree challenged, to the effect of admitting all parties to the discussion of their rights, and in the advocacy, advocates the cause; holds the proper parties as not sisted; and on the merits, finds that it has been finally determined by this Court, that the machinery, the value of which is now in question remained the property of the pursuers at the date of the issues joined in these conjoined processes; and finds that the defenders, now duly sisted as representing the deceased James Wilson, have failed to instruct any legal claim by right of hypothec or otherwise to the machinery, or the proceeds thereof in the hands of the clerk of the inferior court: therefore, finds that the pursuers are entitled to receive the price of the machinery as now lying in the hands of the said clerk, and reduces the decree, and declares to this effect accordingly, in terms of the libel: and

¹ Parties were at issue whether the non-appearance rose from neglect, or from some cause beyond the party's control.

the pursuers entitled to some expenses; but in the circumstances, finds No. 250.
that the account must be subject to a very considerable modification." *

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* "NOTE.—If there had been no plea, but that the decree was in absence, or by default, expenses must have been paid before reponing. But as it is clear that the application was by a party having no title, the proceedings were clearly so inept as to exclude such a claim.

"On the merits, the case, though perplexed by the proceedings, is shortly this. James Wilson proposed a lease to John M'Leod for thirteen years. It was verbally agreed to; but though the lease was written out, it was never signed. M'Leod took possession, and acknowledged himself as tenant till Whitsunday, 1820, at which term he paid the preceding rent. The pursuers, in contemplation of the lease, had sold to him valuable property in machinery. But he, relenting from the lease, or falling in circumstances, desired to be relieved from the bargain; and it was by solemn paction extinguished in July, 1819, as found by the Court. In the meantime, the machinery had been deposited in the premises. But M'Leod being unable to go on, the landlord transacted for a surrender of the lease; and there is no question that the premises were new let to M'Phail, so early as February, 1820, with an entry at Whitsunday. The defenders say that they did not then liberate M'Leod; but besides that their power to hold M'Leod as under a lease for years, where confessedly there was no signed writing by either party, may well be doubted, the very making of the arrangement with M'Phail liberated M'Leod, and there is no evidence of any qualification made, even if it were shown that he was a party to it. And the acting on the lease to M'Phail, by an action for the very rent which is here claimed as due by M'Leod, appears to the Lord Ordinary to be conclusive evidence that, after Whitsunday, 1820, Mr Wilson had ceased to consider M'Leod as his tenant in any sense.

"It does not therefore appear to be at all an essential element in this case, whether M'Phail was actually bound as tenant under a lease for thirteen years. The defender obtained decree against him; but he let it drop on advocacy. The question is, whether any lease, as for the year from Whitsunday, 1820, to 1821, subsisted, or was maintained as against John M'Leod; and this cannot be reasonably maintained in the face of Wilson's proceedings.

"It was separately maintained to the Lord Ordinary, that, assuming M'Phail to have been the tenant, the hypothec was effectual, because the pursuers had either sold to him, or given him possession of the goods on hire.

"The Lord Ordinary thinks, 1. That this is changing the case, contrary to the state of the record. 2. That no claim ever was made in the Inferior Court on this footing, and that the process of sequestration, as for the debt of M'Leod, cannot possibly cover it. 3. That it is not well founded in itself, unless it were proved, contrary to all the essential averments of the defenders, that the goods were either sold or hired to M'Phail, on the supposition of his being in actual possession as tenant of the premises.

"The defenders seem to make two serious mistakes in the argument. They assume, that unless M'Phail can be shown to have been absolutely bound to them as tenant from Whitsunday, 1820, M'Leod could not be liberated. But this is an error. The documents may prove that the one was understood to be liberated (there being no concluded contract), though a question might be raised as to the other's obligation. But they seem to assume, secondly, that the mere fact of the goods being in the premises gives a hypothec at random for the debt of any tenant. There is clearly no ground for this in law. There is no evidence of either a sale or a hiring to M'Phail. But it may be that M'Phail had no possession. What is the inference? Simply that Wilson had run himself into a scrape in negotiating with two bad

No. 250. The defenders reclaimed.

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LORD PRESIDENT.—I think the interlocutor well founded. M'Leod was not liable for the rent. In the face of the landlord's missives, and judicial procedure, I cannot hold M'Leod to have remained the tenant for the year in question. There is just an attempt by the defenders to have two tenants and hypothecs at one and the same time.

LORD GILLIES.—The machinery which lay in the mill is not proved to have lain there as in connexion with any tenant for the year in question. But it is from its connexion with the tenant alone that the claim of hypothec over it for that tenant's rent can arise.

LORD BALGRAY concurred.

THE COURT adhered.

M'MILLAN and GRANT, W.S.—HAMILTON and COOPER, W.S.—Agents.

No. 251.

ANDREW ROBERTSON, Pursuer.—*A. Wood—Macdougall.*

DAVID OGILVIE, Defender.—*H. J. Robertson.*

Stamp—Execution—Messenger—Reparation.—1. An assignation by a company of a bill for £25, and by a partner of another bill, in security of a debt due by the company, being written on a single deed stamp, and letters of horning raised on the bill for £25—held, in the circumstances, that the stamp was to be considered as applicable to the assignment of the £25 bill, and, therefore, an objection to the assignation as not duly stamped, with reference to the legality of the diligence, repelled. 2. A party having been incarcerated in virtue of diligence proceeding on an assignation to a debt, brought a suspension and liberation, and a reduction, on the separate grounds that the debt had been extinguished prior to the date of the assignation, and that the messenger's execution was false; and in the reduction certification contra non producta passed as to the execution, (which the messenger and his cautioners did not attempt to maintain,) while defences were ordered as to the alleged extinction of the debt, but no further procedure was had therein; and the letters in the suspension and liberation were suspended simpliciter, in respect of the decree of certification—held, in an action of relief by the creditor against the messenger and his cautioners, that he was not entitled at once to decree for the debt, but that the action fell to be sisted till the reduction was finally disposed of.

tenants. Should the pursuers lose their declared property because of any such error? The result would be, that the property was not effectually let for the year in question, and, consequently, no hypothec could exist, though by accident the goods lay under deposit within the premises.

“The Lord Ordinary thinks that some expenses must be found due to the prevailing party. But the grounds on which chiefly he finds that there must be very considerable modification are,—1. That the pursuers, by leaving their goods in the premises of Wilson for so long a period, gave occasion to the difficult and perplexed questions since raised; and, 2. That by the failure of their agent to appear, and state the objection to the title in the Inferior Court, serious expense was occasioned to the defenders, which, though he does not think that they can be justly required to pay it before being reponed against a decree so incomplete, ought reasonably to be considered in the ultimate settlement of the expenses.”

IN February, 1823, a Company, carrying on business under the firm No. 251. of Cameron and Bisset, being indebted to the pursuer, Robertson, executed, along with James Cameron, one of the partners, upon a stamped sheet of paper, bearing a single deed stamp of £1, 15s., an assignation in favour of Robertson, whereby, first in order, Cameron and Bisset assigned to him a bill for £25, 8s., accepted by two parties, Smiton and Watson, and held by the Company as indorsees, together with registered protest and charge thereon; and second and third in order, Cameron individually signed two bills held by him, all in security of the debt due by the Company to Robertson.* In July thereafter, Robertson, by virtue of this assign-

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2d Division.
Ld. Medwyn.
T.

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Ogilvie.

* The following were the terms of the deed :—"We, James Cameron and Patrick Bisset, carrying on business under the company of Cameron and Bisset, agents for the Perth Union Bank, Dunkeld, considering that James Pirnie, by his bill dated the 29th day of April, 1817, drawn by him upon and accepted by Thomas Smiton, Wright, Nairn, and Charles Watson, farmer, Balilach, ordered them to pay to him, or order, three months after date, at the Sheriff-clerk's office in Perth, £25, 8s. sterling for value, which bill was indorsed to us by the said James Pirnie, and was upon the 1st day of August, 1817, protested at our instance against the acceptors, drawer, and indorser therein named, for not-payment, and for interest, damages, and expenses, as accords of law, as an instrument of protest taken, and the protest registered in the Sheriff-court books of the shire of Perth, more fully bear; on which registered protest we caused a charge of payment be executed upon the 2d day of January, 1818, against the said Thomas Smiton, Charles Watson, and James Pirnie: As also, that I, James Cameron of the company foresaid, considering, that by my bill dated the 20th day of November, 1815, drawn by me upon and accepted by Robert Menzies, dyer in Inver, I ordered him to pay to me, or order, one day after date, at my shop in Dunkeld, £15, 11s. 8d. sterling, being value delivered in dyestuffs, which bill was, upon the 24th day of November, 1815, protested at my instance against the said Robert Menzies, for not-payment, and for interest, damages, and expenses, as accords, and the protest registered in the Sheriff-court books of the shire of Perth; on which registered protest I caused a charge of payment be executed upon the 28th day of November, 1815, against the said Robert Menzies, in the said registered protest, and execution upon the back thereof, more fully bears; and also that I, the said James Cameron, by my other bill dated the 15th day of June, 1816, drawn by me upon and accepted by Niel Lamont in Ballinald, Strathummel, I ordered him to pay to me, or order, three months after date, at the Perth Union Bank Office in Dunkeld, £21 sterling, being value received of me; which bill was protested at my instance upon the 21st day of September, 1816, against the said Niel Lamont, for not-payment, and for interest, damages, and expenses, as accords, and the protest registered in the Sheriff-court books of the shire of Perth: upon which registered protest I caused a charge of payment be executed against the said Niel Lamont, as the said registered protest, and execution of charge upon the back thereof, more fully bears: And now seeing that we, the said Cameron and Bisset, as a company, and I the said James Cameron as an individual, are indebted to Andrew Robertson, surgeon in Dalreoch, Strathbrand, in a considerable sum of money, therefore, and in security thereof, we the said Cameron and Bisset have assigned and disposed to and in favour of the said Andrew Robertson, and his heirs and assignees, the foresaid principal sum of £25, 8s. sterling, and whole interest due thereon, contained in the bill first above recited, accepted by

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 Ogilvie.

nation, obtained letters of horning, as to the £25 bill alone. In 1831, Robertson employed one Tyrie, a messenger, to give a charge on the letters of horning to the obligants on the bill. Tyrie having returned a regular execution, Watson, one of the acceptors, was denounced, and afterwards incarcerated under letters of caption. Watson thereupon presented a bill of suspension and liberation, on the ground, *inter alia*, that the charge had not been regularly executed, as set forth in the execution, by leaving a copy with his servant at his dwelling-house, but that it had been sent to him enclosed in a letter from Tyrie, which he produced. He also subsequently, in a minute, stated an objection to the assignation in favour of Robertson, that it was invalid under the stamp acts, as including under one stamp two separate transactions. The Lord Ordinary having passed the bill without caution or consignment, Watson raised a summons of reduction against Robertson, concluding for reduction of the assignation—the letters of horning—the execution of charge thereon by Tyrie—the execution of denunciation and the letters of caption. The grounds of reduction stated were, 1. That there was no debt due, but that the assignation had been granted and accepted in *mala fide*, after the whole debt had been paid. 2. That the assignation was not truly executed by Patrick Bisset, one of the parties. 3. That the assignation was null, in respect of its being not duly stamped. 4. That the execution of charge was false; and, 5. That at the time when the letters of caption were raised and executed, a much larger sum had been arrested in Mr Watson's hands than the amount of the bill charged for. Robertson immediately intimated this action to Tyrie and his cautioners, and enquired if they were to defend it. An answer having been returned on the part of the defender, Ogilvie, one of the cautioners, that they considered the grounds of reduction to relate to the illegality of the debt, with which they had no concern, and did not intend to enter appearance, Robertson's agent wrote in reply—"I now beg to intimate to you, as agent for Mr Ogilvie, one of the cautioners, that the legality of the diligence will be supported by my client, and that he leaves it to and calls upon your client to support the execution. The production in the reduction will be satisfied so far as the assignation is concerned, and with regard to the execution I will give myself no concern." No appearance was entered for the messenger or cautioners, but Robertson satisfied the production so far as regarded the assignation and horning. The Lord Ordinary thereupon made an order upon him for defences; and as to the execution of charge, denunciation, and caption, he pronounced decree of certification as *contra non producta*. No further proceedings took place

Thomas Smiton and Charles Watson, and drawn by James Pirrie, and indorsed by him to us: As also, I the said James Cameron, for myself, have assigned and assigned to and in favour of the said Andrew Robertson, and his heirs, the foresaid," &c.

in the reduction, while, in the suspension, Watson, having produced the decree of certification, the Lord Ordinary pronounced this interlocutor: No. 251.
 —“ In respect of the decret of reduction at the suspender's instance, ^{May 13, 1834.} ^{Robertson v.} ^{Ogilvie.} sustains the reasons of suspension in so far as regards the execution of charge, and other proceedings following thereon, and decerns; finds the suspender entitled to expenses.” Robertson thereupon raised an action against Tyrie and his cautioners, concluding to have them ordained to relieve him of the processes of reduction and suspension, and to pay the amount of the bill and the expenses incurred. Defences were given in for Ogilvie, in which, besides objecting that the validity of the debt itself, challenged in the reduction, had never been determined, he mainly pleaded that the assignation was invalid in respect of its including two separate transactions under one stamp, and consequently, that Robertson had no title to do diligence at all, and so could suffer nothing by the defective execution on the part of the messenger. The Lord Ordinary pronounced this interlocutor, adding the subjoined note : *—“ Finds that the defender, Tyrie, having been employed by the pursuer to execute diligence against Charles Watson, returned an execution stating that the charge was left at his dwelling-house with a servant: Finds that Watson having been incarcerated, brought a suspension and liberation, and among other reasons stated that the charge had been sent in a letter, which was produced, so that the execution was false: Finds that Watson then instituted a process of reduction against the pursuer, as well as Tyrie and his cautioners, in which he called for production and reduction of the bill and assignation of it in favour of the pursuer, as well as of the diligence and executions, on the ground that the debt was not due, that the assignation was not duly stamped, and that the execution was false: Finds that the pursuer called upon the defenders to appear and defend the execution, while he would support the validity of the debt and assignation, but they declined to appear, and decret of certification contra non producta was pronounced against them; and the pursuer, having satisfied the production as to the bill and assignation, was appointed to lodge defences:

* “ If the defenders had appeared in the process of reduction to defend the validity of the charge given, Robertson might have found it necessary to meet Watson's allegation as to the debt and assignation. These allegations the defenders do not in this process undertake to maintain and prove. The defenders state that the bill was passed in respect of the objection to the stamp. As no ratio is assigned by the Lord Ordinary, this cannot now be ascertained; but it is much more probable that it was in consequence of Tyrie's letter produced, which at once disproved the execution. At all events, the letters were ultimately suspended, because the defenders did not appear to defend the validity of the execution. For the ground of repelling the objection on the stamp laws, see Bell, vol. i., p. 322. The argument so strongly urged at the bar, that the claim ought not to amount to the full debt, because Watson is bankrupt, is clearly ill founded.—*Chatto and Company against Marshall, 17th January, 1811.*”

No. 251. Finds that Watson then obtained an interlocutor in the suspension suspending the letters 'in respect of the decree of certification in the reduction :'. Finds that in this present process of relief, although the defenders state that Watson in the suspension and reduction alleged that the debt was not due, they do not say that this is true, or offer to prove the truth of this allegation ; and therefore that no proof on this point can be allowed : Finds that the objection to the assignation is not well founded, in respect that the stamp on the deed, as it originally stood, is sufficient to support the assignation of the first bill contained in it, which is the bill in question, although it would not be effectual for the conveyance of the two other bills by a separate party : Finds no allegation in the present record that the execution of charge was correct ; and therefore decerns against the defenders in payment of the principal sum of £25, 8s., with interest from 31st July, 1817, together with the expense of diligence thereon ; also for the expenses incurred by the pursuer in the processes of suspension and reduction, as well as of the expenses decerned against him in favour of the opposite party : Finds expenses due in this process."

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Ogilvie reclaimed and pleaded—

Where two transactions are engrossed on paper with a single stamp capable of validating only one of them, in order to make it available even for one, there must be evidence of appropriation of the stamp to that particular transaction at the time of executing or issuing the deed, and there is no authority for holding that the matter may be left indefinite till an action is brought, and that the party may then take his option to which transaction he will hold it applicable. The case of *Perry v. Boucher*, on which Mr Bell founds his opinion referred to in the Lord Ordinary's note, was that of a release to a master and three of his crew, of a claim of damage for mismanagement ; and although Lord Ellenborough adverts to the circumstance of the master's name being first in order, there were two other considerations of much greater weight, sufficient to support the decision, viz. 1. The release on its very first issuing was delivered to the master, which was complete appropriation of the stamp to the release in his favour ; and, 2. A joint release for a common tort only requires one stamp, as has since being specifically decided.¹ Then as to the only other cases referred to on the subject,² they related to stamps subsequently appended on payment of a penalty, and the appropriation was inferred from the stamp being affixed to the particular transaction intended to be validated. Here, however, there is no evidence of appropriation whatever, and the stamp being equally applicable to both transactions, cannot be available to either.

To this it was answered—

The policy of the stamp laws is not to void deeds, but to secure the

¹ *Rex v. Bayley*, (1 Car. & Pay. N. P. 435).

² *Howell v. Edmond* (12 East. 5) ; *Doe v. Day* (13 East.

evenue ; and therefore where there is no intention to defraud, a limitation No. 251.
 to what the stamp will cover ought to be favourably viewed. It is un-
 doubted, that an intention to appropriate the stamp to one of several May 13, 1834
 transactions in the same deed, is sufficient to protect that transaction ; but Robertson v.
 where there is no other evidence, the transaction first in order will be Ogilvie.
 held that to which the stamp applies, and so Lord Ellenborough positively
 laid down in the case of *Perry v. Boucher*. Here, however, there was
 an appropriation by raising horning in 1823, under this assignation,
 limited to the £25 bill alone ; and further, the assignation being by par-
 ties all jointly bound for the debt due to Robertson, viz. the company and
 Cameron, an individual partner, and being for one and the same purpose
 —the extinction of that debt—the assignation does not truly embrace two
 transactions, so as to require two stamps.

LORD JUSTICE-CLERK.—In regard to the appropriation of the stamp, I think
 it material that there is a horning, referring to the assignation, but limited to this
 bill of £25, and also that this bill is first narrated on the face of the assignation.
 Besides, there is a great deal in the view, that it was for one individual purpose—
 the payment of this man's debt by parties who all were bound—the company and
 the individual partner. But independent of that, there is the decision and dictum of
 Lord Ellenborough, in the case of *Perry v. Boucher*, which seems quite applica-
 ble, and which deserves the greatest attention from us. There a release on a sin-
 gle stamp to four persons, a master and three of his crew, was handed to the
 master as a witness ; and Lord Ellenborough held that he being the man first men-
 tioned, he at least was validly released. The same rule here would cover this bill, as
 being the one first mentioned. And therefore, as there is demonstrative proof
 that there was no intention to defraud the revenue, on that authority we must
 adhere to the interlocutor. The other pleas are untenable.

LORD GLENLEE.—I am of the same opinion as to the stamp, still I am not
 satisfied that we can altogether adhere to the interlocutor decerning for payment.
 In so far as this is an action of relief, concluding to be relieved of the reduction,
 so far as laid on the defect in the execution, it is, no doubt, perfectly well founded.
 But there is another ground of reduction, that the bill was paid before the date of
 the assignation. The Lord Ordinary says that the defender does not make any
 allegation as to this. Is it not enough, however, to state that the bill is already
 challenged on that ground by the debtor in the reduction, who has got an order on
 the pursuer to give in defences ? This is averred, and I doubt if we can give de-
 cree against the cautioners, till we see, by disposing of the other action, if the debt
 be really due. There is a sort of informality in going further in a mere action of
 relief before the issue of the principal action. I would therefore adhere to the
 findings, but remit to sist till the issue of the principal action.

LORD CRINGLETIE.—Lord Glenlee has just stated what I had written on my
 papers. If the cautioners pay, they are entitled to an assignation to the debt ; but
 to what would they have an assignation here ? A debt under reduction. That ac-
 tion must be brought to an end. There stands just now an order for defences,
 which the pursuer has never lodged, and he must get absolvitor in the reduction,
 before he can get decree here.

No. 251. LORD MEADOWBANK.—I concur.

May 14, 1834.
Walker's Exe-
cutors v. Speirs.

THE COURT accordingly adhered so far as regarded the findings, but before finally decreeing for payment, sisted till the issue of the process of reduction.

GEO. MONRO, S.S.C.—JAS. BURNES, S.S.C.—Agents.

No. 252.

WALKER'S EXECUTORS, Pursuers.—*Thomson*.
ANDREW SPEIRS, Defender.—*Skene—Wilson*.

Bill of Exchange—Stamp.—In an action founded on a bill written on stamp below the proper value, and signed by the defender—held, that although on a reference to oath, he admitted that he had signed the bill to enable another party to get the contents from the pursuer, the latter was not entitled to decree.

May 14, 1834.
1st Division.
Ld. Corehouse.
D.

THE late John Walker, on 2d June, 1826, drew a bill at twelve months for £104, on Robert Henderson, to whom alone it was addressed. It was accepted by Henderson; and Andrew Speirs, the uncle of Henderson, signed along with him. The bill was written on a 4s. 6d. stamp, in place of 5s., the requisite amount under the stamp act. Walker's executors raised action for payment against Henderson and Speirs. Henderson's estates had been sequestrated, and no appearance was made for him. Speirs pleaded that the bill was null under the stamp act; that no obligation was contracted by signing it; and that it could not be founded on in a court of law to any effect whatever. The pursuers averred that Speirs, "through mistake or intention," wrote the bill on a wrong stamp; and they "referred the constitution of the debt libelled to the oath of Speirs."

Speirs emitted a deposition, inter alia, stating, that the signature at the bill was his, and that the body of the bill was in his handwriting. "Interrogated what was the occasion of his writing and signing the said document, depones, that so far as he recollects, it was to accommodate Robert Henderson. Being interrogated if he understood that Robert Henderson was to get money for it, depones, that he believes that it was with that intention; and being interrogated whether he has any doubt that the bill was written and signed by himself with that intention, depones, that he has no doubt that it was with that intention. Interrogated from whom Robert Henderson was to get the money, depones, that he knows it was intended that the money should be got from the late John Walker. Being interrogated whether he knows that money was got accordingly from the late John Walker, depones, that he cannot say. Being interrogated whether he knows, from seeing it or otherwise, that money was got from the late John Walker, in connection with the said document, depones, that so far as he recollects, it

at any money was got." "Being interrogated for what purpose he No. 252.
 took the bill with Robert Henderson, depones, that he supposes the inten-
 tion was to get money for it. Interrogated from whom, depones, that May 14, 1834.
 : cannot answer that. Being referred to his former answer, as to the Walker's Exe-
 cutors v. Speirs.
 : tention of signing the bill, and again interrogated if he knows from
 whom the money was to be got by Henderson, depones, that he supposes
 was intended to be got from the late John Walker." He also deponed,
 at in 1831, he called at the house of Walker, and asked for a sight of
 the bill, and that he applied to Walker because "he supposed if Walker
 had given Robert Henderson the money, he would have the bill." He
 deponed that he had paid no part of the debt claimed, and did not know
 of any other person having done so.

Walker's executors contended, that the deposition was sufficient to
 prove the debt, independently of the bill. Speirs pleaded that it proved
 no constitution of no debt whatever.

The Lord Ordinary "sustained the defences, assolizied the defender,
 Andrew Speirs, but found no expenses due, and decerned, reserving
 action to the pursuers, if they shall be so advised, upon the head of fraud,
 and to the defender his defence against the same, as accords."*

The pursuers reclaimed on the merits, and Speirs as to expenses.
 The Court adhered to the Lord Ordinary's interlocutor, but allowed to
 Speirs the expenses incurred since the date of that judgment.

LORD PRESIDENT.—I observe a peculiarity *ex facie* of the bill, as it is addressed
 Henderson only, and yet is signed not only by Henderson, but also by Speirs.
 It supposing that Speirs is to be dealt with as an acceptor, the bill is null, as an

* **NOTE.**—This case is essentially different from that of *Christie v. Henderson*,
 No. 19, 1833,¹ on which the pursuers rely. In *Christie's* case the bill was indis-
 putably a valid obligation, before the sexennial prescription had run, and after that
 time, it was a document which, although it could not be the ground of action, or
 licence, was nevertheless an adminicle of evidence, which might be considered
 by the Court, and used to explain the deposition of the suspender. In this case
 there was no obligation contracted by Speirs, for though he admits he signed the
 bill, he is libelled on, as an acceptor, the drawer at the time knew, or must in law be held
 to have known, that Speirs did not thereby become bound to pay it, as it was not
 stamped on the proper stamp. Further, this bill, in terms of the stamp act, cannot
 be used in evidence in any shape, or even looked at by the Court.—The deposition
 therefore, instead of proving the constitution of an obligation, proves that no obli-
 gation was constituted against Speirs by the bill. It is possible that a case of fraud
 might be made out against Speirs, or of conspiracy between him and Henderson, to
 defraud Walker, and damages awarded on that ground; but the question in that
 case cannot be tried under the present record. It is a case of great hardship on
 the part of Walker's representatives, but such cases daily arise under the operation
 of the stamp acts. There are circumstances attending the transaction, however,
 which debar any claim for expenses of process."

- No. 252. obligatory document, under the stamp act; and, on the import of the oath, I concur with the Lord Ordinary. If a case can be made out on the ground of fraud and circumvention, it must be in another action, and it would require to be tried by a Jury. In the present record, it is only said that it was "through mistake or intention" that the wrong stamp was selected by Speirs. I would incline to award in favour of Speirs the expenses since the Lord Ordinary's interlocutor.
- May 14, 1834. *Watson v. Gardner.*
- LORDS BALGRAY and GILLIES concurred.

THE COURT adhered.

J. DUNCAN, W.S.—W. WALLACE, W.S.—Agents.

- No. 253. THOMAS WATSON, Suspender.—*M'Neill—A. M'Neill.*
JOHN GARDNER, Charger.—*Jameson—Robertson.*

Proof—Payment.—Averment of an agreement to take payment by instalments of a debt which was afterwards constituted by a decree, proveable only by writ or oath.

May 14, 1834. IN the months of June and July, 1831, the suspender Watson, shoemaker in Greenock, bought some goods from Gardner, leather merchant in Glasgow, the credit of the trade being four months. In January, 1832, Gardner raised an action for payment before the Sheriff of Renfrewshire for the amount, £21 odds, in which, of date February 3d, he obtained decree in absence. On the 3d of March, a charge was given; and on the 8th, Watson made a payment of £3 to account, and on the 20th, a further payment of £4. On this latter occasion he received from Gardner a letter, addressed to his (Gardner's) agent in Greenock, in these terms:—"Sir, Mr Thomas Watson has paid me the sum of £4 sterling, and he is to pay the remainder by this day fortnight, and also his bill for the balance."

2D DIVISION.
Ld. Mackenzie.
T.

No settlement took place at the end of the fortnight, and on the 5th of May, Gardner caused Watson to be apprehended and incarcerated on a caption, in which he did not deduct the two sums of £3 and £4 paid to account. Watson presented a bill of suspension and liberation, which was passed, and Gardner thereupon entered a restriction of the amount in the jail books; but in an action of damages for wrongous imprisonment, Watson obtained a verdict for £50.¹ In the meantime he expedited the letters of suspension and liberation, and averred, that immediately on the summons being served on him, under which the decree in absence had been got, he had made an agreement with Gardner, that the account should be paid by instalments, as he could command funds; that therefore the decree and doing diligence was in contravention of this agreement. He, however, did not offer to prove this alleged agreement (which was denied by the writ or oath of Gardner, and took no steps to set aside the

The Lord Ordinary suspended the letters to the amount of £7, and found ultra, found them orderly proceeded; and as to expenses, found Watson entitled to those incurred down to the expeding of the letters, and Gardner to those subsequently incurred, adding the subjoined note.*
 Watson reclaimed.

No. 253.
 May 15, 1834.
 Mackenzie v. Magistrates of Dingwall.

LORD CRINGLETIE.—The interlocutor is well founded. The partial payments could, no doubt, have been deducted in the caption; but after redress was given, the suspender goes on with this process, on the allegation that the charger agreed to take payment by instalments, which can only be proved by writ or oath, while it does not make a reference. It is clear we must adhere.
 The other Judges concurring,

THE COURT adhered.

C. FISHER, W.S.—M'LEAN and GIFFEN, W.S.—Agents.

HON. MRS M. H. MACKENZIE and OTHERS, Petitioners.—

No. 254.

H. J. Robertson.

MAGISTRATES OF DINGWALL and OTHERS, Respondents.—Jameson.

Expenses—Appeal.—A party presenting a petition for applying the judgments of the House of Lords in cross appeals, is not entitled to decree against the respondent for one half of the expense of the petition.

THE Hon. Mrs M. H. Mackenzie and others, pursuers, presented a petition to apply a judgment of the House of Lords, which dismissed an appeal, in which they were respondents, and also dismissed a cross-appeal, which they were appellants. They craved the Court to remit to the Lord Ordinary, for farther procedure, and also to “ordain the defenders

May 15, 1834.
 1ST DIVISION.
 D.

* “The decree seems to have been unobjectionable, the four months’ time being only for payment of the amount so far as due for goods, and no attempt been made to open it up in any form. The agreement to take payment of a sum in a decree by instalments seems not proveable, except by writ or oath. Thus the charge also appears not objectionable, except as being without deduction of the instalment payment made before its date. Then there seems to be evidence of an agreement to take payment of £4 down, £3 more in fourteen days, and a bill for the balance; and then the parties differ. The suspender says he offered the £3, and the charger demanded farther the expenses of the whole procedure, and the erroneous wording. The charger denies this. It does not seem worth while to allow proof of this, since it is undoubted that the suspender failed afterwards to pay or tender any sum or any bill of exchange, so that the caption being omitted, as it now is by the Lord Ordinary, seems unobjectionable. The extent of the charge and caption appears to have been an accidental error, not attempted to be maintained by the charger. And in this view the procedure, after expeding the letters, seems a wanton waste of his creditors’ money, or an undue attempt to lay a foundation for damages beyond what the reality of the case afforded.”

No. 254. to make payment to the petitioners of one half of the expense of the present application." The defenders objected to the last prayer of the petition, and the Court sustained the objection.

May 15, 1834.
Arbuthnot v.
Symon.

J. BURNES, S.S.C.—HORN and ROSE, W.S.—Agents.

No. 255. POOR CHARLOTTE ARBUTHNOT, Advocate.—*A. Wood—Milne.*
JAMES SYMON, Respondent.—*Keay—Deas.*

Presumed Extinction.—A woman having become pregnant by a young man who was about to leave the country, his parents undertook to provide for the child, but without giving any legal document; the child was kept some time by its mother and afterwards taken by the parents of the father, and subsequently resumed by the mother, who for a period of 32 years never complained that the father's parents had not fulfilled their obligation; the father having returned at the end of this period she raised an action against him for the expense of alimentering the child while with her, but the Court assoilzied.

May 15, 1834. In the year 1796, the respondent Symon, who was then a young man, a wright by trade, and living with his father, had illicit intercourse with the advocate Arbuthnot, in consequence of which she became pregnant. Symon being about to leave this country for the West Indies, his parents undertook to provide for the child when born, though they granted no obligation which could be the foundation of an action in Court of law. He left Scotland in September, 1796, and, in November, Arbuthnot was delivered of a female child. When the child was about two or three years old, she was taken into the family of Symon's parents, and treated in all respects like one of their own children. When she was near nine years old, she returned to her mother Arbuthnot, who was then married, and had two children; but the cause of the child leaving the house of her grand-parents, did not appear. In 1828, Symon returned to this country, having realized considerable funds. In the meanwhile, no complaint had ever been made by Arbuthnot, that Symon's parents had not fulfilled the obligation undertaken by them in providing for the child, as on his part; but she now raised an action against him before the Sheriff of Forfarshire, concluding for incurring expenses, and aliment for the child during the period while she resided with her, till she reached the age of fourteen.

The Sheriff having assoilzied Symon, Arbuthnot brought an advertisement, in which the Lord Ordinary pronounced this interlocutor, adding the subjoined note. * — "In respect it is established that on the

* "This is certainly a singular case, where such a claim is brought after the distance of thirty-two years from the birth of the child, and the fact that the defender was abroad does not seem sufficient, when the

pursuer becoming pregnant, and the defender having acknowledged the child, but being on his way to the West Indies, the parents of the defender undertook to aliment the child when born: That the child was born at Johnshaven, and there nursed by the pursuer, Mrs Symon supplying by-clothes, and providing for the support of the pursuer and the child while residing at Johnshaven: That after the child was weaned, it was brought by the witness Barbara Symon to Mrs Symon at Marykirk; and while the pursuer maintains that the child was then three years and nine months old,—and her three first witnesses support this statement,—there are other witnesses who prove that at this time the child was much younger, probably under two years of age: That the child, which was named after Mrs Symon, was treated kindly, and as one of her own children, was put to school with them, and got mournings along with the others for one of the children, and was alimented and clothed by Mrs Symon after it went to reside with her, first at Marykirk and then at Montrose: That although the child, when eight years and nine months

No. 255.

May 15, 1834.
Arbuthnot v.
Symon.

can be proved by the parents. Prescription, however, does not apply to such a claim. The burden of proving that the undertaking was duly implemented, no doubt, falls upon the defender; but, post tantum temporis, such a measure of proof cannot be required of him as if the circumstances had been recent. There does seem, however, sufficient in the proof, (see evidence of Ann Jamie, James Adam, Agnes Alexander, and Barbara Symon,) together with taciturnity, to establish the defence to this first period. Next, there is abundance of evidence of the kindness shown to the child when living with Mrs Symon, and this was even shown to her by presents at the time of her marriage (Ann Clark). It is of little consequence when the child came to Marykirk, if it be established that as long as it lived with the pursuer Johnshaven it was alimented by the defender's relations; but the preponderance of the proof bears that the child came to Marykirk when about, or rather under, two years old. Symon died in December, 1799, (James Adam,) and Mrs Symon removed to Montrose at Whitsunday, 1800 (Janet Taylor). The child therefore was, even in this view of the evidence, (and on the pursuer's statement it was still less,) for a short period only at Marykirk, which may account for the evidence of the witnesses who did not see the child there. When an illegitimate child has been brought up within the family of its father, kindly treated and educated as one of the other children for seven years; when, after this, it is taken to reside with its mother when it is near nine years of age, it would be necessary to show that there was some reason for withdrawing it from its former residence, either in the conduct or wish of the father's family, to found a claim for aliment. The mother's right of custody which the Lord Ordinary admits in the general case, would not warrant a claim for aliment on the part of the mother, merely from the circumstance of the residence of the child with her. Besides, the claim would not extend beyond ten years, without showing that she was then unable to obtain her maintenance by herding, or otherwise, which is not shown here. Although the mother of an illegitimate child is bound equally with the father for aliment, the Lord Ordinary cannot adopt the argument which was stated at the Bar as to compensation, so as to give the father who has alimented the child for one period, a right to come against the mother to aliment during an equal period. But this plea does not seem necessary to decide the present question."

No. 255. old, returned to reside with the pursuer, she has not established upon what account this change of residence took place; while, on the other hand, it appears that the pursuer was then married, and had two children, for whom the child's services, even at that age, would be useful: Finds it under these circumstances, established by the proof, as well as by the taciturnity for so long a period, that the obligation undertaken by the parents of the defender has been implemented by them during the first period of the child's age, while it resided with its mother at Johnshaven as well as during the period when it resided with Mrs Symon at Marykirk and Montrose; finds further, that the pursuer has not shown why the child was withdrawn from the residence of its grandmother, nor established that she declined to keep, clothe, aliment, and educate it longer; therefore repels the reasons of advocacy, remits the cause simpliciter, and decerns; finds no expenses due."

May 15, 1834.
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Arbuthnot reclaimed.

LORD GLENLEE.—This is the plainest of all the cases I ever saw, and it is a great hardship that people should be troubled by such actions at the instance of parties on the poor's roll, from whom they cannot have any hope of recovering expenses. It is clear that the claim was long ago sopite and extinguished. It is admitted that there was an arrangement, though it cannot properly be called a delegation, whereby the family of the respondent were to be at the expense of maintaining the child; and for all this long period, till he came back, no complaint was made that they did not fulfil this obligation. There is not a vestige of evidence that she ever made a complaint. It may be true that she had no document on which she could have raised action against them; but had they not provided for the child, it is impossible but that she must have made a demand; and though we need say nothing about prescription or delegation either, it is clear that she was fully satisfied, and remained so for twenty years, when this action has been reared up most improperly after the man comes home.

LORD CRINGLETIE.—I entirely agree. The view of the Lord Ordinary is consistent alike with good sense and law.

LORD JUSTICE-CLERK.—I am completely of the same opinion, and I think we ought to mark our sense of the character of the action, by awarding expenses since the Lord Ordinary's interlocutor.

THE COURT accordingly adhered, with expenses.

GEORGE RITCHIE, W.S.—BROWN and MILLER, W.S.—Agents.

MAGISTRATES OF EDINBURGH, Claimants.—*Tawse.*

No. 256.

WALTER HORSBURGH (Common agent in ranking, &c. Sibbald's Estate),
Objector.—*Jameson—G. G. Bell.*May 16, 1834.
Magistrates of
Edinburgh v.
Horsburgh.

Superior and Vassal.—1. A superior, after obtaining decree of declarator of tinsel of the feu, ob non solutum canonem, cannot insist in an action for arrears of feu-duties; 2. but he may insist for payment of composition previously incurred by entry of the vassal a singular successor; and it is not relevant to allege, in defence, that the entry was incomplete in respect of the charter and sasine being retained in the hands of the superior's agent, who was entitled, under the feu-contract, to expedite them, and who kept them till arrears of feu-duty should be paid.

In 1812, the late William Sibbald, for himself and W. Sibbald and May 16, 1834.
Company, feued an area of ground in Leith from the Magistrates of Edinburgh. Under the feu-contract, the entry of singular successors 1st Division.
was taxed to the extra payment of a year's feu-duty, which was £236. Ld. Fullerton.
Heirs were bound to enter within year and day of the decease of a predecessor, and singular successors within three months of their acquiring the subjects; "the vassals, whether heirs or singular successors, always paying up the whole bygone feu-duties, and others, which may happen to be due at the time of their entry, and being at the expense of preparing their several rights, which are to be expedite, &c. by the town-clerks of Edinburgh for the time." B.

Infeftment followed in favour of Sibbald, who erected valuable ware-houses on the feu.* He died in 1817, at which time two years' feu-duties were in arrear. He had executed a trust-settlement, under which his trustees accepted and acted. As the disposition of heritage in their favour was conceived in general terms, they led an adjudication in implement, and applied for a charter from the Magistrates. This was expedite in their favour, and followed by infeftment. The expense of these deeds was paid by the trustees, but the writs themselves were retained by the town-clerk, as agent of the Magistrates, the feu-duties not being paid up.

The trustees held possession of the subjects until 1821. For some time prior to this, it had become apparent that the trust-estate of Sibbald was inadequate to pay his debts, and various creditors had used diligence for the purpose of attaching it. In December, 1821, a process of ranking and sale was raised; the judicial factor entered into possession of the whole heritable estate, and, by an arrangement with the trustees, became liable to the Magistrates, in so far as the trustees had been, in relation to the questions which arose regarding the feu.

At this time a considerable arrear of feu-duties was owing, as the trus-

* Stated to have cost £6000.

No. 256. May 16, 1834. *Magistrates of Edinburgh v. Horsburgh.* tees had only paid £400 to account, which did not extinguish the arrears due at Sibbald's death. In January, 1822, the Magistrates raised a declarator of tinsel of the feu, ob non solutum canonem, libelling on the act 1597, c. 246, which provides, that vassals failing to pay their feu-duties, "shall amit and tine their said feu of their said lands, conform to the civil and canon law, siclike and in the same manner as if a clause irritant were specially engrossed and insert in their said infeftments of feu-farm;" and they concluded for declarator, that the defenders had "lost and forfeited all right and title to the foresaid warehouses and area erected thereon ob non solutum canonem;" and that "the said feu-contract, and all that has followed thereupon, has become void and null, as if the same had never been granted; and that it shall be lawful for the pursuers, and their successors in office, to enter into possession of the said area and whole buildings erected thereon, and dispose thereof at pleasure;" and farther, that the defenders should be decerned to remove. There was no conclusion for payment of any of the arrears of feu-duties.

The common agent in the ranking and sale was allowed to state defences against the declarator, but ultimately decree of declarator of tinsel was pronounced. From various causes,* this was so much delayed, that the pursuers did not obtain possession of the feu and subjects until Martinmas 1824. They then got the subjects struck out of the ranking and sale in December, 1824; and, in January, 1825, they made a claim, in the ranking, for the arrears of feu-duties from 1815 to Whitsunday, 1824, deducting £400, as paid to account, and amounting to £1549; also for the composition of £236, in respect of the title made up by the trustees of Sibbald; and for the expenses of the declarator, in which the common agent had made appearance. The whole claim was objected to by the common agent, and Cases were ordered, in respect of the general questions of feudal law which were involved.

Pleaded by the Magistrates,—

1. Apart from specialty, the feu-duty generally is, at the date of the contract, the true market-value of the ground feued; being the consideration for the yearly use of the ground. If the vassal fail for two whole years to pay this duty, the superior has right to resume the feu; but even after doing so, he is entitled to claim payment of the arrears due for the time during which the vassal has held possession of the feu;—otherwise, wherever the feu-duty is the true worth of the subject, he would, on the one hand, gain no patrimonial benefit by the forfeiture to him of the feu, and yet he would, on the other hand, be punished with the loss of the arrears justly due to him. In the analogous case of a landlord obtaining decree declaring an irritancy of a tack, under the Act of Se-

* These seemed chiefly imputable to the pursuers, who, inter alia, amended their libel.

ent, 1756, on account of arrears, he does not thereby lose his claim for No. 256.
 these arrears against the tenant.

2. The alleged value of the erections on the feu is not admitted; May 16, 1834.
Magistrates of
Edinburgh v.
Horsburgh.
 it the fact of buildings or other meliorations being made by the vassal,
 ough it may raise a case of hardship, does not affect the principle.
 he ground may, in the lapse of years, fall below the worth of the feu-
 ity, as well as rise above it. In both cases alike, the forfeiture of the
 u is a penalty on the vassal's failure, and a means of protecting the
 iperior quoad the future, but not of indemnifying him quoad the past.
 is the existing arrears of feu-duty may vary in every case, it would be
 unjust and arbitrary to view the forfeiture of the feu, as, in all cases,
 quivalent to the payment of them—a purpose which it was never meant
 to serve.

3. In regard to the composition for entry, Sibbald's trustees actually
 took an entry,—having applied for a charter of adjudication, and in-
 feftment having passed on it, for all which deeds they paid the town-
 clerk. Though the deeds remained in the town-clerk's hands, in conse-
 quence of the feu-duties being unpaid up, the entry had been completely
 given, and the subsequent forfeiture of the feu could not discharge the
 liability previously incurred for the composition.

4. As opposition was made by the common agent in the process of de-
 clarator of tinsel, and he had been subjected in expenses, these must now
 be allowed to the claimants.

Pleaded by the Common Agent,—

1. By the decree of declarator, the superior had irritated and annulled
 the feu-contract as from the beginning. But as his claim for feu-duties
 rested solely on that contract; and it had not been preferred until after decree
 of declarator was obtained, the basis of the claim was thereby destroyed.
 The right to dissolve the feu-contract was alternative with the claim for
 arrears of feu-duties, but both demands could not be made together. So
 true was this, that, in the case of Ballandene,¹ after extract of decreet of
 declarator, when the arrears of feu-duty were tendered, and a reduction
 of the decree brought, it was found that the superior was entitled to refuse
 them, and abide by his decree. There were other authorities expressly in
 point,² and the practice of the country was concurrent with them.

2. In this case, the buildings were of such value, that the superior was
 more than compensated. Had the creditors believed it possible that the
 arrears could be claimed, over and above forfeiting the feu, they would
 have caused payment to be made, in time to save from forfeiture. But
 all parties understood that the arrears were to be extinguished by the
 forfeiture; and it was only after decree that this demand was made.

¹ July 6, 1793; Bell's Cases, p. 157.

² Ross, 305 and 403, 442, 498; M'Vicar, July 14, 1748 (15,095)—Bell's Principles,
 166, 170, &c.; Napier, May 31, 1831 (ante, IX. 655)—Bell's Principles,
 p. 104.

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3. The entry was incomplete, until actual delivery of the charter was made to the vassal.¹ Until then, the composition-dues had never been actually incurred. But, separately, as the decree of declarator forfeited the feu-right ab initio, there was no longer a claim competent for entry, any more than for feu-duties.

4. The claim for expenses, in the process of declarator, should not include the expense of extracting the decree, as that was truly part of the necessary expense of the superiors making up their own title to the property.

The Lord Ordinary reported the cases. *

¹ Stewart, Nov. 12, 1794; Bell's Cases, p. 75.

* "NOTE.—There are here two questions, the one involving the competency of the superior's claim for bygone feu-duties, after taking decree of declarator of irritancy ob non solutum canonem; and the other regarding the superior's right to claim, after that declarator, the composition on an entry formerly taken by the vassal. It rather appears to the Lord Ordinary, that whatever difficulty the first question might at one time have presented, it must now be held to be closed by the decision in the case of M'Vicar v. Cochrane and Kerr, of 14th July, 1748 (Morrison, 15,095). The report by Lord Kilkerran gives no detail, and is, in that respect, unsatisfactory. But the case is reported as positively determining that 'a superior cannot pursue both for payment of bygone feu-duties and a declarator of irritancy ob non solutum canonem, but must be content with the one or the other.' And it seems to follow, a fortiori, that a superior who, as in the present case, has actually taken decree of declarator of irritancy, must be content with that remedy, and cannot afterwards pursue for the bygone feu-duties. Accordingly, this decision is generally referred to by institutional writers, as fixing the point, and the principle seems to be taken for granted in some later cases. In the case of Ballendene against the Duke of Athole, an attempt was unsuccessfully made to reduce a decree of declarator of irritancy after extract, the pursuer of the reduction tendering at the bar payment of the bygone feu-duties. It is clear that the attempt, and, in particular, the tender of payment, must have been absurd, if it could have been supposed that, even after decree, the bygone feu-duties were legally exigible by the superior. And in another unreported case, Viscount Stormonth against Bell of Whitsonhill, referred to in the report of Ballendene against the Duke of Athole, it seems to have been assumed, that the superior's claim for the bygone feu-duties was inconsistent with his holding by the decree of declarator. As the question is one, however, of great importance in practice,—as the report of the only decision upon the point is not quite satisfactory, and as the authority of that report is questioned by the objector, upon grounds entitled to consideration, the Lord Ordinary has thought it advisable to bring the question under the notice of the Court.

"On the other point, that regarding the composition, the Lord Ordinary has no doubt. There is nothing in a declarator of irritancy ob non solutum canonem which can be held, either directly or by implication, to import an abandonment by the superior of his claim for a composition previously due by the vassal. In the present case, the entry was taken by the trustees of Mr Sibbald, who were infest in the feu. It is true that, agreeably to a clause of the feu-right, the infestment was completed by the town-clerk of Edinburgh. But considering the terms of the correspondence, and above all, the fact, that the expense of preparing the title and taking the infestment was paid by the trustees, and that payment was made to a judicial factor, it is impossible to listen to the statement, that it was made without their cognisance and authority."

LORD BALGRAY.—I had persuaded myself that there were some points fixed No. 256.
settled in the law of Scotland beyond the power of challenge. But I find I
have been mistaken, at least as to one of these, for the question is now raised, May 16, 1834.
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whether a superior, who has taken a declarator of tinsel of the feu, can also demand
arrears of feu-duty from the vassal. It was the opinion of Lord Justice-Clerk
Gillies that he could not. I have heard Lord Justice-Clerk Braxfield and Lord
Justice-Clerk Rae confirm that opinion; and after these authorities, especially the
latter, who was one of our greatest feudal lawyers in modern times, I am not disposed
to treat the matter as an open question, or one upon which the law admits of
doubt. This right of forfeiture does not arise properly from the nature of the
contract of feu, but is founded on the act 1597, which is accordingly libelled on.
As soon as the decree of declarator is extracted, the feu is gone, and of course the
superiority is equally annihilated. How can a claim for feu-duties remain after
that? The poiding of the ground is the most regular and appropriate method of
recovering arrears of feu-duties; but I should wish to know how a superior is to
resort to that remedy after a declarator of tinsel has brought the feu to an end.
When a declarator is just an irredeemable adjudication of the feu in favour of the
superior, as appears from the case of Ballendene, where it was held, that after ex-
traction of the decree, the forfeiture could not be rescinded, even by payment of the
whole arrears of feu-duty which were there rendered. Indeed, that case is a strong
illustration of the doctrine, that a superior cannot both forfeit the feu and claim
arrears of feu-duties. The feu was there shown to be of incomparably greater
value than the arrears of feu-duty, and the vassal tendered the whole arrears and in-
terest. The superior was found entitled to refuse these, which most distinctly implied
his acceptance of them would have inferred the restoration of the feu; for in-
deed the superior could have otherwise had no cause to refuse them. But the
Court would not allow the decree to be opened up, and held, that it now stood as
an irredeemable adjudication in favour of the superior. I am clearly of opinion,
therefore, that the claim made by the Magistrates for the arrears of feu-duty is untenable.
There is another point, regarding the composition, as to which I think their
claim is well-founded. Sibbald's trustees applied for an entry, and a charter and
lease were expedited in their favour, the expense of which they paid. I think they
are bound, by their own act, to pay the composition for an entry, and that this
claim is not extinguished by the subsequent declarator.

LORD GILLIES expressed his concurrence with Lord Balgray.

LORD PRESIDENT. I am of the same opinion. The Lord Ordinary observes
in the case referred to in Kilkerran, that the report "gives no details, and is in
every respect unsatisfactory." I apprehend that Lord Kilkerran had treated it as a
minor point, which did not call for minute examination. He had considered the
position enunciated in his report to be unchallengeable, and I look on it in the
same light. That the superior who forfeits the feu cannot also claim arrears of
feu-duty, appears to me as clear a proposition, as that if a seller, under an irritant
condition, shall void a contract of sale, he cannot also claim the price.

THE COURT pronounced this interlocutor:—"In respect of the decree of
declarator of irritancy obtained and extracted at the instance of the Magis-
trates of Edinburgh, find, that they are not entitled to the arrears of feu-
duty for which they have made claim in the ranking, and repel the said
claim accordingly, and decern: Find that the said Magistrates are entitled

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to the composition of L.236, 18s. 3d., for an entry to the premises in question: Remit to the Lord Ordinary to proceed farther in the cause, reserving for farther discussion the question of preference for the said composition, and interest thereon; and also all question of expenses."

CUNNINGHAMS and BELL, W.S.—W. HORSBURGH, W.S.—Agents.

No. 257. MRS M. S. DARLING and OTHERS, Pursuers.—*Shene*—G. G. Bell.
JAMES ADAMSON, Defender.—*Anderson*—*Neaves*.

Trust—Interest.—A trustee, who had himself a beneficiary interest under the trust, entered into litigation with the other parties interested therein, as to point affecting his own individual interests, in which he was ultimately found to have been in the wrong; and in the meantime, he withheld from the other parties certain annual payments to which they were entitled under the trust-deed, and deposited the funds in a bank, but without judicial authority or their consent; held liable in interest at the ordinary rate, and not entitled to have it restricted to what he drew from the bank.

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By trust-deed of settlement executed in 1805, the late James Stormonth conveyed three properties of Lednathy, Inverchroskie, and Whitefield, to his niece, Mrs Darling—her husband, Mr Darling—the defender, Adamson, who was his nephew, and two other parties, named Watson and Wilson, as trustees, for the purposes therein mentioned.

As to Lednathy, the trustees were directed to apply the free rents to the education of James Stormonth Darling, one of Mrs Darling's sons, and on his attaining majority, to convey it to him under the fetters of an entail. As to the other properties, it was provided that one-fourth of the free rents should be payable to Adamson, and that the other three-fourths, after supplying any deficiency in the rents of Lednathy, for educating James Stormonth Darling, should be laid out upon the education of the other children of the family; and the trustees were directed, upon the falling of the current leases, which was to take place in about ten or twelve years after the date of the deed, to sell the lands, and to pay over one-fourth of the price to Adamson, and to divide the remaining three-fourths among Mrs Darling's children. By a separate deed of Mr Stormonth, Adamson was appointed his executor; and by a codicil to the trust-deed above mentioned, the burden of debts, annuities, &c., which by that deed had been laid on the trust-estate, was transferred upon him. In 1812, Mr Stormonth executed a new disposition and settlement, whereby he conveyed to Adamson the lands of Inverchroskie and Whitefield, subject to a provision of £6000 to Mrs Darling's family, and an annuity of £50 to herself. Mr Stormonth died in October, 1817, and at a meeting held immediately thereafter, it was agreed between Adamson on the one part, and Mr and Mrs Darling for themselves and children on the other part, that the latter should succeed

these properties, as provided by the deed of 1805, and under all the conditions and provisions contained in it and the relative codicils, they renouncing the provisions settled on them by the deed of 1812, and the parties verally became bound to execute all deeds necessary for carrying this agreement into effect. At the same meeting, Mr Darling and Adamson accepted the office of trustee; and, at their request, Watson also subsequently accepted, but the only part he took in the after proceedings under the trust, was to give his name to the measures recommended and adopted by Adamson.

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Notwithstanding the agreement above mentioned, that matters should be regulated by the deed of 1805, and not by that of 1812, Adamson and Watson, at a meeting held by them in 1819, while they authorized certain payments to be made to the Darlings out of the rents of Inverroskie and Whitefield, did so under the proviso that these were to be considered "to account of the provisions settled upon them by Mr Stormonth's settlement of August, 1812;" and in 1821, Adamson refused to accept receipts framed with reference to the deed 1805, and bearing that the payments were out of the rents of the lands. In consequence of this, no further payments were made, the Darlings refusing to grant receipts on terms which might be held to recognise the abandoned settlement of 1812. Thereafter Adamson demanded from the Darlings a deed, discharging all claim to their provisions under the settlement 1812, in terms of the minute of agreement entered into at Mr Stormonth's death. This they were willing to have executed, but required as a counterpart that he should on his part execute a discharge of all right to the lands under the same deed. Adamson, however, not only refused, but in June, 1826, he directed the factor to deposit in the Royal Bank the rents which had accumulated in his hands, amounting to £1200, "there to remain for behoof of all concerned, until Mrs Darling and her family discharge me of the above-mentioned claim;" and he at the same time intimated to the Darlings that they might raise a process of multiplepoinding and exoneration. The money was accordingly deposited, and the Darlings thereupon raised a summons of count and reckoning, and for implement of the same deed, wherewith was conjoined a multiplepoinding in name of the factor, as to the rents collected by him. In this conjoined process, the main points in dispute related to the warrantice to be given to purchasers, and the terms of the discharge to be granted to Adamson, who contended for a particular form with reference to his own individual interests under the settlements. In these points, by judgment of the Court affirmed on appeal, he was found to be wrong, and the terms of the discharge approved, as the Darlings had all along been willing to grant. In the meantime, an accountant's report had been obtained on the state of intromissions and mode of settlement, to which objections were given in, sufficiently adverted to in the interlocutor of the Lord Ordinary, quoted below. At this point the accountant reserved to the decision of the Court. This

No. 257. regarded the interest wherewith Adamson was to be charged on the rents collected by the factor, and by directions of the former deposited in the bank. As to this Adamson contended he could only be liable in the interest he actually received, viz. bank interest, while the Darlings maintained that, having in violation of his duty as trustee, and to serve his own individual interests, unjustly withheld payment of these rents, devoted by the trust-deed to the education of the family, he must be liable in the ordinary rate of interest, and that his depositing the money in a bank without any judicial authority or consent of parties, could not relieve him from this obligation.

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The Lord Ordinary pronounced this interlocutor :—" Having resumed consideration of the debate, upon the objections to the foregoing report, and advised the process ;—as to the objections of James Adamson to the accountant's report, repels the first objection, in respect that, by the trust-settlement of the late James Stormonth, 1805, ' the whole arrears of rent that shall be due at his death,' are expressly conveyed and made over to his trustees, and not left to be uplifted by his executor ; repels the second objection, in respect that, by codicil in November, 1805, the burden of paying his debts is laid upon Mr Adamson, and that the melioration here in question was payable at the Whitsunday prior to the death of Mr Stormonth, and was thus a debt due by him, although, by an arrangement with the tenant, payment was deferred till the Martinmas following ; repels the third objection, as to the charge of 5 per cent interest on the balance in his hands from 18th April, 1831, in respect that, as the accountant has calculated interest at that rate down to 12th March, 1833, on the payments received by the family of the Darlings, it was necessary, in like manner, to state interest at that rate against Mr Adamson, on the funds in his hands, so as to admit of a just division of these accumulating funds, by paying one-fourth to Mr Adamson, and three-fourths to Mr Darling's family, in terms of Mr Stormonth's settlement. As to the mode of allocation, finds the mode proposed by the accountant unobjectionable : Finds, as to the fifth objection, that the sum paid for legacy-duty, stated against the pursuers, is £193, 10s., on which interest at 5 per cent is charged against them, brought down to 12th March, 1833, which removes the present objection, as it is of no consequence from whom or from what fund a part of this sum, to the amount of £161, 4s., was borrowed, during a short period ; and the defenders are not entitled to more than if the whole sum had been paid originally from the trust-fund by Mr Brown : With regard to the sixth objection, if it appear, in the continuation of Mr John Brown's accounts, that the sum of £12, 7s. here mentioned, was repaid by Mr Adamson on 12th May, 1827, finds that he will be entitled to credit for it in this accounting : Finds that the defender has credit for the arrear of one pound, so that it is not ultimately charged against him : With regard to the claim which has been reserved by the accountant as to the rate of interest with-
tees are chargeable in their intromissions, finds the sum

is an action of count and reckoning, sufficiently broad for disposing of **No. 257.**
 this question: Finds that no payments have been made, in terms ^{May 16, 1831.}
 of the trust-deed, in behalf of the children of Mr and Mrs Darling, ^{Darling v. Adamson.}
 since January, 1821, except a single payment to one of them in
 March, 1826; and it appears by a letter of Mr Adamson, in May,
 1824, that it was by his desire that the payments were discontinued,
 such payments having been made prior to that period: finds, that although
 the balances which accumulated in consequence of withholding payments
 for the education and outfit of the children, were consigned in bank, this
 was not done under judicial authority, nor by the desire, or with the
 approbation of the pursuers: finds, from the defences stated in this action,
 and the previous correspondence, that these payments were discontinued
 in consequence of the parties having differed as to the warrandice to be
 given, and other matters arising out of Mr Adamson's interest as exe-
 cutor, and not in his character of trustee; and, upon the whole, as Mr
 Darling was entitled to this fund periodically, for the education of his
 family, and has been obliged to advance other funds for that purpose,
 finds that Mr Adamson, as acting trustee, must be liable for interest at
 the rate of four per cent from May, 1824, down to 18th April,
 1831. With regard to the objections of Mrs Darling and her children,
 finds, that if the trustees were not to be allowed to charge their expenses
 in defending the action relative to Mrs Darling's right to act as a trustee,
 against them, it would, in effect, be finding that Mr Adamson, the acting
 trustee, must bear the whole expense personally, although it does not
 appear, from the Court only allowing a part of the expense, and the
 House of Lords no part of the expenses of the appeal, that the litigation
 was such as to have called upon the Court to make the trustees person-
 ally liable; but finds it reasonable that Mrs Darling should also be allowed
 payment, out of the trust-funds, of the whole of the expenses incurred
 by her in that process: and in respect it is stated that the factor fee or
 commission of five per cent to Mr Brown is too high, remits to the auditor
 of Court to consider the accounts of the factor, with power to hear the
 parties, and to receive explanations from them, and to report what com-
 mission should be allowed for the trouble incurred, taking into account
 the other charges stated by him as agent of the trustees; remits also to
 the auditor the account of expenses incurred by the trustees and by Mrs
 Darling, in the action above alluded to, to tax, and to report."

Adamson reclaimed.

The Court were agreed in adhering to the Lord Ordinary's interlo-
 cutor, as to the several objections to the accountant's report, except that
 regarding the meliorations, which they thought fell under the executry;
 and as to the question of interest, they delivered the following opinions:

LORD JUSTICE-CLERK.—I do not think Adamson is entitled to say you must
 be content with two per cent. I have no doubt he lodged the money in the

No. 257. bank, and only drew two per cent ; but then he had no judicial authority. It was a proceeding proprio motu, at his own risk ; and being trustee and executor, has he in this done what was incumbent on him for the interests of the parties concerned ? He, with the concurrence of Watson, had the whole management, excluding Mrs Darling. He agreed to be regulated by the deed 1805 ; but in 1819 he and Watson, this nominal trustee, hold a meeting, and rest on the deed of 1812 as the regulating deed, and it is now demonstrated that they were endeavouring to bring that deed into play. No doubt he afterwards changes his tone ; but an interminable litigation was persisted in as to the terms of the discharge, and it was ultimately decided against him in the House of Lords ; and all this time these parties did not receive a farthing, and just at the period most important for the education of the children, while the deeds provide that the rents were to be paid for this express purpose. There is clear proof throughout that Adamson was not acting in a fair and bona fide exercise of his duty, but for his own private ends, and keeping up a litigation, in which he was wrong in every point except as to the meliorations decided this day. I think the Lord Ordinary's judgment, finding him liable in interest at four per cent, consistent with justice, and we must adhere, without founding on the finding as to the letter—the whole circumstances affording sufficient proof.

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Co.

LORD GLENLEE.—I am a little at a loss what to think ; but on the principle that Adamson ought to have paid these sums periodically, not being entitled to retain the money to their prejudice, I cannot see that it makes any difference, if, instead of keeping it in his own pocket, he puts it in a bank ; and I am therefore for adhering.

LORD CRINGLETIE.—I am perfectly of the same opinion. It is impossible that he could be in the bona fide discharge of his duty of a trustee, if he retained or consigned this money, without authority from the Court, or notice to these parties ; and he is very well off in getting clear for four per cent instead of five.

THE COURT accordingly altered as to the meliorations, and sustained the objection, but quoad ultra adhered.

J. S. DARLING, W.S.—D. TURNBULL, W.S.—Agents.

No. 258. **CRUTTENDEN, MACKILLOP, and Co., and WILLIAM RENNY, W.S.,**
Petitioners.—Christison.

Jurisdiction—Ranking and Sale—Judicial Factor.—1. Incompetent for the Court to authorize the sale at Glasgow of part of a bankrupt estate, under a ranking and sale. 2. Circumstances in which the Court granted authority to strike an heritable bond out of the process of ranking and sale, the petition being presented by the pursuers of the process, and by the common agent, with concurrence of all the creditors.

May 17, 1834. **SEQUEL** of the case reported ante, p. 479, which see.¹ In disposing of

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¹ The Court are there reported as having refused the petition, in the circumstances of the case, and not upon the ground of incompetency.

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Mackillop, and
Co.
—
Meek.

W. Renny, W.S.—Agent.

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¹ Creditors of Colquhoun, &c., Feb. 22, 1712 (13,320); Turnbull, March 9, 1773, ibid's MS. Rep.)

No. 259. allegation that they were done under medical advice, with a view to a cure. He, therefore, contended, that since the true defence against a material part of the action, as stated to the jury, and sustained by them, was first broached in the course of the trial, he was entitled to a new trial on the ground of surprise.

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Smith.

THE COURT did not consider, in the circumstances, that there were sufficient grounds stated, and they refused the motion.

No. 260. POOR MARY MARTIN or MILN, Pursuer and Advocate.—*R. Robertson.*
POOR JAMES SMITH, Defender and Respondent.—*Forbes.*

Parent and Child—Proof—Semiplena Probatio.—Circumstances which, in an action of filiation, held not to amount to a semiplena probatio of connexion.

May 17, 1834. **MARY MARTIN** having been delivered of a natural child on the 29th May, 1831, raised an action before the Magistrates of Dundee against Smith, foreman in a flax mill there, whom she alleged to be the father, concluding for inlying expenses and aliment. Smith was a married man, with a family of children, and an elder in a dissenting congregation. He lived in the flat of a house situated in a close containing a considerable number of dwellings, with access by a public entry, and she resided in the flat immediately under him in the same tenement. He had generally one or two workmen lodging with him; and, in autumn, 1830, his wife having gone with their children for a few weeks to Kirriemuir, a village at some little distance, on account of the health of one of the children, Martin was employed to look after the house, and prepare the meals for Smith and his lodgers, in consequence of which she was, during this period, a good deal about the house. It was at this time that she alleged the intercourse to have taken place with Smith; and being allowed a proof, she adduced two witnesses in support of her averment. The one, Mrs M'Ghie, a person upwards of sixty years of age, deponed as follows:—"That (while residing in Dundee) her house was situated in the same flat, and immediately adjoining the house of the pursuer: That their houses were divided by a thin partition, and so thin that the deponent could hear what went on in the pursuer's house: That the defender occupied the flat above: That the deponent recollects of the defender's wife being absent from Dundee during the harvest of 1831, and while so absent, the deponent knows that the pursuer took charge of cooking the defender's victuals, and attending to his house: That during the absence of the defender's wife the pursuer was frequently in his house in the evenings: That the deponent knows this from having heard the defender in the pursuer's house, and from key, and from hearing the pursuer go up with him to h

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tea for him ; and the witness of herself adds, that she never saw them
 ak together. Interrogated, On these occasions, when the pursuer and
 fender went up together to the defender's house in the evenings, did
 deponent ever hear them conversing together?—Mr Smillie, (agent,)
 the defender, here stated that he considered the pursuer had exhausted
 third article of her condescendence, and was not entitled to put the
 estion, but he did not object to her doing so ; and the question being put,
 pones, That she did not : That the defender generally returned from
 work about six o'clock in the evening, but she cannot say positively.
 terrogated, How late was the hour at which the deponent sometimes
 ard the pursuer return from Mr Smith's house to her own ? depones,
 at she heard the pursuer return to her own house between two and
 ree o'clock in the morning ; but the deponent cannot say whether she
 me from Mr Smith's house or not : That the deponent never noticed
 a defender come down from his own house and go into the pursuer's
 out ten o'clock at night. Interrogated, Whether it consists with the
 ponent's knowledge that after the pursuer had attended in the defen-
 er's house, as above deponed, the pursuer became pregnant ? depones,
 at she appeared to be so. Interrogated, Whether, after the pursuer
 peared to be pregnant, the deponent recollects of any conversation be-
 een the pursuer and defender ? depones, That she does, and that it took
 ce in the pursuer's house. Depones, That one forenoon, when the
 ponent was standing at her own door, she saw the defender go into the
 rsuer's house, and when there, the deponent heard Mr Smith say to
 pursuer that Mrs Smith had told him that morning that she, the pur-
 er, would have to tell who was the father of the child, but not to lay it
 him, but on some other, and he would give her money to bring up the
 ld : That when the deponent heard this conversation she was standing
 ween the door of her own and the pursuer's house, and heard it quite
 ll : That the pursuer answered the defender that she could not lay it
 any one else, and the defender replied that she could if she had a
 ad, and that it would hurt him. Interrogated, depones, That she is
 fectly certain the conversation alluded to took place between the pursuer
 l defender, as she saw the defender go into the house, and heard their
 ces. Interrogated, Whether, when she says that she ' never saw
 m speak together ' she means to depone that the pursuer and defender
 er spoke together ? depones, That they never spoke together by way
 correspondence, but just as one neighbour would do to another. In-
 terrogated for the defender, depones, That the deponent's and the pur-
 er's house entered by a low door in front of the house, and defender
 red to his house by an outside stair at the back. Depones, That
 she heard the pursuer go out of her own house in the evening, after
 defender called for his key, she cannot swear that the pursuer always
 to the defender's house, as she did not go out to see : That the rea-
 leponent supposes the pursuer went to the defender's house is,

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No. 260. that when the pursuer was absent from her own house, and any of her neighbours called, they were desired by her children or her lodger, to go to the defender's house for her: That this happened frequently, but she will not swear it happened a dozen of times: That at the time spoken of the defender had one lodger in his house. Interrogated, If it does not consist with the deponent's knowledge that the defender, at the time referred to, had two young men, flax-dressers, lodging in his house? depones, That he might have had a dozen for her, but she never knew but one. Depones, That when the conversation took place she has deponed to as above, the deponent did not see the parties, but only heard them. Interrogated, Whether she can swear that at the time the conversation took place there was no other person in the pursuer's house but the pursuer and defender? depones, That she heard the defender ask the pursuer when he went in, whether there was any other person in the house, and heard her say there was none."

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The other witness, Eliza Baxter, emitted the following deposition:—
 "That she recollects of seeing the pursuer and defender about ten months ago standing at the foot of the entry leading to the house where they resided, and the defender then had his arm round the pursuer's waist. Depones, That the deponent on that occasion went up the entry for a jugful of water, and when she returned the parties were still standing in the same position. Depones, That the deponent never saw the parties in the same circumstances at any other time, nor did she ever see them together but on that occasion.—Cross-interrogated for the defender, depones, That when the deponent saw the parties standing together as above mentioned, they seemed to be in conversation: That the parties were standing within the entry, but at the very foot of it close to King Street: That the deponent thinks the entry may be about 3 yards, or 3½ yards broad. Depones, That as far as the deponent recollects, it was about eleven, or between eleven or twelve o'clock at night that she saw the parties together, and she thinks it was then moonlight: That they were standing in the shade. Depones, That the deponent knew the parties from the circumstance of their both speaking to her: That as far as the deponent recollects, the defender remarked that it was a fine evening, and the pursuer asked the deponent if she was not thinking of going to bed yet: That the parties so spoke to her as she went up the entry: That the deponent stopped and spoke to the parties. Depones, That if the deponent had passed them near, she might have known them although they had not spoken, but she could not have been so sure: That the above entry leads to a great many houses, and is quite a public entry. Depones, That the parties did not seem to wish to make any secret of the way in which they were standing: That the deponent spoke to them as she returned down the entry, but she does not recollect what she said. Depones, That she is perfectly certain that the defender's arm was round the pursuer's waist: That it was his right arm: That the p

with her back to the wall, and the defender opposite to her looking No. 260.
on the entry."

Smith, who had been judicially examined previous to the proof, had May 17, 1834.
declared, "That the pursuer never during the above period came to the Martin v.
defender's house late in the evening, at least when the defender was in Smith.
house: That the defender is aware that the pursuer was delivered of
child in the course of the present summer: That the defender never had
any carnal intercourse with the pursuer: That the defender never ac-
knowledged to any person that he was the father of the pursuer's child:
That the defender did not at any time request her to lay the child to the
charge of some other person, and he never promised that if she did so she
could never want: That the defender never stood at the foot of the
stair leading to his house with his arm round the pursuer's waist."

And, on his part, he adduced three witnesses who established that
Martin had repeatedly stated that the father of the child was a young
man, who had left Dundee on her becoming pregnant, and that Smith
is not the father, and had solemnly declared that she was free of a mar-
ried man; that she had further stated that the child had been begotten by
a young man alluded to by her, but whom she did not name, on a par-
ticular night, being the night after the fair of Dundee, while it was
proved that on that particular night Smith was at Kirriemuir on a visit to
his wife and child.

On this proof, Martin contended that it at all events amounted to a
probatum, to entitle her to her oath in supplement. The ma-
gistrates, however, found "that in the circumstances of this case, the
proof adduced, though supported by the pursuer's oath in supplement,
could not establish the alleged paternity;" and therefore assoilzied
Smith.

Martin thereupon brought an advocacy, in which the Lord Ordinary
announced this interlocutor, adding the subjoined note.* "Remits the

* "It is not said that Eliza Baxter is a discreditable witness. What she saw
cannot be mistaken about. She says, on a cross interrogatory, she is perfectly
certain. She says it was about ten months before her examination. This is prob-
ably incorrect; but she concludes with saying it was when the defender's wife
was absent. It is less likely she would be mistaken as to this fact than as to
time. The circumstance is not of much importance, except as a contradiction
of the defender's declaration, and as showing familiarities, though certainly not of
criminal character.

"If McGhie is to be believed as to what she overheard, the case is against the de-
fender. She does not seem a forward witness, anxious to make a case for the pur-
suer. In many respects her deposition would have gone much further if it had
been so. She says she is perfectly certain the conversation took place in which
the defender desired the pursuer to lay the child, not on him, but on some other
man. She did not see them, but heard them, and saw the defender go into the
pursuer's house. He may not have seen the witness, nor suspected she was listen-

No. 260. cause with instructions to the magistrates to recal the interlocutor
 May 17, 1834. plained of, and to find that the pursuer has established facts and c
 Martin v. stances which amount to a semiplena probatio, and to admit her
 Smith. supplement, and thereafter to proceed as may be just."

Smith reclaimed.

LORD JUSTICE-CLERK.—I differ from the Lord Ordinary, and concur
 judgment of the Magistrates, that there is not semiplena probatio, taking the
 evidence together. Although we can lay down no general rule applicabl
 cases, yet it is always a circumstance that the party is a married man, and v
 not lay out of view that he is also an elder. There is also this circum
 that while his wife was absent this woman went about the house and prepa
 meals, so that there is nothing suspicious in that alone. Then, is there basi
 ficient ground of suspicion to amount to semiplena? No doubt, Mary
 swears to this conversation. But the pursuer is deponed then to have said t
 could not lay it on any other. If this were so, I would not hesitate to hol
 was enough—where it was proved by a witness omni exceptione major. W
 however, look to the defender's proof, though I will observe as to the other

ing. This witness is now removed to Leith, and does not seem to have any
 able motive except to tell the truth.

"The witnesses for the defender, in one view of their evidence, support
 timony. The counsel for the pursuer admitted that all these witnesses spok
 that she did tell them what they say she did, but that what she said was in
 with the defender. Brown proves that the pursuer said she was unwill
 disoblige the defender and his wife. And it is most remarkable that proba
 only two days on which the defender was absent, and that the pursuer co
 shown to have gone west the town, is selected by the pursuer for her story
 for this why was she so minute in her specification of the day, and that she
 unknown friend west the town? Further, why did she tell it to people wh
 not asking her about it? (see last witness.) With all her minuteness she nev
 tures to specify the name of any person to those witnesses.

"It is further a singular circumstance that the three witnesses to whom sh
 this minute communication, happened to remember that the defender had be
 sent on that particular night, and the last witness recollected that she had
 going west that night, although the communication of these particulars mu
 been at least six months afterwards.

"Although the pursuer does not say in her condescendence that she con
 this story, she does say that the defender desired her to tell such a story, and
 be inferred that she meant to aver that she did so.

"Under these circumstances, the Lord Ordinary cannot say that there i
 semiplena probatio entitling the pursuer to her oath. It is not stated that
 woman of infamous character, to whose oath no credit should be given ev
 personal case of this kind; and if she swears that the conversation deponed
 M'Ghie took place, and that in consequence she told the story she did to t
 fender's witnesses; further, that the defender had connexion with her, and
 father of her child, the Lord Ordinary thinks there will be as much proof as
 expected in a case of this kind, where there was no occasion for out of des
 Harities, and sufficient to warrant an award against the defender."

his standing with an arm round her waist, that it was without any attempt at concealment, and therefore no ground for suspicion of undue familiarity. But as to the defender's proof, it is always of importance to see if the conduct of the party is all along consistent with her statement. Now it is most satisfactorily proved that she denied the defender being the father, and repeatedly and solemnly charged it on another. This, therefore, is inconsistent with the supposed conversation with the defender, and altogether I am of opinion that there is not *sempilena probatio*.
The other Judges concurred.

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May 20, 1834.

Malcolm v. M'Neill.

THE COURT altered and remitted simpliciter.

JAS. MARSHALL, S.S.C.—GEO. TAYLOR, W.S.—Agents.

SHOTTON MALCOLM and Co., and MANDATARY, Pursuers.—*Currie*.
MALCOLM M'NEILL and TRUSTEE, Defenders.—*Rutherford—Speirs*.

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Process—Adjudication.—In a first adjudication, the Lord Ordinary, after hearing objections at the bar, appointed intimation; and the defender having presented a reclaiming note, along with defences, the Court remitted to the Lord Ordinary to repon the defender on paying reasonable expenses, and with power to his Lordship to hear parties as to the legality of recalling the intimation.

SHOTTON MALCOLM and Co., and their Mandatary, raised a process of adjudication against the estate of Captain Malcolm M'Neill of Gallochilly. No defences were lodged, but objections were stated before the Lord Ordinary, by Captain M'Neill and by Charles Ferrier, accountant, trustee for M'Neill's creditors.

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D.

The Lord Ordinary "having heard the counsel for the parties, in respect it is admitted that this is the first process of adjudication brought against the defender of the subjects libelled, appoints intimation thereof to be made in the Minute-Book, and on the walls of the Parliament House, to all the other creditors of the defender, for the purposes, and in the form prescribed by the statutes thereanent."

Ferrier and Captain M'Neill presented a reclaiming note, accompanied with defences, and craved the Court "to recal the interlocutor before recited and complained of; and to remit to the Lord Ordinary to repon the defenders, and receive the defences, on payment of such expenses as his Lordship may consider just."

At moving the note, the reclaimers craved the Court to remit to the Lord Ordinary to recal the intimation which he had appointed to be given.

LORD PRESIDENT.—The utmost length which the Court can go at present, besides the usual remit to repon on paying such expenses as the Lord Ordinary shall consider reasonable, is to empower his Lordship to hear parties as to the legality of the motion for recalling the intimation.

No. 261.

May 20, 1834.
Macqueen v.
Clyne's Trustees.

THE COURT pronounced this interlocutor:—"Remit to the Lord Ordinary to receive the defences now lodged, on payment of such expenses as to him shall seem just; and farther, to hear parties as to the recal of the intimation, and to do therein as to his Lordship shall seem proper."

CUNNINGHAM and WALKER, W.S.—J. H. BURNETT, W.S.—Agents.

No. 262.

JOHN MACQUEEN and MANDATARY, Pursuers.—*Shene—Buchanan.*
CLYNE'S TRUSTEES, Defenders.—*Boswell.*

Process—Transference—Trust.—Competent to transfer an action against the trustees and executors nominate of a defunct, on an induciæ of six days.

Process—Citation.—Where the principal execution of citation is *ex facie regular*, and not brought under reduction, an alleged defect in the service copy cannot be founded on in impeachment of the citation.

Process—Jus Tertii.—The provision of Act of Sederunt, July 11, 1828, § 26, directing a summons to be lodged with the clerk, on or before the third day preceding that of the calling, is intended for the convenience of the clerks of Court, and it is *jus tertii* for a defender to object that the summons was only lodged the day before the calling.

May 30, 1834.
Jus Divisor.
Ld. Coshouse.
D.

JOHN MACQUEEN and Mandatary raised an action against the late David Clyne, S.S.C., who died while it was in dependence. He left a trust-deed, conveying his estate to Sir William Baillie and five other parties, who were nominated executors as well as trustees. Macqueen and mandatary raised an action of transference against them, as "trustees and executors, or as otherwise representing the said David Clyne, on one or other of the passive titles." The will of the summons gave warrant to cite the defenders on six days induciæ.

Preliminary defences were lodged in name of the trustees, who did not deny that they had accepted and acted, as was alleged in the summons, but pleaded, 1st, That, though ordinary legal representatives might be cited on an induciæ of six days, yet trustees required an induciæ of twenty-seven days: 2d, That no defender, except Sir William Baillie, had got a correct service copy of citation; the copy left with five of the defenders being irregular, and inter alia, citing them on an induciæ of twenty-seven days, while the Will of the summons specified six days: 3d, That the date of citation was 20th January, and, though twenty-seven days could not elapse before 16th February, the summons had been called in Court on 29th January: And, 4th, That the summons was only founded on 28th January, the day before it was called, whereas, by § 26 of Act of Sederunt, July 11, 1828, it was enjoined that the sum-

¹ Dunlop, July 10, 1827 (*ante*, V. 915).

mons should be lodged with the clerk on or before the third lawful day preceding that on which the calling was to take place. **No. 262.**

Soon after these defences were lodged, the whole trustees whose citations were thus impugned, excepting David Manson, S.S.C., lodged a letter passing from all objections to the execution. The pursuers then answered, that, as the citation of one party was unchallengeable, and four others waived all objection, it was immaterial whether the sixth trustee was effectually cited; but, separately, 1st, The trust-deed appointed the defenders to be executors, as well as trustees, of Clyne; and executors nominate were liable to have an action transferred against them on six days induciæ: 2d, The principal execution was regular, and no reduction of it was raised; and it had been repeatedly decided that the production of a service copy could make no faith in the face of a regular and unreduced execution: 3d, The summons was regularly called on the 29th January, reference being had to the principal execution: and, 4th, The regulation of the Act of Sederunt was introduced for the benefit of the clerks of Court, and it was *jus tertii* to the defenders to found on it.

May 20, 1834.
Macqueen v.
Clyne's Trustees.

The Lord Ordinary pronounced this interlocutor:—"Repels the first preliminary defence, in respect that the defenders are called as executors-nominate of the late David Clyne, as well as trustees under his trust-disposition and settlement—that it is averred in the summons that they, or one or other of them, have accepted the said office, and that this averment is not denied in the defences: Repels the second preliminary defence, in respect it is admitted that the execution against the defender Sir William Baillie is correct; that the defenders Meiklejohn, Farquhar-Gordon, Logan, and Lockhart, by their letter produced, agree to pass from the objections stated in their names to the execution, and as to the defender David Manson, in respect the third objection to the citation is not founded in fact, and that although there are alleged defects in the service copy left with him, the messenger's execution, which is *ex facie* correct, is not brought under reduction: Repels the third preliminary defence, in respect the summons was regularly called in Court in reference to the diet, as fixed by the execution returned by the messenger: Repels the fourth preliminary defence, in respect the 26th section of the Act of Sederunt, 11th July, 1828, was introduced for the convenience of the clerks of Court, and to facilitate the performance of their duty, and not to confer any right on defenders, to whom, therefore, this objection is *jus tertii*: Finds the defender liable in the expense of discussing the preliminary defences."

The defenders reclaimed.

LORD PRESIDENT.—We have repeatedly found, that, though there be alleged defects in a service copy of citation, yet, if the messenger's execution be regular, *ex facie*, and not brought under reduction, it must make faith with the Court.

No. 262. The case of Dunlop, referred to by the defenders, was of a special nature, and quite different from this.

May 20, 1834. The other Judges concurred, and
Thom v. Jack.

THE COURT adhered.

J. MACDONELL, W.S.—D. MANSON, S.S.C.—Agents.

No. 263. JAMES THOM, and JOHN SPEIRS (THOM'S TRUSTEE), Suspenders.—
Robertson.

ALEXANDER JACK, Charger.—*Rutherford.*

Bankrupt—Sequestration—Poinding.—A creditor having, posterior to a sequestration of the estates of a farmer and grain-dealer, poinded part of the effects on the farm, a bill of suspension, without caution, passed (in the circumstances) at the instance of the trustee and bankrupt, though the lease contained a clause excluding assignees or subtenants, and the bankrupt had continued in the occupancy of the farm.

May 20, 1834. In February, 1832, the estates of James Thom, farmer and grain-dealer, were sequestrated under the bankrupt act, and John Speirs was appointed trustee. Thom at this time held a lease of the farm occupied by him, which excluded assignees and subtenants. On 15th March, 1834, Alexander Jack, a creditor of Thom, holding a decree anterior to the date of the sequestration, executed a poinding of some wheat stacks and others, the crop of the farm. Thom and the trustee presented a bill of suspension, without caution, alleging that the trustee had taken possession of the lease, though he had allowed the bankrupt to remain in the occupancy and management of the farm for behoof of the creditors, and that the poinded effects were thus a part of the sequestrated estate, and were not liable to individual diligence. They produced receipts for the rents of the farm, as paid by the trustee since the sequestration.

1st Division.
Bill-Chamber.
Lord Craigie.
8.

Jack alleged that the sequestration was a mere collusive device between the trustee, who was himself a bankrupt, and Thom, to defraud Thom's creditors; that the lease excluded all assignees and subtenants, and was never acquired by the trustee; that the bankrupt had been allowed to possess and manage the farm for his own behoof; and that the crop poinded consisted of effects acquired by the bankrupt long subsequent to sequestration, and therefore open to individual diligence. He craved that the bill should not be passed except on caution.

The Lord Ordinary "passed the bill without caution."*

The charger reclaimed.

* "NOTE.—After a sequestration under the bankrupt statute, which has not been challenged in proper time, an individual creditor of the bankrupt cannot proceed to poind effects falling under sequestration."

LORD BALGRAY.—I observe that the trustee has paid the rents to the landlord, which seems to show that he looks on it as falling under the sequestration, and on himself as having the right to the crops. I am for adhering.

The other Judges concurred, and

No. 263.
May 20, 1894
MacLean v.
Morrison.

THE COURT adhered.

J. FORRESTER, W.S.—

Agents.

KENNETH MACLEAN, and ALEXANDER MACLENNAN, Advocators.— No. 264.
Cuninghame—Reid.

RODERICK MORRISON, Respondent.—*Skene—Innes.*

Bill of Exchange.—The onerous indorsee of a bill of exchange which was manifestly vitiated in the sum, not entitled to enforce payment of it against an acceptor, where the alteration was not proved to have been made with the acceptor's knowledge or consent, before issuing the document.

RODERICK MORRISON, National Bank agent at Stornoway, raised an action before the Sheriff of Ross-shire, against MacLean and MacLennan, as acceptors of a bill for £26, which he had discounted under the indorsation of Roderick M'Iver, the drawer. The bill was manifestly vitiated, ex facie, in the sum. The defenders refused payment, and alleged that the alteration had been made without their consent, and subsequently to their acceptance. A judicial declaration of the pursuer and defenders was taken. The pursuer stated that the bill was now in the same condition as when discounted by him. M'Lean stated that "he received from M'Iver £3 sterling of the proceeds" of the bill: "that M'Iver and MacLennan told him, that MacLennan received £2 from M'Iver at the time the bill had been discounted; but he is not certain whether that sum was a share of the proceeds or not: that, when he signed the bill, the sum therein was £24, and not £26: that M'Iver, after the bill had been discounted, informed the declarant, that he had altered the bill from being £24 to £26: that M'Iver stated his reason for altering the bill was, to give £2 to MacLennan, and this occurred on the day that the bill was drawn, and the declarant got this information from M'Iver after the bill had been discounted: that the declarant found no fault with him for altering the bill, and said nothing more to him on the subject." MacLennan stated, "that he applied to M'Iver, the drawer, for the loan of £2, a few days after the bill had been discounted, and that, in a few days thereafter, he lent him the £2 accordingly: that he did not apply to M'Iver for any of the proceeds, at the time he signed the bill."

1st Division.
Ld. Corehouse
D.

The pursuer pleaded, 1st, That he, as an onerous and bona fide indorsee, was entitled to enforce payment, at least to the extent of £24; 2d, That MacLean having received £3 of the proceeds of the bill, as dis-

No. 264. counted, and having been informed by the drawer of the alteration, without objecting, had homologated that alteration as effectually as if it had been made before he signed as acceptor: and, 8d, The evidence established, that the alteration was made before the bill was put into the drawer's hands, and that the acceptors were now endeavouring to rear up a fraudulent defence on their own mere allegation of the contrary.

May 20, 1834.
MacLean v.
Morrison.

The acceptors answered, 1st, The vitiation of the bill was apparent *ex facie*; and Morrison, at discounting it, must have known that it would not bind the acceptors, even at common law, unless he could prove that the alteration was made with their consent; and farther, that, under the stamp laws, such alteration must have been made before the bill was issued, otherwise it was null, being a new agreement, superinduced upon one and the same stamp: 2d, MacLean was no party to the alteration, and his receiving £3 of the proceeds of the bill could not validate that document, if null under the stamp laws: this was especially true, as it was not even proved that at the date of taking the £3, MacLean had been informed of the alteration of the bill: in regard to MacLennan, it was not proved that he had got any of the proceeds of the bill at all. 3d, There was no evidence to prove that the alteration was made prior to the issuing of the bill, and the contrary was the fact, as the alteration was subsequently made by Morrison alone, without the privity of the acceptors.

The Sheriff decerned against the acceptors, who brought an advocacy. The Lord Ordinary "advocated the cause; altered the interlocutors complained of; assoilzied the defenders from the conclusions of the libel, and decerned; found the defenders entitled to expenses." *

Morrison reclaimed.

* "NOTE.—The bill, *ex facie*, is manifestly vitiated; and it is now admitted by the pursuer that this is the case, the same having been altered from £24 to £36. It is proved, so far as there is evidence, that the vitiation was made by the drawer, without the knowledge or consent of either of the acceptors, and that it was then discounted by the respondent; and there is no offer made to prove the contrary. The bill, when discounted, therefore, was clearly null, imposing no obligation whatever on the acceptors in favour of the holder. The question remains, whether either of the advocates is barred, personally exceptione, from pleading this nullity. With regard to MacLennan, it is thought there is no ground whatever for that plea. It is not proved that he ever acquiesced in the discount of the bill so altered, or that he received any part of the proceeds. The drawer, some days afterwards, advanced to him £2, but he declares that this was by way of loan, and the contrary is neither proved nor offered to be proved.

"There may be more difficulty with regard to M'Lean, who admits that he received £3 of the proceeds of the bill. But the Lord Ordinary is of opinion that, even in his case, the plea of personal exception ought not to be sustained. The bill, in the acceptance of which, action against him is exclusively laid, is clearly null, both before and after discount. By receiving the £3, his bill

LORD BALGRAY.—A vitiation in the sum is certainly in an essential part of a bill. It makes the bill void and null; and the nullity was apparent on the face of it when the indorsee acquired it. I do not think he has adduced any proof under which he can recover payment. No. 264.
May 20, 1834
Grant v. Rose

LORD GILLIES.—The indorsee has directed the chief force of his argument against MacLean; but it does not appear to me to be clear, upon the proof, that, at the time when MacLean took the £3, he was aware of the alteration of the bill. That fact, however, is essential even to make room for the plea chiefly pressed by Morrison: and I do not think it is proved. The bill signed by the acceptors was an obligation of a different tenor from that which is now founded on. I do not think they are made parties to the alteration which was subsequently made, and which had the effect of rendering the bill a null instrument.

LORD PRESIDENT concurred.

THE COURT adhered.

W. MUIR, S.S.C.—**DALLAS** and **INNES, W.S.**—Agents.

DOUGAL GRANT, Raiser.—*Keay—Moncreiff.*

No. 265.

SIR GEORGE ROSE, Claimant.—*Speirs.*

DAVID THOMSON and ROBERT BORROWMAN (Trustees of Mrs Rose),
Claimants.

Process—Multiplepinding—Consignation.—Circumstances in which the Court recalled an order for consignation, pronounced against the nominal raiser of a process of multiplepinding.

QUESTION as to an order for consignation, pronounced by the Lord Ordinary against the nominal raiser of a multiplepinding. It had been given under a notice, which did not inform the party that consignation was to be moved for, but merely stated that the enrolment was “for the May 20, 1834
2d Division.
Ld. Corehouse
B.

for the remaining £23, is not necessarily inferred; for the respondent is not entitled to plead that he discounted the bill on the faith of MacLean being an obligant, when he saw, or ought to have seen, that it was vitiated in substantialibus, and had no evidence that either of the acceptors had consented to the alteration, which, indeed, they never had.

“The opposite doctrine, it is thought, would encourage slovenly practices in the investigation of bills, and impair or render uncertain their security as transferable documents of debt. It may be questioned also, whether, after a bill of exchange has been acted upon by discount, and in that situation constitutes, not only a valid but an executed agreement, as between the drawer and discount, while it remains null as an agreement between both these parties on the one hand, and the acceptors on the other, it can subsequently be converted into a valid agreement against the acceptors by their consent, without an infringement of the stamp laws. The English cases cited by the advocates, seem to infer that this question must be answered in the negative; and if so, there is no room for the plea of personal exception, which is never available against these statutes.”

No. 265. purpose of getting the fund in medio ascertained, and an order for revising the claims." On this, and other grounds, the Court recalled the order.
 May 20, 1834. *Wilkie v. Dunlop & Co.*

MACMILLAN and GRANT, W.S.—MOWBRAY and HOWDEN, W.S.—THOMSONS and ELDER, W.S.
 —Agents.

No. 266. JOHN WILKIE and Curators, Pursuers and Suspenders.—
H. J. Robertson.
 DUNLOP and Co., Defenders and Chargers.—*Maitland.*

Expenses—Auditor.—The Court, in repelling an objection to the report of the auditor, observed, that, in a question of detail, depending upon an examination of the steps of procedure, it would require strong ground to be stated, to induce them to alter his award, founded on such an examination.

May 20, 1834. SEQUEL of the case reported ante, p. 506. In this conjoined process of suspension and reduction, the Court, after finding the charge irregular, and pronouncing absolvitor to a certain extent in the reduction, found Dunlop and Company, the chargers and defenders, entitled to their expenses, "under deduction of the expenses of discussing the irregularity of the charge."
 1st Division.
 Ld. Fullerton.

The auditor reported that he had examined the papers in process, and that he thought the same fees, writings, and steps of procedure must have been required, independently of the objection to the regularity of the charge, so that there was little or no extra expense, exclusively caused by it: that the chief difference occasioned by that objection seemed to be a slight addition to the length of some of the papers; and that, though it was difficult to say what might be the precise extra expense, he conceived it would be justly disposed of by striking off £3 from the charger's taxed account, and reducing it to £40.

The suspenders objected, on the ground that too small a deduction was made.

THE COURT, without hearing counsel in support of the report, repelled the objection, with expenses; observing that, in a question of detail, depending upon an examination of the steps of procedure, such as the auditor had specially made, it would require strong ground to be stated to induce them to alter his award.

J. SHAND, W.S.—

—Agents.

JAMES PEDIE, W.S., Pursuer.—*Skene—J. Wilson.*
 MRS MOIR'S TRUSTEES, and MISS ANNESLEY, Defenders.—*Cunninghame*
 —*Deas.*

No. 267.

May 20, 1834.
 Pedie v.
 Moir's Trustees.

Title to Pursue—Jus Tertii—Property-Tax.—The raiser of a multiplepoinding to a fund in his hand, claimed no deduction for property-tax, and decree of reference, primo loco, was pronounced in favour of a claimant for certain annuities, who drew the same without deduction—held that another claimant, who was referred to the balance, had neither title nor interest to reduce the decree of preference, to the effect of having the amount which the raiser might have deducted and retained as property-tax repeated and restored to the fund in medio.

IN 1814, Mr Taylor, attorney in exchequer, raised a process of multiplepoinding, as to a fund of £6000 in his hands, in which claims were lodged for the late Mrs Moir, and for one Spalding, cedent of the pursuer, Pedie, W.S. Various interim-decrees were pronounced in favour of Mrs Moir, who was finally preferred for the amount of an annuity. Mrs Moir died in 1831, leaving a settlement in favour of the defender, Miss Annesley, who subsequently obtained decree of preference for certain arrears of annuity due Mrs Moir at her death. Thereafter Pedie, as assignee of Spalding, was preferred to the balance of the fund. Mr Taylor had never claimed any deduction from the fund in medio, on account of property-tax; and decree of exoneration was pronounced in his favour in November, 1832. Pedie, however, conceiving that if the sums which might have been retained by the raiser on account of property-tax had been deducted from certain of the payments to Mrs Moir, they would have formed part of the fund in medio, and fallen to him as preferred to the balance thereof, raised a summons of reduction and repetition against Mrs Moir's trustees, and Miss Annesley, concluding to have the decrees of preference in favour of Mrs Moir set aside, and these parties declined to repeat and again consign in the multiplepoinding the sums which might have been deducted as property-tax. The defenders, besides maintaining a plea that, from the nature of the debt, no property-tax was chargeable, contended, that no one but the raiser could have any right to claim repetition of this sum, and that it was *jus tertii*, so far as Pedie was concerned, whether it might have been retained by him or not.

May 20, 1834.
 2D DIVISION.
 Ld. Medwyn.
 T.

The Lord Ordinary pronounced this interlocutor:—"Finds that the defenders, the trustees of the late Mrs Moir, being claimants in a multiplepoinding raised in this Court by Mr John Taylor, attorney in Exchequer, as holder of a fund belonging to Mr John Wiseman Moir, Mrs Moir's claim was ranked primo loco for the sum of £6000, after being opposed by the other claimants, the creditors of Mr Moir, of whom the pursuer's author, Mr Spalding, was one: Finds, that in virtue of repeated interim-decrees in favour of the defenders, as trustees of Mrs Moir, commencing in the year 1815, various payments were made, and in 1823

No. 267. an annual payment of £200 was authorized, reserving all claims for arrears, as the amount of the fund in medio was not then sufficient to pay the claim of Mrs Moir, which, in consequence of having divorced her husband in 1820, was now for an annuity of £300 : Finds, that an addition to the fund by the falling in of a large sum set apart for payment of certain prior annuitants having arisen, the defenders, in 1830, raised an action of wakening and transference of the process of multiplepinding, which was executed against the creditors, including Andrew Spalding, and which was thereafter proceeded in without delay : Finds that the defenders gave in a claim for the arrears due to Mrs Moir, amounting to £2192, 10s. 6d., by a state put into process, and after it was allowed to be seen by all concerned, and not objected to, decree was pronounced on 3d June, 1831, for this sum, and the said sum was paid by Mr Taylor, on a discharge subscribed by Mrs Moir herself : Finds, that Mrs Moir having died in September, 1831, left a settlement in favour of the defender, Miss Annesley : That the defenders then gave in a state, claiming the ultimate balance due of Mrs Moir's annuity, and on 19th January, 1832, obtained decree for £280, which the raiser has also paid on a discharge subscribed by Miss Annesley, as well as the defenders : Finds, that on 20th November, 1832, decree of exoneration was pronounced in favour of the raiser, Mr Taylor : Finds, that on 22d December, 1832, Mr Pedie, as assignee of Mr Spalding, and on the ground that he was the next arrester to Mrs Moir's trustees, put in a minute, claiming to be preferred to the balance of the fund ; and further, stating, that on the payments made to or on behalf of Mrs Moir, the property-tax had not been deducted ; and his claim not having been objected to, Mr Pedie was preferred accordingly : Finds, that after this, in order to claim for himself the amount of the property-tax, Mr Pedie raised the present process of reduction and repetition : Finds, that if property-tax was due on the sum payable under the decree of the Court to Mrs Moir's trustees, it was the duty of the raiser to have retained the same, or of the claimants to have objected that this should have been included as part of the fund in medio, for which he was accountable before he was exonerated ; and as it has not been shown that the pursuer is in right of the raiser, so as to plead in his name, or that such a claim has ever been sustained by way of repetition after payment on a judicial decree, not objected to by the pursuer or his author, and after a regular discharge of the debt—Repels the reasons of reduction, and sustains the defences ; assoilzies the defenders, and concerns : Finds the defenders entitled to expenses."

Pedie reclaimed.

LORD GLENLEE.—This party has neither title nor interest.
The other Judges concurring,

THE COURT adhered.

JAS. PEDIE, W.S.—JOHN BOWMAN, Agent.

JAMES M'NAUGHT, Suspende.—*Weir*.
JOHN GRAHAM, Charger.—*Cunninghame—A. Graham*.

No. 268.

May 22, 1834.
M'Naught v.
Graham.

Lease—Removing—Stamp.—A party in possession of a farm under an unstamped missive of lease having, during the currency thereof, been charged under a decree to remove, for not finding caution in terms of the Act of Sederunt, and objected that the missive was not stamped, the Court, in a suspension, remitted to the Sheriff to proceed in terms of the Act of Sederunt.

IN 1830, Graham of Craigallian let the farm of Boards, by an unstamped missive, to James M'Naught, for 19 years, at a rent of £110. In November, 1833, Graham raised an action before the Sheriff of Stirling-shire, founding on the missive and the Act of Sederunt, 14th December, 1756, setting forth, that M'Naught was more than a full year's rent in arrear, and concluding, to have him ordained to find caution, failing which, to remove. After a record was made up, the Sheriff ordained the defender to find caution; and as he failed in this, decree of removing was pronounced. The defender presented a reclaiming petition, and, founding on the case of Ross,¹ pleaded, that, as there was no stamped lease, the pursuer had no lawful ground of action, and that the action should have been dismissed. The Sheriff refused the petition, and M'Naught, having been charged to remove, offered a bill of suspension, without caution. The Lord Ordinary, in appointing the bill to be answered, issued the subjoined note.*

May 22, 1834.
1st Division.
Bill-Chamber.
Ld. Fullerton.
B.

Graham pleaded, that the case of Ross did not apply; and that the objection of the want of stamp was not tempestivè stated. In the meanwhile, he got the missives duly stamped.

The Lord Ordinary passed the bill on caution. The charger reclaimed, and the Court recalled the interlocutor of the Lord Ordinary, and instructed his Lordship to remit to the Sheriff to proceed according to the Act of Sederunt, reserving expenses.

J. MOORE, S.S.C.—GRAHAM and ANDERSON, W.S.—Agents.

¹ Jan. 18, 1834 (ante, p. 308).

* This case differs from that of Ross, 18th January, 1834. It is for removing during a lease, on account of non-payment of rents. The other was for removing when a lease had expired. The Lord Ordinary is bound to pay all deference to the decisions of the Court; but he must say, that he never should have assented to that judgment. If the lease was unstamped, and the Sheriff could not have looked at it, then the defender had no title of possession to defend him from removing. So said Lord Moncreiff. If the lease were to have been stamped, then, after stamping, it only proved that it was still no lease, because it was expired. It, therefore, seems somewhat ridiculous to stamp a deed to make it useless, and in reality no deed at all. This case, as already said, is different. If the missive be stamped, it may be a lease, and would be so if the complainer find caution."

No. 269; WILLIAM DRUMMOND (Cashier of Second Fife Banking Company),
 Pursuer.—*Skene—H. J. Robertson.*
 May 22, 1834. Fife Bank v. CHARLES HUNTER and OTHERS (Thomson's Trustees), Defenders.—
 Thomson's Trustees. *Keay—Murray.*

Partnership—Sale—Homologation—Personal Objection.—1. The contract of a company provided, that a partner could not effectually assign a share, unless certain stipulations were complied with; and a partner assigned a share, without observing these stipulations, but the company homologated the assignation—held, that they could not afterwards object to the validity of the transference. 2. Circumstances held sufficient to infer homologation of an assignation of a share of a company's stock, though the regulations of the contract of copartnery were not complied with.

Process—Summons.—An action being raised for payment of debt, on the medium that the defender continued a partner until the expiry of a contract in 1823; and he having ceased to be a partner before that date—held incompetent to discuss a claim founded on the defender's liability for debt, said to have been contracted before he ceased to be a partner.

Agent and Principal.—Held that a banking company were not entitled to plead ignorance of the entries made in their books, or of the actings of their own officers.

Proving of the Tenor—Process.—A defence being rested on the existence of a deed of assignation, which had been lost—defence held established, in respect of the adminicles of evidence produced, although no proving of the tenor was led.

May 22, 1834. ON 27th May, 1802, a copartnery was formed for carrying on the business of banking, under the firm of the Fife Banking Company. The contract was to endure for 21 years. It was provided, "that if any partner inclines to sell or transfer his share, he shall give notice of the intended sale, and the person to whom he proposes to sell, 30 days at least prior to a general meeting, of which notice the cashier shall immediately advise the whole partners by circular letters, and at the following general meeting, the intending purchaser must be approved of by a majority of the meeting properly authorized to vote, otherwise no sale can take place." It was also provided, that the share should be accepted of by the purchaser "in presence of the directors, who shall also sign the deed of acceptance, after being authorized by the Company." One of the original partners was the late Mr Thomson of Kinloch. He became desirous to sell his share in 1820, with the view of paying up a debt for which he was bound to the Bank on account of a Mr Gourlay, who had become bankrupt; and his agent repeatedly wrote to Ebenezer Anderson, accountant and teller of the Bank, asking whether he could find a merchant for them, and whether it was necessary to make an offer of them to the Bank, in the first instance. The share was advertised in November, 1820, and the copy or scroll of a deed was afterwards produced, which purported to be a sale and assignation of the share to Ebenezer Anderson, for £200. Anderson was therein taken to have accepted the whole conditions incumbent on the partners by their

document bore no date; but, on 2d August, 1822, the sum of £200 was No. 269.
 credited to Thomson's credit in the bank books, in these terms:—"By ^{May 22, 1834.}
 £200 from E. Anderson, £200;" and this was alleged to be the period ^{Fife Bank v.}
 when the price fell due. Part of the sum was applied in extinction of ^{Thomson's}
 the debt so far as still due by Thomson to the Bank for Mr Gourlay, and ^{Trustees.}
 the balance, being £169, was carried to Thomson's credit. An entry was
 made in the books of Thomson's law-agent, debiting him with drawing an
 assignation of Fife Bank stock by him to Anderson. Anderson was the
 holder of one share, acquired from a Mr William Reid, before the
 transaction with Thomson; and it was not alleged that he ever acquired
 any other share, except Thomson's. The first bank-dividend, after
 the date when the £200 was paid, fell due to the partners of the Bank on
 the 10th October, and there was an entry, of that date, to Anderson's credit,
 of the dividend upon two shares. The dividend was at the rate of £12,
 0s. per share, and the entry was in these terms:—"Paid Eb. Anderson
 or two, £25." On the margin, opposite to the entry, were the words:—

" Wm. Reid's, }
 Andrew Thomson's."

This payment was transferred from the day-book to the ledger, and
 entered there, under "dividends payable," in the handwriting of Welsh,
 accountant of the Bank. At the declaration of the next dividend, which
 was in October, 1823, an entry was again made in the books, to Ander-
 son's credit, of the dividend effecting to two shares.

At a general meeting of the Fife Banking Company, on 6th May,
 1822, at which Thomson was not present, it had been proposed to con-
 tinue the banking business, under a new contract, for five years after the
 expiry of the original contract in August, 1823, provided that the pro-
 prietors of 50 shares, out of the total capital of 60 shares, should concur
 in that resolution. The holders of 53 shares consented to this proposal,
 and a new contract was written and signed, between 6th August, 1822,
 and 9th June, 1823. It proceeded on the narrative, inter alia, "that it
 is very desirable, as well considering the pecuniary advantages of the
 present partners, as for promoting trade, manufactures, &c., that the Bank-
 ing Company should subsist for five years longer." It set forth, immedi-
 ately after the narrative, that certain persons, including both Thomson
 and Ebenezer Anderson, had resolved to become parties to a contract,
 to be renewed, under some modifications. The testing clause bore, that
 the deed was signed by Ebenezer Anderson, on 6th October, 1822, and
 again signed by him, "for Andrew Thomson of Kinloch," on the 9th of
 June, 1823. The deed bore two signatures of Anderson, adhibited at
 intervals, to one of which the words were added, "assignee of Andrew
 Thomson." Thomson did not sign the deed.

On 9th June, 1823, a general meeting of the parties to the new con-
 tract was held, at which directors were named, and Ebenezer Anderson
 was appointed to act as one of two joint-cashiers under it. In July,

No. 269. 1823, a circular, intended for the partners of the old contract, calling a general meeting, as on 4th August, 1823, was addressed to Thomson, who immediately caused his agent to enclose it to Anderson, along with a note, saying, "Mr Thomson received the enclosed letter, &c. He appeared surprised at it, as he had previously assigned his share to you." Thomson did not attend the meeting; and though a number of meetings were subsequently held, of the partners, both of the old contract and of the new, it did not appear that he had ever attended any, after the date of the alleged assignation to Anderson, or that he had received any other intimation to attend, except that which has just been mentioned. After the death of Thomson, his son caused a letter to be addressed to Anderson, requesting a state of the sums paid by his father to the Bank on account of Gourlay. In December, 1824, Anderson wrote, in reply,—“I now send you state, &c. You will notice that the £200, the price of the Bank stock I purchased from Mr Thomson, is at his credit on 2d August, 1822, the day it became due.” Anderson drew several dividends, in the new company, as a partner, to the extent of two shares.

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Trustees.

In December, 1825, the Second Fife Banking Company, being indebted in very large sums, ceased to carry on business, until which time Anderson had continued to act as joint-cashier. He afterwards fled the country, and was outlawed. Drummond, in 1831, as cashier of the Second Bank, raised an action against several parties, including Charles Hunter of Glencarse, the acting trustee of Thomson's representatives, setting forth, that a special mode of transferring shares had been provided in the contract; that, at the expiry of the contract, on 2d August, 1823, Thomson remained proprietor of a share; that a dividend was drawn by him, as late as the expiration of the contract; that the whole partners, except seven, had agreed to the renewed contract, and that Thomson was not one of the seven who refused; that the second Company, by the direction of the first, and of managers appointed by them, retired the notes and other obligations of the first; “that agreeably to account-current, commencing said 2d August, 1823, and ending 2d August, 1831, betwixt the First and Second Fife Banking Companies, the First Company was, at the last of these dates, addebted and resting-owing to the Second Company the sum of £143,005, 0s. 10½d. sterling:” that the said sum was still owing “by the said First Fife Banking Company, and the individual partners thereof, and those liable for its debts and obligations, to the said Second Fife Banking Company, and the pursuer.” He therefore concluded, that the first company, and the above-named individual partners, and their representatives, viz. Charles Hunter, as trustee of Thomson's representatives, &c., should be decerned to pay the said sum of £143,005.

In support of this demand, the pursuer averred that previous to the expiration of the contract on 2d August, 1823, heavy losses sustained, and great debts were due by the first Bank; that, &c.

representation, the partners were induced, during the currency of the contract, to believe that great profits had been made; but that, towards the close of the contract, several partners became aware of the heavy claims which would be instantly enforced unless they prolonged the contract, and that it had been resolved to continue it as already mentioned.

It was also averred that the whole of the debt, conform to account current entered, "was incurred by the first Company to the second in paying debts contracted by the first Company prior to the expiry of the contract;" and that Thomson and certain other defenders were either original partners, who remained so at the expiry of the first contract; or the representatives of such partners; or purchasers of the shares of original partners. The defender therefore pleaded, 1st, That there was no sufficient evidence of any assignation of the share by Thomson to Anderson; but, if such a deed had ever been executed, it was not good against the Company, because it was not in conformity to the stipulations of the contract, as the purchase had never been approved at a general meeting, nor was the transference sanctioned by the directors. And, 2d, That in so far as the debt entered for was contracted prior to the date of the alleged assignation, Thomson's representatives must still remain liable to relieve the pursuer.

The defender answered, 1st, That the books of the Company, containing the entries of the dividends paid to Anderson as purchaser of Thomson's share, together with the correspondence of parties, and the relative scroll of assignation, afforded conclusive evidence of a transference of the share to Anderson, which was confirmed by the circumstance, that subsequently Thomson was not called to any meetings; and that as the stipulations of the contract, regarding the transference of a share, were intended in favour of the Company, the Company might waive them, and they had effectually done so, and adopted Anderson as their partner, by the actings above detailed, in all of which the Company could neither plead ignorance of the contents of their books, nor of the actings of their officers; so that they must therefore be held to have been cognisant of the assignation, and to have homologated it. And, 2d, That there were good defences on the merits against the claim on account of debt alleged to be contracted prior to the assignation; but it was impossible to go into such a question under the present summons and record, as they contained no statement that any of the debts existed prior to the assignation, and the only grounds of liability applicable to the defender, were expressly laid to be, that his author continued a partner down to the expiry of the first contract, which was disproved.

The Lord Ordinary "found it proved by the documents produced or referred to, that the late Andrew Thomson sold his share, as a partner of the First Banking Company, in the year 1822, to Ebenezer Anderson, the accountant and teller of that Bank, for the sum of £200, and that the share was conveyed to him accordingly, by a deed of assignation granted by the seller; that the transfer of the share was not executed in the form,

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No. 269. and according to the rules prescribed by the contract of copartnery, but that it was recognised, homologated, and acted upon by the Company, and in consequence became effectual in a question with them, as well as in a question between the seller and the purchaser; therefore, that the late Andrew Thomson was not a partner of the Company at the expiry of the contract in 1823: Assoilzied the defender, Charles Hunter, as trustee for Thomson's representatives, from the conclusions of this action, and decerned, and found him entitled to expenses; reserving action to the pursuer, in competent form, for any sum for which Thomson's representatives may be liable, in consequence of Thomson being a partner of the Company previous to the transfer of his share in 1822."*

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* NOTE.—“ Though the contract of copartnery prescribes certain forms, according to which shares shall be transferred, the Company might dispense with these forms if they thought fit. *East Lothian Bank v. Turnbull*, 3d June, 1824 (ante, III. 95); *Turnbull v. Allan and Son*, 1st March, 1833 (ante, XI. 487).

“ In the present case, it is proved that Thomson sold his share to Anderson, and executed a deed of assignation in his favour. The original deed is not produced, Anderson having absconded, but sufficient adminicles are produced to prove its tenor, which it is not necessary to do in a substantive action to that effect, the deed being founded upon in defence only, and for various other reasons. *Moderators of the Synod of Merse and Tiviotdale v. Scott*, 21st November, 1753 (15,823).

“ That the transfer was recognised and acted upon by the Company, is proved by their giving Thomson credit in account for £200, being the price of the share, and applying that sum in extinction of a debt due by him to the Company; by payment of dividends on that share to Anderson, as holder of it, on various occasions, from the date of the transfer to the expiry of the contract; by entries in the Company's books to all these effects, ignorance of which the partners are not entitled to plead; by Anderson's admission into the Second Company as the holder of the share; by his being permitted to sign the second contract in that character, and to receive dividends upon it from the Second Company; and various other circumstances mentioned in the pleadings. Holding it clear that Thomson ceased to be a partner of the First Company at the date of the transfer, it follows that the present action cannot be maintained against his representatives, as liable for any debt contracted by the Company subsequently.

“ It has been argued, however, that the defender is liable for sums applied towards the extinction of debts contracted by the Company before Thomson ceased to be a partner, and that both at common law, and by the provision in the 13th article of the contract. But the Lord Ordinary thinks that that question cannot be competently raised under the record which has been closed in this action. The sum concluded for against the defender, rateably with the other partners and their representatives, is, ‘ £143,005, 0s. 10½d., with interest, agreeably to an account-current commencing the 2d of August, 1823, and ending 2d August, 1831,’ both periods being subsequent to Thomson's retirement; and it is not set forth in the Summons that any part of that sum was applied in paying debts, or satisfying obligations existing prior to 1823. Farther, it is set forth in the 22d article of the pursuer's Condescendence, as the sole medium concludendi, ‘ that the defenders are either, 1st, Original partners of the First Company, who remained so at the time of its contract, or the representatives or trustees of such partners; or

The Court, without calling on counsel to support the note, unanimously adhered. **No. 269.**

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LORD PRESIDENT.—The pursuer has insisted that the assignation by the late Mr Thomson to Anderson is invalid, in a question with the Banking Company, because it is inconsistent with the stipulations of the contract of copartnery, in regard to the transference of shares among the partners. But these stipulations were intended solely to confer certain privileges upon the Company, and were meant for their benefit. I conceive, therefore, that it was competent for the Company to waive them in any instance, and, if it be once proved that the Company did waive them, they cannot be allowed afterwards to recur to them. They cannot be allowed first to homologate the assignation, and afterwards, when a change of circumstances has occurred, to repudiate it. It thus becomes just a question of evidence whether the Company are proved to have waived their right of objection, and to have homologated the sale and assignation. Now it appears to me that on looking to the facts proved by the Bank books, and the acts of the Bank officers, whether cashier or accountant, as referred to in the note of the Lord Ordinary, it is clear that the Bank had waived all objections to the assignation, and had homologated it. I cannot allow the partners of the Bank to found on their ignorance, as individuals, of these transactions. The entries in the Bank books, and the acts of an officer of the Company, are enough to sustain the plea of homologation by the Bank. In these observations, I have assumed that there is evidence enough in the case to prove the fact of an assignation having been executed as alleged by the defender, a thing which does not appear to me to admit of a question. It is a case in which many of the circumstances, if taken singly and separately, might be open to much observation, but, when the whole are viewed in connexion, as they must in fairness be, they produce complete conviction.

LORD BALGRAY.—I take the same view, and I would just observe, that among the other facts of the case, there is one which appears to me to be of a very decisive character. I mean the repeated payment of dividends, entered in the books of the Bank to Anderson, upon the share sold to him by Thomson.

LORD GILLIES.—I concur with both of your Lordships. The payment of dividends to Anderson, and the discontinuance of payment to Thomson, afford both positive and negative evidence of the assignation.

THE COURT also expressed their concurrence in the opinion of the Lord Ordinary, that a claim for advances made in extinction of debts contracted

or assignees of the shares of original partners, who thus held shares, and were partners at the expiry of the contract, or the representatives or trustees of such purchasers or assignees, and are the whole parties jointly and severally liable for the debt sued for in this action. Lastly, There is no averment in the pursuer's Condemnation, nor plea in law annexed to it, applicable to this separate ground of liability. If it was to be insisted in, the pursuer, in fairness to Thomson's representative, ought to have brought it out distinctly on the record, that a defence might have been stated against it, which has not been done. But as it may perhaps be competently tried in another shape, action has been reserved."

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prior to Thomson's assignation, could not be supported under the present summons.

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Snell v. Glas-
gow Gas Com-
pany.

W. ALEXANDER, W.S.—J. FERGUSON, W.S.—Agents.

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WILLIAM SNELL, junior, Suspender.—*Monteith*.
GLASGOW GAS COMPANY, Chargers.—*More*.

Appeal to Circuit Court—Expenses—Cautioner.—Decree of an Inferior Court, appealed to a Circuit Court of Justiciary, having been recalled *hoc statu*, and a remit made to take further proof, and to decide, with power to award the expenses of the appeal, as well as the other expenses of process—Held that the cautioner in the appeal was not liable to implement the judgment of the Inferior Court, repeating their former decree, and decerning for expenses, including those of the appeal.

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2^D DIVISION.
Ld. Medwyn.
T.

By the 20th Geo. II. c. 43, which inter alia allowed appeals to the Circuit Courts of Justiciary in civil causes of a certain amount, it is provided as to that matter, that the complainer "at the time he enters his appeal, as aforesaid, shall lodge in the hands of the clerk of the Court from which the appeal is taken, a bond, with a sufficient cautioner, for answering and abiding by the judgment of the Circuit Court, and for paying costs, if any shall be by that Court awarded."

In 1830, the Glasgow Gas Company raised an action before the Magistrates of Glasgow against William Kerr and Company, merchants there, for payment of a sum of £12, 9s. 11d. as the balance alleged to be due for gas, averred to have been furnished to them, according to the indication of the meter. In defence, Kerr and Company pleaded that the meter was not a correct indicator of the quantity used. The Magistrates allowed a proof, but neither party led evidence of the sufficiency of the meter. The Magistrates, on advising the proof, found it not proven that the meter exhibited a larger quantity than was used, and decerned for the sum libelled, with expenses, amounting to £24, 0s. 6d. Kerr and Company thereupon entered an appeal to the Circuit Court, the suspender, Snell, granting bond as cautioner, whereby he bound himself "that the appellants should answer and stand by the judgment of the Circuit Court, and should make payment to the complainers (chargers) of whatever sum or sums of money should be found due to them, after discussing the said appeal, including the expenses of the appeal, if any awarded; and failing their doing so, that the said William Snell, junior, and his foresaids, should make payment thereof for them."

The appeal came to be discussed at the Autumn Circuit, 1831, before Lord Meadowbank, by whom the following judgment was pronounced:—"It is ordered and adjudged by the said Lord Meadowbank, ~~that the~~ said interlocutors be, and are hereby recalled *hoc statu*; ~~and~~ their answer, remitted, and hereby remits the case back to

of Glasgow, with instructions to remit the same to Dr Thomas Thomson, No. 270, whom failing, to Dr William Meikleham, both of Glasgow College, to inspect and prove, at the defenders' works, the gas meter placed by the pursuers in said works, and which was used for measuring the gas applied thereto, and to report his opinion on the accuracy of the said meter, as a measure of the gas passing through it to the said works; with power to the said Dr Thomas Thomson, whom failing, to the said Dr William Meikleham, in case he should see it necessary for the purposes of this investigation, also to inspect and try the said meter detached from the defenders' works, and other meters formed on the same principle and construction, and by the same manufacturer, and make such experiments on the same respectively as he shall think fit, and to report his opinion thereon as accurate indicators of gas passing through them, reserving all questions of expenses, and remitting to the Magistrates to proceed farther, as they shall see proper and just, with power to award to either party the expenses of this appeal, as well as the other expenses of process."

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gow Gas Com-
pany.

The cause having returned to the Magistrates, they remitted, in terms of the judgment; and, after obtaining a report from Dr Thomson, they again decerned for the amount sued for, with the whole expenses of process, including those prior to the appeal, those incurred in the appeal, and those subsequent to the remit, amounting in all to £45, 5s. 10½d. Kerr and Company having become bankrupt, shortly after the date of this decree, the Gas Company charged Snell, the cautioner, for payment. He thereupon brought a suspension, and pleaded,—

1. The bond of caution (which must be construed with reference to the statute) could only bind him that the appellants should obtemper the decree to be pronounced by the Circuit Court. That Court, however, recalled the judgment of the Magistrates, and thus sustained the appeal, whereupon the cautionary obligation came to an end, and it cannot be founded on, to the effect of making the cautioner liable that the parties should obtemper the decree of the Magistrates, a different Court, or of the Court of Session or House of Lords, should an advocacy and an appeal have been taken.

2. At all events, he cannot be liable for the expenses incurred subsequently to the remit.

To this it was answered—

The Circuit Court is entitled to remit a cause to the inferior Court, with instructions, in executing which the inferior Court acts by delegation. Here, accordingly, the remit empowered the Magistrates, after taking the proof pointed out, to pronounce decree, and dispose of the matter of expenses, including those incurred in the appeal. In applying this remit, and pronouncing judgment accordingly, the Magistrates exercised the delegated powers of the Circuit Court, so their decree falls to be considered as the decree of the Circuit Court, which, by

No. 270. his bond, the suspender became bound to see implemented, and this holds equally of the judgment, in regard to the subsequent expenses, as in regard to the other parts of the cause.

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The Lord Ordinary reported the cause on Cases, on advising which the Court directed them to be laid before the other Judges for their opinions.

The following were returned—

LORDS PRESIDENT, BALGRAY, GILLIES, MACKENZIE, COREHOUSE, MEDWYN, FULLARTON, and MONCREIFF.—“ The caution required by the statute is, ‘ for answering and abiding by the judgment of the Circuit Court, and for paying costs, if any shall be by that Court awarded.’

“ The obligation of the parties by the bond granted is, that the principal parties ‘ should answer and stand by the judgment of the Circuit Court, and should make payment to the complainers (the Gas Company) of whatever sum or sums of money should be found due to them, after discussing the said appeal, including the expenses of the appeal, if any awarded ; and, failing their doing so, that the said William Snell, junior, and his foresaids, should make payment thereof for them.’

“ Whatever may be held to be the effect of such an obligation, we are of opinion, that the bond, though somewhat varied in expression, must be held to be of the same force and import with the security required by the statute, and no more ; because the party had no right to demand, and the Court had no power to require, any other or more extensive security. But we are also of opinion, that in sound construction the bond is, in point of fact, an obligation in terms of the statute, and nothing more.

“ The judgment from which the appeal was taken to the Circuit Court, was a judgment finding the material fact stated in defence not to be proved, and therefore repelling the defence, and decerning against the defenders, Ker and Company, in terms of the libel. This judgment had been pronounced upon a proof.

“ The judgment pronounced by Lord Meadowbank upon this appeal did not affirm the judgment of the Magistrates appealed from. Neither did it find the appellants liable in any expenses, either of the process or of the appeal. After discussing the appeal, the judgment was one, by which the whole interlocutors were ‘ recalled hoc statu ;’ and before answer, the case was remitted, with instructions to the Magistrates to remit the matter to Dr Thomson, whom failing, to Dr Meikleham of Glasgow College, to inspect the gas meter, and report on the disputed matter of fact, reserving all questions of expenses, and to proceed farther as they should see just, ‘ with power to award to either party the expenses of this appeal, as well as the other expenses of process.’

“ It appears to us, that the effect of this judgment was clearly, in the first instance, to sustain the appeal ; because it not only implied that the judge who pronounced it was not prepared to affirm the judgment of the Magistrates on the proof hitherto taken, but actually recalled the interlocutors appealed from, and laid the case open to a new and entirely different course of investigation.

“ And this being the effect of the judgment, we are of opinion, that no sum of money were thereby found due by the appellants or their cautioner, and that no expenses were thereby awarded against them. The appellants were bound to answer and abide by the judgment, so far as it recalled the interlocutors and the new investigation before answer. But there was no judgment

inding them to pay any sum of money, either as the debt claimed, or as No. 270.
 a. We are therefore of opinion, that the obligation of Mr Snell, the cau- May 22, 1834.
 was fully satisfied and exhausted, when that judgment of the Circuit Court Snell v. Glas-
 nounced; and that he cannot be answerable by his bond for any sums that grew Gas Com-
 e decerned for by the Magistrates, after prosecuting the new investigation pany.
 ience to the remit. It would, in our apprehension, lead to the most per-
 consequences, to admit of any such extension of the obligation. The case
 e litigated for years in the Inferior Court. It might be taken a second
 appeal to another Circuit Court, in which appeal a new cautioner would
 ired; it might even be advocated to the Court of Session, and, after long
 on, appealed to the House of Lords; and it would be a strange result if
 ioner, in this simple matter of an appeal to the Circuit Court, should be
 le for all the remote consequences of the successful appeal, by which the
 ators were recalled, and the remit for farther enquiry made. It would
 state of the law on such obligations, which would render it very unsafe for
 dent man to grant such a bond, and hardly possible for the parties in such
 obtain cautioners at all. But although these difficulties appear to us to
 rious magnitude, we are of opinion, altogether independent of them, that,
 of principle, neither the terms nor the fair import of such a bond of caution
 nit of the construction maintained by the chargers.
 distinction is pointed at in the papers, between the claim for the principal
 th the expenses incurred before the appeal, and the expenses of the appeal
 ad the expenses incurred after the judgment. We do certainly think, that,
 gard to the latter, it would be peculiarly unjust to hold the cautioner to be
 ble for them. But, as our opinion is, that the cautioner cannot be at all
 ed in any part of the claim of the chargers, we do not think it necessary to
 rticularly into that distinction.
 e observe, that a question is also raised as to the power of the Circuit Court
 gate to the inferior Judge the power of determining the question as to the
 e of the appeal. Perhaps there may be doubt in the point, the jurisdiction
 rictly statutory. But, in the view which we take of the present case, we
 at this is a point not at all material to the decision of it. For, supposing
 Judges on circuit have that power, in the same manner as they certainly
 ver to remit the merits of the case for further trial and discussion, they
 y do so, as between the proper parties to the suit in the inferior Court.
 they may leave the general expenses of the process to be determined ac-
 to the ultimate result of the proceedings, perhaps they may be also enti-
 delegate the power of awarding the expenses of the appeal, as part of the
 xpense created, against the party at last found to be in the wrong. But
 really no connexion with the obligation of the cautioner. At the date of
 gment in the appeal, it was scarcely possible that costs could be given
 the appellants, while the interlocutors appealed from were actually recall-
 he only question must have been, whether they should be given to the ap-
 l. But neither was done. There is no judgment of the Circuit Court upon
 in the one way or the other; and, therefore, there is nothing which the
 er, by his bond, is bound to pay or to answer for.
 general, we are inclined to think, that much of the error in the argument
 chargers arises from confounding the situation of the cautioner with that of
 nicipal parties. The latter must stand by all the consequences of any com-

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petent judgment of the Circuit Court, independent of any bond. But the former interposes his security only for one limited and defined purpose. When that is answered, his obligation ceases. He is not a cautioner for all the contingent results which may be said to spring out of the appeal, though, in fact, produced by the imperfect state of the evidence on which the Magistrates at first decided, that is, by what must be assumed to be the just grounds of the appeal. He is simply liable to implement the judgment, if any judgment against the appeal shall be pronounced, or any sums shall be thereby awarded. If no such award shall be given, the case must rest as it was between the principal parties, and each must take his own risk of the subsequent proceedings. And we see no difficulty in the circumstance, that the case may be certified to the Court of Session, or to the High Court of Justiciary: That is in terms of the statute, and the judgment is still the statutory judgment on that appeal."

LORD CRAIGIE.—"I regret that, after full consideration of the opinions already given, I cannot give my assent to them.

"I humbly think, that in such a case enquiry should be made as to the practice of the other inferior Courts, in preparing bonds of caution in appeals to the Circuit Courts. That the form here used had been formerly followed in the city of Glasgow is not disputed, and if such was the prevailing usage in other places, I should be of opinion that it ought to remove all doubt that might otherwise arise as to the import of the clause in the act of Geo. II., referred to.

"It has been said, that *optima legis interpret consuetudo*, and in giving effect to an enactment passed nearly a century ago, it is reasonable to infer from the former usage, if uniform or nearly so, that when the form was first adopted, the opinion of the framers of the enactment, or of eminent lawyers at the time, had been taken, for expressing clearly what was truly intended.

"But holding the words objected to, *pro non scriptis*, still considering the statute as a remedial one, there seems enough to warrant the claim now made. The party taking the appeal is to lodge a bond, with a sufficient cautioner for answering and abiding by the judgment of the Circuit Court, and for paying costs, if any shall be by that Court awarded. But this must include all costs which are sanctioned by the authority of the presiding Judge. If he had decreed for the costs, as they should be taxed by the auditor or clerk of Court, surely the sum so ascertained would be exigible, although not immediately appearing from the interlocutor as subscribed by him. So in processes of advocacy, it is usual, and thought quite competent to remit with instructions, if the Lord Ordinary thinks fit, to give a decree for expenses, which have been incurred in the Court of Session, as well as those in the Inferior Court—a decree for the costs of an appeal, must include the whole costs that are the necessary consequence of the appeal, if no exception is made.

"The result of an opposite determination appears to be inconsistent with justice, and with the probable intention of the Legislature. It would compel the Judge, in such a case as the present, to refuse a farther proof, which he thought necessary, or by authorizing ulterior proceedings, to deprive the otherwise successful party of his claim for expenses, though justly due, and, in this instance, far exceeding those sums which gave rise to the dispute.

"After all, I must express a doubt how far the suspender can now be allowed to object to the terms of the bond subscribed by him. He may ~~be allowed to object~~ to an error which then prevailed; but still the error, if there was an

seen from ignorance of the public law, and is not imputable to the charger, who was not present at the preparation of the bond, and who had a right, from the tenor of it, to apply for such a judgment as was obtained. In this course, it will be observed, the suspender continued until the whole mischief was done. If he had objected before adhibiting his subscription, or before a decree had been obtained, not only the greater part of the expense would have been saved, but the charger might have escaped the loss afterwards arising to him from the bankruptcy of his debtors. At this time, the suspender's remedy, if any, must be by an action against his own agent, who should have prevented him from subscribing the bond in the same terms. It might be also noticed that the terms were not contrary to law, although perhaps not necessary for attaining the object which he had in view."

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Ross v.
M'Leay's
Trustees.

LORD JUSTICE-CLERK.—The opinions returned decide the cause; but I must say, that unless they proceed on the assumption that the Judge on the circuit committed an error in recalling the prior interlocutor of the magistrates, I hold the judgment to be pronounced a very hazardous one, if it is to be held to decide the general point.

LORD MEADOWBANK.—I still think I did right in recalling the interlocutor of the magistrates; but I agree with your Lordship that the judgment we must now pronounce will give rise to the greatest injustice.

LORD CRINGLETIE.—I agree with the consulted Judges.

LORD GLENLEE.—It would be proper in such remits for the Judges to qualify their judgment by making it a condition that new caution be found.

THE COURT suspended the letters simpliciter, with expenses.

CAMPBELL and M'DOWALL, W.S.—W. A. G. and R. ELLIS, W.S.—Agents.

HUGH ROSS, Pursuer.—*Rutherford—Neaves.*

No. 271.

M'LEAY'S TRUSTEES, Defenders.—*D. F. Hope—Shene—A. M'Neill.*

Process—Production of Writs.—Circumstances which the Court held insufficient to warrant the production, after the record had been closed, of a document which had been all along in possession of the party.

In an action of accounting between the pursuer Ross (formerly Rose) and the late Kenneth M'Leay, mentioned ante, XI, 546, the record was closed in 1829. A report was afterwards made by an accountant, and a discussion took place as to various objections. Among other items, M'Leay claimed credit for a sum of £725, remitted by one Sayers to Ross in 1803, and which Ross had placed to M'Leay's credit in his accounts. In regard to this item, the Lord Ordinary found (31st January, 1834) that M'Leay's trustees (who were now sisted in his place) were not entitled to credit, his Lordship being satisfied that the money was remitted in extinction of a debt due by one M'Leod. Against his Lordship's judgment, the trustees reclaimed. In the argument before the Lord Ordinary, the trustees had founded on the non production by

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R.

No. 271. Ross of the letter from Sayers, remitting the money, and which had been referred to by its date in a former petition by Ross, for recall of an inhibition; but on the reclaiming note being put out for advising, Ross stated that he had now discovered this letter, and proposed to produce it. It appeared that Ross had changed his agent in 1826, and he alleged, that after the transference of the papers, this letter had fallen out of sight, and had only been discovered after an anxious search recently made, whereby it was found stitched up with copies of correspondence, not supposed to contain any original letters. The trustees having objected to the production of the letter, the Court ordered minutes of debate.

May 22, 1834.
Ross v.
M'Leay's
Trustees.

Pleaded for Ross—

The pursuer was not specially called on to produce this letter prior to the closing of the record, no plea having been specifically taken as to the item of charge to which it relates, and the case is substantially one of *res noviter*, inasmuch as among the great mass of papers connected with the cause, the letter had been entirely lost sight of, and its discovery was rendered more difficult from the change of agency; but, at any rate, the Court, if they see that a production is necessary to throw light on a cause, so as to enable them to decide it satisfactorily, are entitled to call for production thereof, on its existence becoming known to them.¹

Pleaded for M'Leay's Trustees—

It is impossible to consider this letter as falling under the exception of *res noviter*, it having been referred to by its date in a former pleading of Ross himself. The party therefore having had it in his own possession, cannot be allowed to produce it after the record has been closed, without violating the express provisions of the Judicature Act and relative Act of Sederunt; and were the Court to call for production of such a document on the suggestion of a party, this would just be an evasion of these provisions, and equally incompetent.

LORD JUSTICE-CLERK.—After hearing the argument, I am of opinion that we are not warranted in allowing production of this letter. None of the cases referred to apply: they were under totally different circumstances. When a party at an early part of the cause quotes the date of a letter, and states its import, it is clear it must have been in his possession and knowledge. I do not go on the supposition of its having been wilfully withheld; but in a case of this kind, and where it was the peculiar duty of the party, if he meant the document to be produced, to have done so at once, it would be a most dangerous precedent to admit production at this date.

LORD GLENLEE.—This is merely an offer to produce, with a fair account of why it was not produced before. The other party does not accept the offer, and so the pursuer will just have the benefit of the argument, that he offered to produce, and the offer was refused; and I would let it stand there.

¹ A. B. v. C. D., Feb. 21, 1828 (ante, VI. 527); Hamilton v. ~~Cornwall~~ (ante, VII. 21); Smeaton v. Taylor, Feb. 4, 1832 (ante, X. 293).

LORD CRINGLETIE.—I agree with the chair; and further, I do not think the Court entitled to ask to see a document which the party has omitted to produce; and to let it in by such means, would just be evading the act. The document here must have been in the view of the party; and I am clear for not allowing it to be produced. No. 271.
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Langmuir v. Hunter.

LORD MEADOWBANK.—I am entirely of the same opinion. I understood it was not a mere offer, but that the pursuer was insisting on making the production. I agree entirely with Lord Cringletie, that we cannot call for a document to satisfy our own minds, which it would be incompetent for the party to produce. Sim v. Miles.

THE COURT accordingly refused to allow the production.

D. CLEGHORN, W.S.—JOS. GORDON, W.S.—Agents.

MRS LANGMUIR or M'NAUGHT, Suspender.—*Patterson.*
WILLIAM HUNTER, Charger.—*Wilson.*

No. 272.

Process—Mandate.—Circumstances in which the Court sisted procedure to allow a mandate to be produced for the charger in a process of suspension and liberation, who had quitted the country without leaving a mandate.

HUNTER the charger, in a process of suspension and liberation, having quitted the country without leaving a mandate, the Lord Ordinary, in January, 1834, appointed a mandatary to be sisted within ten days, and, in default of this, suspended the letters simpliciter, and found the suspender entitled to expenses. A reclaiming note was presented in Hunter's name, stating that he had gone to Canada, but meant to return; that it was by omission that no mandate was left, and a mandate had since been written for; and craving that the interlocutor should be recalled, and a reasonable time allowed for producing the mandate. May 23, 1834.
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D.

THE COURT sisted further procedure until the 20th of June next.

J. CULLEN, W.S.—R. KENNEDY, W.S.—Agents.

ROBERT SIM, Pursuer.—*D. F. Hope—Russell.*
Mrs MARGARET MILES or SIM, Defender.—*Rutherford—Neaves.*

No. 273.

Husband and Wife—Adultery—Proof.—Though two witnesses deponed expressly to their having committed an act of adultery with the defender, the Court, considering their testimony to be entirely unworthy of credit, absolved from an action of divorce.

Process—Marriage.—In an action for declaring the date of contracting a marriage, (which had been found by a previous decree to have been constituted, but without specifying the date,) the Court, of consent, pronounced decree, fixing the date as on 1st January, 1827.

No. 278. ON 22d May, 1829, Margaret Miles obtained a decree before the Commissaries, under a summons raised on 3d December, 1827, finding a marriage to be proved as between her and Robert Sim, in respect of a promise subsequente copula. The interlocutor also declared Robert Sim, junior, who was born on 31st October, 1827, to be a lawful child of that marriage. This decree was afterwards adhered to in this Court on 20th November, 1829.¹ On 21st June, 1830, Sim raised an action of divorce, on the head of adultery, against his wife, and libelled that the acts of adultery were committed on 2d February, 1827. The summons concluded, inter alia, for declarator, fixing the date of contracting the marriage to have been as early as 1st June, 1826, or at least 1st January, 1827, or at least 1st February, 1827; so that any act of fornication, if proved to be committed by the defender on 2d February, 1827, might also be proved to have been an act of adultery.

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Hutton's
Trustees v.
Hutton.

In the proof which followed, two of the witnesses, who were adduced, swore expressly that each of them had committed an act of fornication with the defender on the night of a ball given at Dundee, 2d February, 1827, in a close or entry leading off one of the public streets of that town.

The Lord Ordinary considered that their oaths were, in some material points, contradictory of each other, and were unworthy of credit. His Lordship therefore assoilized with expenses.

The pursuer reclaimed.

LORD PRESIDENT.—If we could believe these witnesses, the case would be very clear; but their testimony is utterly unworthy of credit.

The other Judges concurred, and the Court adhered, to the effect of assoilizing from the divorce, with expenses.

The pursuer's note especially craved the Court to fix the date when the marriage appeared on the evidence to have taken place. The defender observed that, from the proof, the date of 1st January, 1827, appeared to be that of contracting marriage, and she consented that it should be taken as the date of the marriage. An interlocutor was pronounced accordingly.

A. ROBERTSON, W.S.—H. INGLIS and DONALD, W.S.—Agents.

No. 274.

HUTTON'S TRUSTEES, Raisers.—*Dick.*
HELEN HUTTON and OTHERS, Claimants.—*Cuninghame.*

Process—Fee or Liferent.—Circumstances in which the Court held it premature to decide, in a multiplepinding, a question under a deed of settlement, as to whether a right of fee or of simple liferent was constituted by one of the bequests.

¹ Ante, VIII. p. 89.

THE late Mr and Mrs Hutton, spouses, having no children, executed, **No. 274.**
 in 1826, a mutual settlement, whereby they conveyed their whole pro- **May 23, 1834**
 perty and effects to each other, in liferent, for the life of the longest **8th Division.**
 liver, and to certain parties as trustees, in fee, for the uses and purposes **Ld. Medwyn.**
 herein set forth. The principal purpose of the trust was, that the whole **T.**
 property of the spouses should, after the death of the longest liver, be **Hutton's**
 divided into eight equal shares, whereof four were provided to the rela- **Trustees v.**
 tions of the husband, and four to the relations of the wife. As to these **Hutton.**
 last, the provisions of the deed were as follows:—" And the other four
 shares the said trustees shall pay to Peter Ferguson, father of the said
 Janet Ferguson, in liferent, for his liferent use alienably; and at his
 death, or in case of his predeceasing the longest liver of the said James
 Hutton and Janet Ferguson, the said trustees shall pay one share and
 half of the said four shares to Elizabeth Ferguson, sister-german of
 the said Janet Ferguson, in liferent, and to her lawful children, equally,
 and share and share alike, in fee—one share and a half of said four shares
 to Peter Ferguson, brother-german of the said Janet Ferguson, in life-
 rent, and to his lawful children, equally, and share and share alike, in fee;
 and the remaining fourth share shall be divided into two equal halves, and
 one of said halves paid by said trustees to Mary Ferguson, and the other
 half to Catherine Ferguson, sisters-consanguinean of the said Janet
 Ferguson, in liferent, and to their several children in case of their death,
 equally, and share and share alike, in fee.

" And in respect it is the intention of the said James Hutton and
 Janet Ferguson, that all the subjects and effects hereinbefore settled
 upon, and sums made payable to the said Janet Ferguson in the event of
 her surviving the said James Hutton, and entering into any future mar-
 riage, and also to the said Helen Hutton, Elizabeth Ferguson, Mary
 Ferguson, and Catherine Ferguson, shall be secured for their own proper
 use and behoof, in all events, it is hereby declared that the same are ali-
 mentary, and shall noways be affected by their debts or deeds, or by any
 diligence to be used by their respective creditors; and for the same
 reason, the jus mariti, and all right of administration competent by law
 to any future husband of the said Janet Ferguson, and to the present
 or future husbands of the said Helen Hutton, Elizabeth Ferguson,
 Mary Ferguson, and Catherine Ferguson, is hereby expressly ex-
 cluded."

Within a few months of the execution of this deed, Mrs Hutton died;
 and Mr Hutton having died in 1832, the trustees brought a multiple-
 pinding to have the rights of the several legatees determined. In this
 process, a minute was given in by parties entitled to the seven-eighths of
 the fund in medio, with concurrence of Mr Hutton's next of kin, and
 without any opposition on the part of the legatee entitled to the remaining
 eighth, agreeing to a certain distribution, which they considered to be
 that intended by the will. To this minute all the Ferguson family were

No. 274. parties, including the child of one of them deceased (Elizabeth Ferguson), for whom appearance was made by its father, as administrator in law; and it was proposed, so far as the shares of the survivors, Peter, Catherine, and Mary Ferguson were concerned, that these should be immediately paid over to those parties, who were all stated to be without children, and unmarried. The trustees, doubting how far the interest of these claimants was not limited to a strict liferent, and whether they were not bound to hold for the children of the claimants, should they any have, craved the judgment of the Lord Ordinary on this point. His Lordship thereupon ordered minutes on the question, "Whether a right of liferent or fee is vested in the claimants, the children of Peter Ferguson, senior?" And on these being lodged, he reported them to the Court.

May 24, 1834.
M'Nab v. Selkirk.
Stewart v.
M'Kenzie.

THE COURT pronounced this interlocutor: "Find, that it is premature to discuss the question of liferent and fee argued in these papers, and remit to the Lord Ordinary to proceed further in the cause as he shall think fit, reserving all questions of expenses hinc inde till the end of the cause."

CAMPBELL and MACDOWALL, S.S.C.—JOHN BLAIR, W.S.—Agents.

No. 275. DR DUNCAN M'NAB, Suspender.—*A. Dunlop.*
CHARLES SELKRIG, TRUSTEE for the DUKE of ARGYLE, Charger.—*Skene.*

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Ld. Mackenzie.
T.

J. A. CAMPBELL, W.S.—TOD and ROMANES, W.S.—Agents.

No. 276. JAMES STEWART, Pursuer.—*Skene—W. Bell.*
WILLIAM M'KENZIE and Others, Defenders.—*Jameson—Patton.*

Trust—Reparation—Contract.—A party bound himself, for an onerous cause, to uplift and retain part of a fund, and pay it over to two trustees, to be named by his husband and wife, for the use of the wife in liferent and her children in fee; he had power to appoint a factor, and he allowed the fund to lie over for several years in the hands of the factor, who became insolvent—held liable to the trustees, though no trustees had been appointed by the parents to receive it.

ON the death of the late James M'Culloch, in January, 1819, it appeared that his debts exceeded the amount which could be expected from his estate. Mrs M'Culloch or Stewart, his sister, was his heir and next of kin, and, at a meeting of his creditors, on 5th February, Mr William Inglis, W.S., on her behalf, offered to lend her name as executrix for the purpose of winding up the affairs, and to agree to any other relative proposal of the creditors, provided that no liability for the debts should be inferred against her, and "provided the creditors should make her some reasonable allowance out of the fund, to be secured to her in liferent, and her children in fee." The meeting agreed that her "offer should be acceded to, and that in consideration of her concurrence in winding up the affairs, 5 per cent of the whole funds which might be realized, should be given for behoof of her and her children." At a subsequent meeting, on 15th February, "it was unanimously agreed to that a committee should be appointed, under whose direction the affairs of the deceased should be wound up, in terms of the foresaid arrangements, and that for this purpose powers should be granted to them, 1st, to carry the arrangements with her, &c., into effect; 2d, 3d, &c., to realize the estate, &c.; 3th, to consider and arrange as to any deeds necessary to be granted by Mrs Stewart for behoof of the creditors."

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1st Division
Ld. Fullerton
D.

Stewart v.
M'Kenzie.

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Power was given to the committee "to appoint agents and factors"—
"Declaring hereby that my said commissioners shall be bound and obliged to hold just count and reckoning with the creditors of the said James M'Culloch, according to their several interests in the premises, for their intromissions, in virtue hereof, after retention always out of the same, of the foresaid consideration or allowance of £5 per centum on the whole funds to be realized, and which consideration or allowance to be so retained by the said commissioners, they shall be bound and obliged to pay over to two trustees, one to be named by me, the said Ann Stewart, and the other by me, the said Alexander Stewart, for behoof of me, the said Ann Stewart, in liferent, for my liferent use only, and the children pro-

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THE COURT pronounced this interlocutor: "Find, that it is premature to discuss the question of liferent and fee argued in these papers, and remit to the Lord Ordinary to proceed further in the cause as he shall think fit, reserving all questions of expenses hinc inde till the end of the cause."

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On the death of the late James M'Culloch, in January, 1819, it appeared that his debts exceeded the amount which could be expected from his estate. Mrs M'Culloch or Stewart, his sister, was his heir and next of kin, and, at a meeting of his creditors, on 5th February, Mr William Inglis, W.S., on her behalf, offered to lend her name as executrix for the purpose of winding up the affairs, and to agree to any other relative proposal of the creditors, provided that no liability for the debts should be inferred against her, and "provided the creditors should make her some reasonable allowance out of the fund, to be secured to her in liferent, and her children in fee." The meeting agreed that her "offer should be acceded to, and that in consideration of her concurrence in winding up the affairs, 5 per cent of the whole funds which might be realized, should be given for behoof of her and her children." At a subsequent meeting, on 15th February, "it was unanimously agreed to that a committee should be appointed, under whose direction the affairs of the deceased should be wound up, in terms of the foresaid arrangements, and that for this purpose powers should be granted to them, 1st, to carry the arrangements with her, &c., into effect; 2d, 3d, &c., to realize the estate, &c.; 8th, to consider and arrange as to any deeds necessary to be granted by Mrs Stewart for behoof of the creditors."

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On 23d February, a deed was executed by Mrs Stewart, and her husband Alexander Stewart, narrating these proceedings, and that a committee, consisting of William Mackenzie, W.S., William Inglis, W.S., and three others, had been appointed by the creditors, and had requested her to execute the said deed: "Therefore I do hereby nominate and appoint the said William Mackenzie, William Inglis, &c., my true and lawful commissioners, with full power to them to obtain me decerned executrix, qua nearest in kin, to my said deceased brother, it being understood that this confirmation is intended for the benefit of the creditors of my said deceased brother, and that I have been induced to give my consent thereto at the desire of a number of the said creditors, and under the provisions already mentioned, and thereafter, or sooner if thought necessary, to intromit with, uplift, and receive the whole estate and effects which belonged to my said deceased brother."

Power was given to the committee "to appoint agents and factors"—
"Declaring hereby that my said commissioners shall be bound and obliged to hold just count and reckoning with the creditors of the said James M'Culloch, according to their several interests in the premises, for their intromissions, in virtue hereof, after retention always out of the same, of the foresaid consideration or allowance of £5 per centum on the whole funds to be realized, and which consideration or allowance to be so retained by the said commissioners, they shall be bound and obliged to pay over to two trustees, one to be named by me, the said Ann Stewart, and the other by me, the said Alexander Stewart, for behoof of me, the said Ann Stewart, in liferent, for my liferent use only, and the children pro-

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No. 276. JAMES STEWART, Pursuer.—*Skene—W. Bell.*
WILLIAM M'KENZIE and Others, Defenders.—*Jameson—Patton.*

Trust—Reparation—Contract.—A party bound himself, for an onerous cause, to uplift and retain part of a fund, and pay it over to two trustees, to be named by a husband and wife, for the use of the wife in liferent and her children in fee; he had power to appoint a factor, and he allowed the fund to lie over for several years in the hands of the factor, who became insolvent—held liable to the fund, though no trustees had been appointed by the parents to receive the

On the death of the late James M'Culloch, in January, 1819, it appeared that his debts exceeded the amount which could be expected from his estate. Mrs M'Culloch or Stewart, his sister, was his heir and next kin, and, at a meeting of his creditors, on 5th February, Mr William Inglis, W.S., on her behalf, offered to lend her name as executrix for the purpose of winding up the affairs, and to agree to any other relative proposal of the creditors, provided that no liability for the debts should be incurred against her, and "provided the creditors should make her some reasonable allowance out of the fund, to be secured to her in liferent, and for children in fee." The meeting agreed that her "offer should be accepted, and that in consideration of her concurrence in winding up the affairs, 5 per cent of the whole funds which might be realized, should be given for behoof of her and her children." At a subsequent meeting, 15th February, "it was unanimously agreed to that a committee should be appointed, under whose direction the affairs of the deceased should be wound up, in terms of the foresaid arrangements, and that for this purpose powers should be granted to them, 1st, to carry the arrangements with her, &c., into effect; 2d, 3d, &c., to realize the estate, &c.; 4th, to consider and arrange as to any deeds necessary to be granted by Mrs Stewart for behoof of the creditors."

On 23d February, a deed was executed by Mrs Stewart, and her husband Alexander Stewart, narrating these proceedings, and that a committee, consisting of William Mackenzie, W.S., William Inglis, W.S., and three others, had been appointed by the creditors, and had requested her to execute the said deed: "Therefore I do hereby nominate and appoint the said William Mackenzie, William Inglis, &c., my true and lawful commissioners, with full power to them to obtain me decerned executrix, qua nearest in kin, to my said deceased brother, it being understood that this confirmation is intended for the benefit of the creditors of my said deceased brother, and that I have been induced to give my consent thereto at the desire of a number of the said creditors, and under the provisions already mentioned, and thereafter, or sooner if thought necessary, to intromit with, uplift, and receive the whole estate and effects which belonged to my said deceased brother."

Power was given to the committee "to appoint agents and factors"—Declaring hereby that my said commissioners shall be bound and obliged to hold just count and reckoning with the creditors of the said James M'Culloch, according to their several interests in the premises, for their commissions, in virtue hereof, after retention always out of the same, of the foresaid consideration or allowance of £5 per centum on the whole funds to be realized, and which consideration or allowance to be so received by the said commissioners, they shall be bound and obliged to pay to two trustees, one to be named by me, the said Ann Stewart, and another by me, the said Alexander Stewart, for behoof of me, the said Ann Stewart, in liferent, for my liferent use only, and the children pro-

No. 276.

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1st Division

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D.

Stewart v.
M'Kenzie.

No. 276. created between us equally in fee, free of the *jus mariti* and debts and
May 27, 1834. deeds of the said Alexander Stewart: And we hereby agree and declare,
Stewart v. that these presents shall not be revocable by us, or either of us." The
M'Kenzie. committee was composed of creditors, or agents for creditors.

On 5th May following, the commissioners granted a factory in favour of the firm of Messrs Inglis, Robertson, and Weir, W.S., giving them full authority "to expedite inventories and confirmations, one or more, as may be necessary, of the personal estate and effects of the said James M'Culloch, and to intromit with, uplift, receive, and discharge, and, if necessary, to sue for and recover, the whole debts and sums of money due to the said James M'Culloch or to us, in behalf of his creditors, or as commissioners foresaid, and to apply the sums to be realized and recovered by them, according as we may direct." "And it is hereby specially provided and declared, that our said factors and agents, by acceptance hereof, bind and oblige themselves to hold just compt and reckoning with us for their intromissions, in virtue hereof, whenever required, after deduction of the expenses disbursed by them, and sums paid under our direction, and a reasonable gratification for their trouble."

Under this factory funds were recovered, out of which a dividend of 10s. per pound was paid to the creditors in 1819, and another dividend of 3s. 6d. per pound in 1824. The payment was made by one or other of the persons named in the deed of factory; but Mr Robertson had retired from the firm of Inglis, Robertson, and Weir, before the latter payment was made. The per centage to which Mrs Stewart and her children were entitled out of the funds thus collected, amounted to at least £259. Neither Mrs Stewart nor her husband (whom she divorced) named a trustee to receive payment of the per centage fund, in terms of the deed of commission of 1819. The commissioners did not call up the fund out of the hands of the factors; and in 1828, the firm of Inglis and Weir became bankrupt.

In 1831, James Stewart, a son of Mrs Stewart, who was a minor for several years after the date of the deed of commission, raised an action against William Mackenzie, W.S., and the survivors of the five commissioners who had been named by his mother, at the request of the creditors. He set forth, that they had never paid over to trustees, for the use of Mrs Stewart in liferent, and her children in fee, the sum which was due to them in name of per centage, and which they had become bound to pay, under her agreement with the creditors of the deceased James M'Culloch; and he concluded against the defenders, jointly and severally, for accounting as to this sum, and for decree ordaining them to pay over the sum, when ascertained, "to such trustee or trustees as might be legally appointed for the purpose of carrying into effect the stipulations and conditions expressed in the said deed of commission."

The defenders pleaded, 1. That the destination of the ~~fee to the children~~ children being gratuitous, was revocable; it could therefore

a child to pursue during the lifetime of the mother. 2. The defenders had been empowered to appoint factors to realize the estate, and had done so; these factors were solvent then, and for many years after the estate was realized; the percentage on the funds realized could not be paid over, in terms of the deed of commission, until Mr and Mrs Stewart had each named a trustee to receive it; and as they had failed to do this, and had allowed the money to lie over until the failure of the factors, the loss must fall upon Mrs Stewart and the children, and not upon the commissioners, especially as the commissioners were not trustees for Mrs Stewart or her children, but parties named to act for behoof of the creditors of the late James M'Culloch. 3. The office of the commissioners was gratuitous, and they could only be made accountable for actual intromissions, or for negligence so gross as to be equiptate to award.*

No. 276.

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Stewart v.

M'Culloch.

The pursuer answered, 1. The interest conveyed to the children under the deed of 1819 was irrevocable, and afforded a good title to pursue. 2. By the deed of factory, the factors were directly accountable for their whole intromissions to the commissioners, and were at all times amenable to them. The commissioners were expressly bound to pay over the percentage fund to trustees, for Mrs Stewart in life, and her children in fee. This was an obligation contracted to the children, as well as to Mrs Stewart, and no negligence of Mr or Mrs Stewart could liberate the commissioners from their obligation to secure the children. If, therefore, the parents failed to name trustees to receive the fund, the commissioners could either have placed it in a bank, or consigned it judicially; if they chose to leave it lying in their factors' hands, who were under their entire control, it must be at their own risk, for they were, substantially, trustees for the children, to the effect of being bound to place the fund in safety which was due in fee to them. 3. The contract by which this provision was made in favour of the children was onerous, as between the creditors on the one part, and Mrs Stewart and her children on the other. Some of the commissioners were themselves creditors, and all of them, as a body, were as onerously bound to fulfil the obligation towards Mrs Stewart and her children, as their constituents, the creditors, were. If they gave their services to the creditors gratuitously, it might raise a question as to the relief they might claim from the creditors; but it did not make the right of Mrs Stewart and her children less onerous to enforce the obligation undertaken towards them.

The Lord Ordinary pronounced this interlocutor: " Finds, that in terms of the commission libelled, dated in 1819, the defenders were authorized to collect the whole effects of the deceased James M'Culloch,

* Some specialties were farther founded on by the defenders, such as, that Mrs Stewart and one of her children had repeatedly got partial payments out of the fund from Inglis, thereby recognising him as custodian for them.

No. 276. brother of Ann M'Culloch or Stewart, the granter of the said commission, and the mother of the pursuer: finds, that in terms of the said commission, these parties were bound to hold count and reckoning with the creditors of the said James M'Culloch, according to their several interests: finds, that they were also bound to retain out of the whole funds to be realized, the consideration or allowance of five per cent on the amount, which consideration or allowance so retained they were taken bound and obliged to pay to two trustees, one to be named by the said Ann Stewart, and the other by Alexander Stewart, her husband, a consentor to the deed, for behoof of the said Ann Stewart in liferent, for her liferent use only, and their children in fee, free of the jus mariti, &c.: finds, that by the said commission, the commissioners, the defenders, were empowered to appoint agents and factors: finds, that the defenders appointed, as agents and factors, Messrs Inglis, Robertson, and Weir, W.S., the principal partner of whom, Mr Inglis, is described in the commission as acting on behalf of Ann Stewart or M'Culloch: finds, that considerable sums, belonging to the estate of M'Culloch, were collected by the factors, partly by the factors originally appointed, Messrs Inglis, Robertson, and Weir, and partly by Messrs Inglis and Weir, who succeeded to the former copartnery: finds, that from the sums so collected, certain dividends were paid to the creditors: finds also, that out of the sums so collected, the per centage or allowance stipulated in the said commission was retained in fixing the amount of these dividends: finds, that this per centage or allowance was, as well as the dividends due to the creditors, left in the hands of the agents or factors, for the purpose of being paid to the parties entitled to receive the same: finds, that the circumstance of the per centage or allowance being in the hands of the factors, was known to Ann M'Culloch or Stewart, mother of the pursuer, who had divorced her husband, and who acted as the administratrix of the children; but finds, that neither she nor her husband appointed trustees authorized to receive payment of the allowance, in terms of the original commission: finds, that the agents and factors were, at the time of their appointment, and continued for several years after the allowance was left in their hands, to all appearance solvent: finds, that in these circumstances, the loss arising from their supervening insolvency is not imputable to the defenders, but to the negligence or intentional delay of the father and mother of the pursuer, by whom the trustees for the children were to be appointed. And therefore assolzie the defenders from the conclusions of the libel, but finds no expenses due." *

* "NOTE.—The case is attended with considerable difficulty; but upon weighing the whole circumstances, the Lord Ordinary thinks that the claim cannot be sustained. He so far concurs with the pursuer as to hold, that the interest created in behalf of the children by the commission, was irrevocable, and beyond the reach of any deed of Ann M'Culloch or her husband. But on the other hand, at

The pursuer reclaimed, and the Court ordered minutes of debate, on No. 276.
 considering which, their Lordships altered the judgment of the Lord
 ordinary.

May 27, 1834.
 Stewart v.
 M'Kenzie.

LORD BALGRAY.—The grounds on which I have latterly formed my opinion in this case are extremely simple, though I at first experienced considerable difficulty in making up my opinion. The terms of the obligation undertaken by the commissioners when they accepted the deed of 1819 which appointed them, appear to be decisive; and I am satisfied that the arrangement between Mrs Stewart and the creditors, of which this deed was a part, was a fair and onerous contract. Under that deed the commissioners, by accepting their appointment, expressly bound themselves to pay over to the creditors the funds realized, but “after deduction always of the allowance of five per cent on the whole funds to be realized, and which allowance so to be retained by the said commissioners, they shall be bound and obliged to pay over to two trustees, one to be named by me, the said Alexander Stewart, and the other by me, the said Alexander Stewart, for behoof of the said Ann Stewart, in liferent, for my liferent use only, and the children procreated between us equally in fee.” Now, I have no doubt that the intent of the children was irrevocable. And in regard to the obligation on the commissioners to retain this per centage, and to pay it over for behoof of Mrs Stewart and her children, the obligation is undertaken in terms so plain, that it does not admit of more than one explanation. But the defenders have not fulfilled this obligation. They were bound to have held the money in their hands, and I intend to deal with them as the actual holders of it now. I think the creditors were bound to see that the money was retained to meet the purpose for which they had

and that the commissioners became trustees for the children. They were merely to collect the funds—to retain the per centage from the funds divisible among the creditors, and to pay it to the parties entitled to receive it, namely, trustees to be appointed by Ann M'Culloch and her husband. They executed the commission, as they were entitled to do, and, as was indeed unavoidable, by means of their factors, when the funds being successively collected, declared certain dividends, after deduction of the per centage or allowance stipulated for by Ann M'Culloch.

Upon a question by the Lord Ordinary at the debate, he was informed that this per centage was treated precisely like the dividends due to the creditors. The same affording it, as well as the dividends, were lodged in bank by the factors, who, according to public notice, were authorized to pay the dividends to the creditors, and it did not seem to be disputed that those dividends had been paid; at all events, the factors were at that time, and for years afterwards, to all appearance solvent, and that the loss seems truly to have arisen, not from the conduct of the defenders, but from the negligence or intentional delay of appointing trustees on the part of the pursuer's father and mother—the last of whom appears, from the facts in dispute, to have considered, and to have dealt with Mr Inglis, on the footing of the money being her own. But as the loss has truly arisen from the insolvency of Messrs Inglis and Weir, combined with the delay in the appointment of trustees, Lord Ordinary thinks, that whatever claim the pursuer may have against the estate of Messrs Inglis and Weir, or against his mother, if she unduly appropriated any part of the allowance in the hands of the factors, he is not entitled to judgment against the present defenders.”

No. 276. undertaken it should be retained. In place of this, the money appears to have been lodged in the hands of Inglis, Robertson, and Weir, and afterwards to have got into the hands of Inglis and Weir; and, considering the time which was allowed to elapse without any attention being paid to it, I cannot think the conduct of the defenders was correct as men of business. If Mrs Stewart and her husband did not appoint trustees, the defenders should have got judicial authority for exonerating them of the fund for which they were liable to Mrs Stewart and her children. They entirely omitted this, and as they accepted their office, undertaking a special obligation which they have failed to fulfil, I think they are liable to the pursuer.

May 29, 1834.
Forbes v.
Baillie.

LORD GILLIES.—I view the case in the same light. I see no sufficient ground for holding that the defenders have got free of the obligation which was onerously undertaken towards Mrs Stewart and her children. Though not nominally trustees, they virtually were so, and they undertook an express obligation to retain the money. But they have not performed it. They not only appoint the factors to uplift, but allow the factors to retain the funds, of which they themselves should have been the custodians. They neither consigned the funds in a bank, nor applied for judicial authority towards their exoneration; and I cannot discover any principle for holding them to be exonerated.

LORD PRESIDENT.—I am of the same opinion. On considering the cases which have been decided on similar questions, I do not think the defenders have ever got effectually free of the obligation which they undertook towards the children of Mrs Stewart. When the object of appointing a factor is merely to uplift rents, it may be a good defence to state that he was habit and repute solvent; but the object of the appointment here was of so different a sort, that the same rule cannot be applied to the circumstances of this case.

THE COURT pronounced this interlocutor :—" Alter the interlocutor reclaimed against, repel the defences, and find the defenders liable in the pursuer's expenses, &c., and remit to the Lord Ordinary to hear parties in the count and reckoning," &c.

J. MALCOLM, S.S.C.—A. CLASON, W.S.—Agents.

No. 277.

Sir WILLIAM FORBES and Co., Raisers.
Sir WILLIAM BAILLIE, Objector.—*D. F. Hope—Colquhoun.*

May 29, 1834. *Process—Multiplepoinding.*—This was a case of a special nature. Sir William Forbes and Co. were the nominal raisers of a process of multiplepoinding, which was executed against Sir William Baillie, who gave in objections to the competency of the process. The Lord Ordinary repelled the objections. Sir William Baillie reclaimed, but the Court adhered, and subjected him in expenses.

1st Division.
Ld. Fullerton.
D.

A. SWINTON, W.S.—D. MANSON, S.S.C.—Agents.

MARY BLACK and Others, Pursuers.—*Carlyle*.
ROBERT HARDIE and Others, Defenders.—*M'Neill—Baillie*.

No. 278.

May 29, 1834.

Black v.

Hardie.

Contract—Mora.—Circumstances in which the Court assoilzied from a claim founded on a contract, which was dated nearly 30 years before the action was brought, the claim not having been prosecuted tempestivè, and a change of circumstances having occurred in the interim. Hutcheson v. Hutcheson.

THIS was a special case, involving the effect of a contract entered May 29, 1834, in 1801, between Black's ancestor on the one part, and the proprietor of a commonry on the other. They employed him to drain the commonry; and part of the remuneration for this service consisted in a right to work out the marl in certain parts of the commonry. The draining was carried on to some extent, and marl was also taken out at the same time. After a long interval, and a variety of proceedings since, and a change of circumstances, a claim on this subject being preferred by Black's representatives, the Lord Ordinary assoilzied, and the Court adhered. 1st DIVISION.
Ld. Fullerton.

J. DAVIDSON, S.S.C.—A. DOUGLAS, W.S.—Agents.

PATRICK HUTCHESON, Pursuer.—*Wilson*.
MRS HUTCHESON OF RICHARDSON, Defender.—*A. Wood*.

No. 279.

Proof—Process—Husband and Wife—Divorce.—It is necessary, in leading proof in an action of divorce, to furnish a list of witnesses to the agent of the opposite party; and this not having been done at the intimation of the diet of proof, and the depositions of the witnesses having been sealed up, the Court refused to allow them to be opened.

HUTCHESON raised an action of divorce against his wife. A proof was allowed, and commission was granted to the Commissaries to take the proof. The pursuer gave intimation to the defender's agent of a diet for leading proof, but did not furnish him with a list of witnesses. The defender objected to the examination of the witnesses, in respect that it had been always the practice in the Commissary Court to supply a list of witnesses at intimating the diet of proof; that though the jurisdiction of the Court was now transferred to the Court of Session, the same practice must continue till abolished by Act of Sederunt; and that it was useful to a defender, in actions of this sort, to have ample opportunity of ascertaining beforehand into the character of witnesses to be adduced against him. The pursuer answered, that in taking a proof on commission, in other cases, or in taking a proof in the Jury Court, no list of witnesses was furnished; and that, since the abolition of the Commissary Court as a separate jurisdiction, the same practice should be observed in taking a proof. May 29, 1834.
1st DIVISION.
Ld. Fullerton.

No. 279. proof on commission in a consistorial case, as in any other. The Commissaries ordered the depositions to be taken and sealed up; and, being
 May 30, 1834. reported to the Lord Ordinary, his Lordship reported the question to the
 Donaldson v. Court. Their Lordships held, that the former practice of the Commissary Court on this subject was not abolished; that it was necessary to
 M'Fee. furnish a list of witnesses; and that, the depositions having been irregularly taken, they must remain sealed up, and could not be read in the cause.

D. BROWN, W.S.—J. M'GILL, S.S.C.—Agents.

No. 280.

— DONALDSON, Pursuer.

— M'FEE, Defender.—*Robertson—Russell.*

Process—Jury Trial.—Circumstances in which the Court refused a motion for new trial, which was made on the ground that the verdict was contrary to evidence.

May 30, 1834. IN a jury trial at the circuit, Donaldson had obtained a verdict for a
 1st Division. very small sum of damages against M'Fee. M'Fee now moved for a rule to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence, and that a verdict should have been returned for him. Lord Fullerton, before whom the case had been tried, was present at the discussion of the motion, and after M'Fee's counsel had been heard, his Lordship was requested by the Court to deliver his opinion, which M'Fee stated was opposed to the verdict of the jury. His Lordship stated, that he considered the question raised at the trial to have been properly a question for the jury. He was not prepared to say, that, if he had been a jurymen, he would have coincided in opinion with the jury; but he thought the case was one which was to be left with them, and that there was nothing in the evidence to warrant a new trial, on the ground now pleaded, though the verdict had been in favour of the pursuer.

LORD PRESIDENT.—As the presiding Judge considered the question raised to be a proper jury question, and left it as such in the hands of the jury, I have not heard any thing stated at the bar to induce me to grant the motion now made.

LORDS BALGRAY and GILLIES concurred.

Motion refused.

CRANSTOUN and OTHERS, Pursuers (Trustees of Sir William Forbes and Company).—*Skene—Anderson.*

ROBERT C. BONTINE, Defender.—*Speirs.*

No. 281.

May 30, 1834.
Cranstoun v.
Bontine.

—*Bankruptcy*—Stat. 1621, c. 18; 1696, c. 5.—In an action on the statutes 1621, c. 18, and 1696, c. 5, the Lord Ordinary reduced, in terms of the libel, but, in a note, that he rested on the act 1696: the defender having reclaimed—Court “recalled the interlocutor, so far as the same reduces, and decerns, grounds of the act 1696, and remitted to the Lord Ordinary to proceed further in the cause as to his Lordship shall seem proper”—held that the case was not foreclosed from insisting, under the remit, on the act 1621.

CRANSTOUN, W.S. and others, trust-assignees of Sir William Forbes and Company, raised an action on the first branch of the act 1621, c. 18, and also on the statute 1696, c. 5, against Robert C. Bontine.

May 30, 1834.
1st Division.
Ld. Moncreiff.
D.

of Ardoch, to reduce certain missives of sale, and a relative claim and infestment. The Lord Ordinary pronounced a judgment, which he “reduced, decerned, and declared, in terms of the conclusions of the libel, and directed the case to be enrolled, and the parties may be heard on the remaining points in the case.” In a note, the Lordship explained, that “parties differed materially in regard to the grounds on which it would be indispensably necessary to ascertain before disposing of the case separately, of either of these grounds of reduction.” But his Lordship further stated, that the allegations of the defender, on the merits, were such, “that the deed under reduction, if not falling under the provisions of the act 1621, must necessarily, and according to the admission of the defender, be struck at by the act 1696. The only point remaining to be disposed of, is the conclusion for the rents.”

The defender having reclaimed, the Court “recalled the interlocutor, and the same reduces and decerns upon the grounds of the act 1696, and remitted to the Lord Ordinary, to proceed and do further in the cause as to his Lordship shall seem proper, reserving all questions of law and fact, hence inde, until the issue of the question presently in dispute.”

The pursuers having appealed, the House of Lords ordered, “that the appeal be dismissed, and the interlocutor complained of be affirmed.” After the Court had applied the judgment, the defender contended that, taking the interlocutors in connexion with the statements of fact, the pursuers could not now recur to the ground of reduction under the act 1621, and therefore that nothing remained except to pronounce judgment of absolvitor. The pursuers, on the other hand, maintained that as they had specially libelled on that act, and put averments on

¹ Feb. 2, 1830; ante, VIII. 425.

² 1 Sup. p. 16.

No. 281. record in support of that ground of reduction ; and as the Lord Ordinary had not decided any thing in regard to it, but placed his judgment on the act 1696, the recal of that judgment, "so far as the same reduces and decerns upon the grounds of the act 1696," necessarily left it to the pursuers to proceed upon the other ground libelled ; and that was the object of the remit to the Lord Ordinary, to proceed in cause, reserving all questions of expenses.

May 30, 1834.
Smith v.
Lauder.

The Lord Ordinary appointed minutes of debate, which he reported to the Court, on the point, "how far it is still competent to the pursuers to insist for reduction of the deeds called for, in respect of the statute 1621."

LORD PRESIDENT.—The very words of the interlocutor of this Court, recalling the Lord Ordinary's judgment, "so far as the same reduces and decerns upon the grounds of the act 1696," show that we did not decide on the other ground of reduction. On the contrary, the cause was remitted to the Lord Ordinary, reserving expenses, hence, with instructions to his Lordship to proceed in disposal of the cause as he should see fit. I think the pursuers are not forestalled from insisting in their grounds of reduction on the statute 1621.

The other judges concurred.

THE COURT therefore remitted to the Lord Ordinary to proceed accordingly.

E. MACMILLAN, S.S.C.—KER and DICKSON, W.S.—Agents.

No. 282.

ALEXANDER SMITH, Pursuer.—*D. F. Hope—Russell.*
MRS MACBETH or LAUDER, and Others, Defenders.—*Rutherford—Russell.*

Testament—Legacy—Foreign.—A Scotsman domiciled in Scotland, who possessed slaves in Demerara, executed in Scotland a deed of settlement, whereby he directed his executors to sell the slaves, put out the proceeds to interest, put interest to his father and mother, and the survivor, and, at the death of both parents, to divide the proceeds, by giving one-fifth to each of his brothers, John and Alexander, one-fifth to each of his sisters, Anne and Margaret, and one-fifth to John and Alexander predeceased the surviving parent :—held, that the right to their respective shares vested in each of them from the testator's death, and, 2. That the vested rights "were shares of funds, subject to a foreign law, the valid taking up of which, by the representatives of the deceased, no action was necessary."

Res Judicata—Process.—In a multiplepinding, a party appeared, and made a pro forma representation, to prevent a decree of preference from becoming absolute, but made no claim nor stated any thing on the merits—held, that this does not form res judicata, so as to bar an action of reduction.

May 30, 1834.

1st Division.
J. A. Moncreiff.

THE late Dr William Macbeth, a Scotsman, went to Demerara, and practised the medical profession there for some years, prior to 1797.

l to Scotland, early in that year, and remained in Scotland till No. 282.
 th of October, when he died, without having indicated any inten-
 again leaving Scotland. On the 7th of October, he executed a May 30, 1894.
 nt, dated at Inverness, in these terms :—" Messrs Ichabod Smith v.
 Robert Gordon, and George Inglis.—GENTLEMEN, On consider-
 will which I made and deposited with Mr Brush at my departure
 merara, in which I named you my executors, and being now de-
 alter it, I hereby declare the present writing to be the only des-
 of my property which I wish and desire to be made, and I do
 all former wills to be cancelled, and request you to attend hereto,
 executors; and whatever measures are taken by any two of you
 ng the fulfilment and execution of this, my last will and testa-
 all be binding on my heirs to all intents and purposes. It is my
 desire that all my slaves be sold as soon as may be convenient,
 the proceeds, after paying all my just debts, together with any
 arising from the partnership of M'Beth and M'Donald, be, as
 convenient, put to interest, at the discretion of my aforesaid exe-
 and, in like manner, the proceeds of all moveables and effects, of
 ver description, that do belong to me; and the interest of the
 [desire may be paid to my father and mother annually. On the
 either of my parents, it is my wish and desire that the survivor
 e with my sister, Mrs Anne Lauder, who, in such event, is to re-
 ch aforesaid interest for the benefit of my surviving parent; and
 eath of both my parents, the amount of the whole of my property
 y desire to be divided in the following manner:—One-fifth to
 my two brothers, John and Alexander; one-fifth to each of my
 rs, Anne and Margaret; and one-fifth to Miss Jane Edwards of
 gh, daughter of the late Captain Edwards, as a mark of my es-
 d attachment. I request that the interest above mentioned to be
 parents, may be lodged, at the convenience of my executors, in
 ds of some respectable inhabitant of Inverness, who will take
 ble of paying it quarterly to my parents and to my sister, Anne,
 aid."

e death of Dr Macbeth, Mr Inglis, one of the executors, resided
 and; the other two executors were in Demerara. It did not ap-
 v far Mr Brush had ever acted. But Mr Robert Gordon, soon
 Macbeth's death, sold the slaves to a Mr Spencer Mackay. The
 of sale bore to be between Mr Gordon, "acting executor to the
 and testament of Dr Macbeth, and authorized by a sanction of the
 ble Court of Justice." The appraised price was stated to be 23,450
 , which "the said Spencer Mackay engages to pay, at the demise
 ther and mother of the deceased Dr Macbeth, into the hands of
 utors, representatives, or to the heirs by will; and the said
 Mackay, moreover, obliges himself to pay in England, every six
 lawful interest, at the rate of 6 per cent per annum on the ap-

No. 281. record in support of that ground of reduction ; and as the Lord Ordinary had not decided any thing in regard to it, but placed his judgment solely on the act 1696, the recal of that judgment, "so far as the same reduces and decerns upon the grounds of the act 1696," necessarily left it open to the pursuers to proceed upon the other ground libelled ; and that this was the object of the remit to the Lord Ordinary, to proceed in the cause, reserving all questions of expenses.

May 30, 1834.
Smith v.
Lauder.

The Lord Ordinary appointed minutes of debate, which he reported to the Court, on the point, "how far it is still competent to the pursuers to insist for reduction of the deeds called for, in respect of the statute 1621."

LORD PRESIDENT.—The very words of the interlocutor of this Court, recalling the Lord Ordinary's judgment, "so far as the same reduces and decerns upon the grounds of the act 1696," show that we did not decide on the other grounds of reduction. On the contrary, the cause was remitted to the Lord Ordinary, reserving expenses, hinc inde, with instructions to his Lordship to proceed in the disposal of the cause as he should see fit. I think the pursuers are not foreclosed from insisting in their grounds of reduction on the statute 1621.

The other judges concurred.

THE COURT therefore remitted to the Lord Ordinary to proceed accordingly.

E. MACMILLAN, S.S.C.—KER and DICKSON, W.S.—Agents.

No. 282.

ALEXANDER SMITH, Pursuer.—*D. F. Hope—Russell.*
MRS MACBETH or LAUDER, and Others, Defenders.—*Rutherford—Russell.*

Testament—Legacy—Foreign.—A Scotsman domiciled in Scotland, who possessed slaves in Demerara, executed in Scotland a deed of settlement, whereby he directed his executors to sell the slaves, put out the proceeds to interest, pay the interest to his father and mother, and the survivor, and, at the death of both his parents, to divide the proceeds, by giving one-fifth to each of his brothers, John and Alexander, one-fifth to each of his sisters, Anne and Margaret, and one-fifth to Miss Edwards ; and John and Alexander predeceased the surviving parent :—held, 1. that the right to their respective shares vested in each of them from the testator's death ; and, 2. That the vested rights "were shares of funds, subject to a foreign law, to the valid taking up of which, by the representatives of the deceased, no confirmation was necessary."

Res Judicata—Process.—In a multiplepinding, a party appeared, and lodged a pro forma representation, to prevent a decree of preference from becoming final, but made no claim nor stated any thing on the merits—held, that this decree did not form res judicata, so as to bar an action of reduction.

May 30, 1834.

1st DIVISION.
Ld. Moncreiff.
D.

THE late Dr William Macbeth, a Scotsman, went to ~~Dumfries~~ ~~and~~ practised the medical profession there for some years, prior

returned to Scotland, early in that year, and remained in Scotland till the month of October, when he died, without having indicated any intention of again leaving Scotland. On the 7th of October, he executed a settlement, dated at Inverness, in these terms :—" Messrs Ichabod Brush, Robert Gordon, and George Inglis.—GENTLEMEN, On considering the will which I made and deposited with Mr Brush at my departure from Demerara, in which I named you my executors, and being now desirous to alter it, I hereby declare the present writing to be the only destination of my property which I wish and desire to be made, and I do declare all former wills to be cancelled, and request you to attend hereto, as my executors; and whatever measures are taken by any two of you respecting the fulfilment and execution of this, my last will and testament, shall be binding on my heirs to all intents and purposes. It is my will and desire that all my slaves be sold as soon as may be convenient, and that the proceeds, after paying all my just debts, together with any moneys arising from the partnership of M'Beth and M'Donald, be, as soon as convenient, put to interest, at the discretion of my aforesaid executors; and, in like manner, the proceeds of all moveables and effects, of whatsoever description, that do belong to me; and the interest of the whole, I desire may be paid to my father and mother annually. On the death of either of my parents, it is my wish and desire that the survivor do reside with my sister, Mrs Anne Lauder, who, in such event, is to receive such aforesaid interest for the benefit of my surviving parent; and at the death of both my parents, the amount of the whole of my property I hereby desire to be divided in the following manner :—One-fifth to each of my two brothers, John and Alexander; one-fifth to each of my two sisters, Anne and Margaret; and one-fifth to Miss Jane Edwards of Edinburgh, daughter of the late Captain Edwards, as a mark of my esteem and attachment. I request that the interest above mentioned to be paid my parents, may be lodged, at the convenience of my executors, in the hands of some respectable inhabitant of Inverness, who will take the trouble of paying it quarterly to my parents and to my sister, Anne, aforesaid."

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At the death of Dr Macbeth, Mr Inglis, one of the executors, resided in Scotland; the other two executors were in Demerara. It did not appear how far Mr Brush had ever acted. But Mr Robert Gordon, soon after Dr Macbeth's death, sold the slaves to a Mr Spencer Mackay. The contract of sale bore to be between Mr Gordon, "acting executor to the last will and testament of Dr Macbeth, and authorized by a sanction of the honourable Court of Justice." The appraised price was stated to be 23,450 pounds, which "the said Spencer Mackay engages to pay, at the demise of the father and mother of the deceased Dr Macbeth, into the hands of the executors, representatives, or to the heirs by will; and the said Spencer Mackay, moreover, obliges himself to pay in England, every six months, lawful interest, at the rate of 6 per cent per annum on the ap-

No. 282. praised value," &c. Farther, "the said Spencer Mackay binds himself to procure, within 12 months from this date, security in England for the payment of the whole amount, with interest-money, to the satisfaction of one or either of the executors foresaid, or to their representative or representatives duly authorized for this purpose."

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Lauder.

In a letter from Mackay to Inglis, on 5th March, 1799, he stated, that he had become bound "to procure a security, approved by you, for the payment of the principal, and the interest every six months, in England." "You will of course have the bond executed in sterling money, as the payment of interest and capital is to be made in England." Another letter, from a Mr James Gordon, in London, a correspondent of Mackay, addressed to Inglis, on 21st May, 1799, stated, "On reading over Mr Mackay's letter a second time, I find he desires me to grant you a bond, as executor to Dr Macbeth, &c., with interest at 6 per cent, payable half-yearly to your order, which shall be regularly complied with, and the principal he desires to be reduced into sterling, at the present exchange, and to be made payable nine months after the death of the parents."

Mr Robert Gordon, one of the executors, came, about this time, to London, and it appeared from the account of a London attorney, dated in 1800, that a bond had been then executed, as he charged Dr Macbeth's executors with the expense attending on drawing out "a bond from Mr Mackay, and Mr James Gordon as his surety, for the performance of an agreement for the payment of 23,450 guilders, currency of Demerara, with interest, at 6 per cent, for negroes purchased," &c. This bond, which was signed under a power of attorney by Mackay, was afterwards lost.

At the death of Dr Macbeth, he left two brothers, John and Alexander, and two sisters, Anne, married to Mr Lauder, and Margaret, married to Alexander Smith. John died, unmarried, about the year 1800; Alexander died, unmarried, in 1808; Mrs Smith died in 1810, leaving a husband and a daughter; and Dr Macbeth's father, who survived his wife, died in 1813. All these parties were resident in Scotland, except John Macbeth, who was not alleged to have lost his Scottish domicile. The interest on Mackay's bond had been always paid to Inglis, the executor, who resided in Scotland, and, apparently, this was done by remittances from Mackay to a London house, on which Inglis drew, and he then paid the interest to the Doctor's father, so long as he lived. On his death in 1813, Inglis received payment of the proceeds of Mackay's bond, of which he paid one-fifth part to Mrs Lauder the surviving sister of Dr Macbeth, one-fifth part to Miss Edwards, and he also paid one-fifth part, without objection, to Alexander Smith and his daughter, as in right of Mrs Smith. He raised a multiplepoinding as to the two fifth shares which would have belonged to John and Alexander Macbeth, the Doctor's brothers, had they survived their

Lauder expedite a confirmation to both of them, and was preferred in the process. Appearance was made for Alexander Smith and his daughter, who repeatedly borrowed up the process, and lodged a pro forma representation against the interlocutor of preference, to prevent it from becoming final. The Lord Ordinary "refused this representation, which does not state the merits of the case, and adhered," &c. After the interlocutor had been for some time final, decree of preference was extracted by Mrs Lauder, and the shares were paid to her in 1822.

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In 1828, Alexander Smith raised a reduction of the decree of preference, and pleaded—

1. It was a decree in absence. Though appearance had been made for him, he had never lodged a claim, and there was thus no room for the plea of *res judicata*, as no judgment upon the merits of his claim had been pronounced.¹

2. The shares of John and Alexander Macbeth vested in them from the moment of the testator's death. The distribution of the capital sum bequeathed was postponed until the death of Dr Macbeth's last surviving parent; and the interest of the sum was payable to such parent during survivorship; but the fee of one share, under these burdens, vested immediately on the testator's death.² Such share was given absolutely and unconditionally to each of John and Alexander nominatim; and the term of its becoming payable was one which must certainly arrive, though the precise period of its arrival was contingent on the death of a surviving parent. It was clearly the intention of the testator to give a vested interest to each legatee, and such intention ought to receive effect.

3. Even if Dr Macbeth were to be regarded as a domiciled Scotsman at his death, the share of his succession which vested in the legatees was moveable property not situated in Scotland. At the testator's death it consisted of slaves in Demerara, and was afterwards converted into an English bond bearing interest at the rate of six per cent, and the debtor resided in Demerara. Besides this, the principal was payable, and was paid in London, and the interest had been paid by remittances to London. But, as the share of John and Alexander was thus a share of foreign funds, it must have vested in them, to the effect of transmitting to their next of kin without confirmation, if such funds, by the law of the place where they were locally situated, did vest and transmit without confirmation;³ and the pursuer was ready to prove that such was the law, whether the

¹ Boyd, 1772 (5 Brown's Supp. 425); Crawford, *ibid.*; Leith, June 7, 1822 (*ante*, I. 468); Millie, Nov. 27, 1801 (12,176); Smith, Dec. 14, 1711 (12,194).

² Fowke, March 1, 1770 (8092); Sempill, Nov. 15, 1792 (8108); Turnbull, July 28, 1778 (8099); Wallace, Jan. 28, 1807 (*Dict. v. Clause*, Appx. p. 14); Smith and Others, June 2, 1826 (*ante*, IV. 659, and 3 W. & S. 366); Rutherford, May 30, 1821 (*ante*, I. 37).

³ Egerton, Nov. 27, 1812 (F.C.); Craigie, June 12, 1817 (F.C.); Milligan, Feb. 9, 1826 (*ante*, IV. 432).

No. 282. funds were regarded as English or colonial. The fact that executors had been appointed, and that the executor resident in Scotland had survived the rest, and had taken a considerable management, did not affect the right of the legatees; otherwise, the change of residence of an executor, after a testator's death, or the decease of one or two executors in one country, before that of another in a different country, might have the effect of altering the succession of legatees, without the least connexion with the will of the testator.

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4. At the death of John and Alexander, a part of the share of each having transmitted to Mrs Smith, the pursuer's deceased wife, as one of the next of kin, a right to it immediately vested in the pursuer, *jure mariti*. He was now entitled to claim two-third parts of the portion which had thus fallen under the *jus mariti*.

The defenders, besides various special defences, pleaded—

1. The decree was truly *in foro*; the claim, therefore, fell under the exception of *res judicata*, and could not be revived.

2. None of the legatees possessed a vested right in the capital of the bequest, until after the death of the last surviving parent of the testator. The executors were directed to realize the estate; to put it to interest; to pay the whole interest to the parents; "and at the death of both my parents, the amount of the whole of my property I hereby desire to be divided in the following manner: one-fifth to John," &c. There were no words which gave or granted any thing to any of the five legatees, as from the death of the testator; the only provision in their favour was wholly suspended until after the death of both parents, and made no reference to them as legatees until after that event; therefore no right had vested in any of the five legatees until that event occurred, and if any one predeceased, the legacy necessarily lapsed.¹ As both John and Alexander, and the pursuer's wife, had so predeceased, no claim was competent to the pursuer, of any sort, in respect of the legacies destined to John and Alexander.

3. As the testator was a Scotsman who had returned to this country, and spent some months here when he made his settlement and died, he must be dealt with as a domiciled Scotsman, there being no proof adduced of his having had any intention to leave this country. If it were held that, under his settlement, a right had vested in John and Alexander Macbeth, this was a right, the vesting of which did not depend on the circumstance, whether the subject of succession was a native or foreign fund, but solely on the terms of the Scottish settlement itself; and it was a right, ascertained to vest in them, by the law of Scotland alone. Such

¹ Voet. ad Pand. l. 36, t. 2, § 2. Quando dies, &c.; Burnett, Dec. 17, 1738 (474); Burden, April 27, 1738 (Cr. and St. App. 216); M'Culloch, Dec. 18, 1760 (639); Glendinning, Nov. 30, 1825 (ante, IV. 237); Stevenson, June 30, 1826 (140); 776; Buchanan, Feb. 12, 1830 (ante, VIII. 516).

t, on their death, could be taken up only according to the law of No. 282.
 land.¹ It had no essential connexion with the local position of the
 la, or the residence of the executors. But if either of these latter cir- May 30, 1894.
 stances could affect the question, it would be the residence of the exe- Smith v.
 r, who finally uplifted the contents of the bond, and was debtor to the Lauderdale.
 tees. He was domiciled in Scotland, and the legatees had nothing
 a claim against him, which was to be made good in a Scottish court.
 h a right as this must be dealt with according to the law of Scotland,
 it could not vest without confirmation.

. If nothing vested in the wife of the pursuer, there was nothing
 smitted to him under the *jus mariti*.

The Lord Ordinary pronounced this interlocutor: " Finds that the
 ect-matter of this reduction is not *res judicata* as between the present
 ias, and repels the defence stated on that ground: Finds that, by the
 is of the will executed by Dr W. Macbeth, there was a right legally
 ed, at his death, in each of his brothers and sisters, and Miss Jane
 vards, in the fee of one-fifth part of the produce of his estate, or in a
 n against the executors named by him to that extent, subject to the
 interest of the father and mother of the testator, and the longest liver
 hem: Finds that, by this title, John Macbeth and Alexander Macbeth
 , severally, vested rights, under this trust, to the shares of the trust-
 ls appointed for them at the time of their deaths respectively, though
 beneficial interest in the said funds still stood suspended by the sur-
 vance of the father, William Macbeth; but finds, that the rights so
 ed were of such a nature, that, by the law and practice of Scotland,
 hen established, both at the times of the deaths of the said John and
 xander, and at the death of the said William Macbeth, the father, they
 ld only be validly taken up and transmitted by their nearest of kin, by
 of confirmation duly proceeded in: Finds, that Margaret Macbeth,
 deceased wife of the pursuer, having predeceased her father, never
 ing obtained possession of the property in question, and not having
 ed any confirmation as one of the nearest in kin to the said John
 Alexander Macbeth, or either of them, any right competent to her,
 hat character, to a share of the claims descending to the representa-
 s of the said John and Alexander, against the trust-funds of the tes-
 r, was not duly vested in her, and was not effectually assigned or
 smitted to the pursuer as her husband, and her other representatives:
 erefore, Finds that the said shares of the funds in question were
 idly taken up by the defender in this action, and that the decree under
 action is not liable to reduction on any ground of law: Sustains the

Christie, Nov. 4, 1746 (4569); Watson, Jan. 21, 1792 (Bell's Cases, 92); Ar-
 r, Jan. 21, 1792 (F. C.); Royal Bank, Jan. 20, 1813 (F. C.); Rickman, &c.,
 124, 1827 (*ante*, V. 700).

No. 282. defences, assoilzies the defenders, and decerns: Finds expenses due, &c." *

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* "NOTE.—This cause involves three points, two of which, at least, are of some difficulty. The Lord Ordinary thinks the first point, that of form, clear enough; and the cases of *Boyd and Crawford* in 1772, (Brown, 5,425,) and *Leith*, June 7, 1822,¹ appear to decide it. The question, Whether there was any vested right in John and Alexander, is certainly nice. But the decision of the House of Lords in the case of *Leitch v. Smith*, February 17, 1829, is very much in point. The Lord Ordinary cannot distinguish that case, in principle, from the present; and he sees no reason to doubt here, that the testator's intention must have been to give a vested interest. The later cases referred to, though important, admit of explanation consistently with that decision—some of the earlier he should have thought very much opposed to it.

"But the third point is equally essential, and more difficult. Supposing that such rights were vested in John and Alexander, were they transmitted to Margaret, the pursuer's wife? It gives a feeling of hardship to consider this point, after the law has been entirely altered by the 4th Geo. IV. c. 98. But the rights of the present parties must be determined by the law as it stood at the death of Margaret Macbeth, in 1810. At that period, taking Alexander and John Macbeth as domiciled Scotchmen, the rights vested in them, in regard to Scotch moveable property, could not pass, ab intestato, to their sister Margaret, without confirmation; and, consequently, they lay open to the defender, Mrs Lauder, when her confirmation was obtained. But, in this part of the case, the pursuer relies on the statement in fact, that the funds were situated in Demerara, or in England, by the laws of which they passed to the parties having interest ipso jure, and on the decisions in the three cases of *Egerton v. Forbes*, November 27, 1812—*Craigie v. Gardner*, June 12, 1817—and *Milligan v. Milligan*, February 9, 1826. But though the Lord Ordinary, with a perfect feeling of the difficulty of these cases, is humbly of opinion that they were decided on sound principles, and must now be of authority, he cannot come to the conclusion that the pursuer has brought his case within the rule adopted in them. He thinks that the facts stated, and, though not admitted, not denied, are sufficient to afford ground for holding that the funds which constituted the trust-estate were situated in England, in fact and in law; and if there had been any right vested in John and Alexander Macbeth, by which they or their representatives could have directly taken up these funds, he should think that, under the decisions, the plea, that that right was transmitted to Margaret without confirmation, would have been very strong. But the case is different. Dr Macbeth died a domiciled Scotchman. The succession to him was regulated by deed. His acting executor, or trustee, Mr Inglis, was resident, and legally domiciled in Scotland. All the interests, during the subsistence of the liferents, were drawn by him, and paid to the liferenters in Scotland; and there never was any direct claim competent, either to the fiars or liferenters, to recover the money under the bonds or obligations of the debtors in the West Indies or in England. The Lord Ordinary, therefore, thinks that, in every possible sense, the fund, in regard to the legatees, was Scotch. It lay out, indeed, on English securities—but the claim was against the Scotch executor. His obligation was to pay in Scotland, and no claim could be made, except by indirect courses, otherwise than against him. He could have changed the securities twenty times. The obligants in them were debtors to him, and he was the only proper debtor to the legatees. The

¹ Ante, I. p. 506.

The pursuer having reclaimed, the Court ordered minutes of debate. No. 282.

LORD PRESIDENT.—I do not think that the succession of the testator is to be affected by the circumstance of the residence of his executor, who may change his residence from one country to another, during the subsistence of his office. But the executor had realized the estate, and invested the funds in this country, I could have thought there was more ground for supporting the Lord Ordinary's judgment. May 30, 1834.
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LORD GILLIES.—If it were a case of intestate succession, the law of this country would govern the intestate succession of a domiciled Scotchman, so far, at least, as to point out what parties were entitled to take up the succession; but this is a case in which the succession has been regulated by deed. I regard the case as one of some difficulty, but am disposed to alter the Lord Ordinary's interlocutor.

LORD BALGRAY.—I must suppose the bond which Mackay granted to have been in terms of the contract of sale, and the correspondence referred to. The principal and interest were thus taken payable in England, and the contents of the bond should be regarded as a foreign fund. On looking to the contract of sale, I see the debtor, Mackay, is taken bound to pay "at the demise of the father and mother of the deceased William Macbeth, into the hands of the executors, representatives, or heirs by will." I conceive, therefore, that a direct right of action against the debtor was given to the legatees. On the whole, I am for altering the judgment of the Lord Ordinary.

Rutherford, for defenders.—There is a separate point pleaded, whether any right vested in John and Alexander Macbeth.

LORD BALGRAY.—I am clear that there was a vested right in them, and I cannot distinguish their case from that of Leitch referred to by the Lord Ordinary.

LORDS PRESIDENT and GILLIES concurred.

THE COURT pronounced this interlocutor, "Alter the interlocutor reclaimed against, and find that the shares of the funds in question, vested in John and Alexander Macbeths, were shares of funds, subject to a foreign law, to the valid taking up of which, by the representatives of John and Alexander, no confirmation was necessary; and reduce, and decern accordingly;

and Ordinary has not observed, among the numerous cases quoted to him on this point, any case in which the fund stood in a trustee domiciled in Scotland. In the case of Milligan, indeed, there had been a trust; but it appears, from the report in law and Dunlop, that, at the death of the legatee, the fund was 'Government stock, vested in her own name.'

"The trial of this case, after eight years' acquiescence in the decree, has probably been suggested by the late act of Parliament; but as it can have no retrospect, it only proves the undoubted rule of law at the date of the decree; and, as there is mainly no reason for stretching the principle adopted in Egerton and the other cases, the Lord Ordinary is, on the whole, of opinion that it does not reach the present case.

"He would have ordered cases; but, having heard the cause very fully, he was unwilling to increase the expense to the parties."

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find no expenses due to either party; and remit to the Lord Ordinary to proceed farther in the cause as shall be just."

May 30, 1834.
Brackenridge
v. Kenneth.

FERGUSON and THOMSON, S.S.C.—J. D. LAWRIE, S.S.C.—Agents.

M'Donald v.
Parlane.

No. 283.

ELIZABETH BRACKENRIDGE and Children, Pursuers.—*Hay*.
ROBERT KENNETH, Defender.—*J. Anderson*.

Process—Reponing—Expenses.—Judgment having passed in absence of a defendant resident abroad, and cited to an action of declarator of marriage, raised in virtue of an arrestment jurisdictionis fundandae causa, the Court, while allowing him to be reponed, refused to reserve the question of expenses, although he disputed the jurisdiction, but remitted to the Lord Ordinary to repon, on payment of such expenses as he might see fit.

May 30, 1834.

2^d DIVISION.
Ed. Mackenzie.
R.

THE defender, Kenneth, was formerly a land-surveyor at Kilwinning, in Ayrshire, but was now resident in Ireland. The pursuers, claiming the status of his wife and lawful children, having used arrestments jurisdictionis fundandae causa, raised a summons of declarator of marriage and legitimacy, to which he was cited edictally as furth of the kingdom. No appearance having been made, the usual interlocutor, allowing a proof, was pronounced by the Lord Ordinary in absence. Thereafter, a reclaiming note, accompanied by defences, in which the jurisdiction of the Court was disputed, was given in for Kenneth, praying to be reponed against the interlocutor in absence, and to have the question of previous expenses reserved.

The Court declined to reserve the question of expenses, and remitted to the Lord Ordinary to repon in common form, on payment of such expenses as his Lordship should deem just.

R. DUNLOP, W.S.—MACKINTOSH and GEMMELL, W.S.—Agents.

No. 284.

R. M'DONALD and J. GALLOWAY, Suspenders.—*Patterson*.
WILLIAM PARLANE, Charger.—*A. M'Neill*.

Process—Furthcoming—Jurisdiction.—1. The owner of a vessel, and two other parties, having bound themselves conjunctly and severally in a bond of caution on loosing an arrestment on the vessel, and a furthcoming having been carried on against these parties, without calling the owner, the proceedings held inept. 2. The defenders in the furthcoming having been allowed in the Inferior Court to call the owner, and having declined, and the cause having gone on to an issue, not precluded in a suspension from insisting on the objection in the Court of Session. 3. Question whether the sea basin of the Forth and Clyde Canal, adjoining the river Clyde, but above the level thereof, and separated by a lock, be within the jurisdiction of the water-bailie, so as to warrant the arrestment, under vessel lying in the basin.

In March, 1830, the charger, Parlane, raised an action before the water-bailie of the Clyde, against Archibald M'Coag, master of the smack Margaret of Oban, whereof Mr John Derepas of Lismore, in Argyleshire, was sole owner, for payment of £9, 11s. 9d, as the amount of an account of goods alleged to have been furnished to the crew. On the dependence of this action, Parlane obtained a precept of arrestment from the water-bailie, in virtue of which he had the vessel arrested in the basin of the Forth and Clyde Canal at Bowling Bay, adjoining the Clyde, but several feet above the level of the river, and separated by a lock. The arrestment so laid on was immediately loosed on the application of Derepas the owner, who, along with the suspenders, M'Donald and Galloway, granted bond of caution, whereby they bound themselves, " jointly and severally, as cautioners for the said Archibald M'Coag, to the effect that the said vessel, with her float-boat, &c., should be made forthcoming to the pursuer" (Parlane). Decree having passed against M'Coag in the original action, Parlane raised before the water-bailie an action of furthcoming, to the extent of the sum decerned for, against M'Donald and Galloway, under the above-mentioned bond of caution, but he did not cite Derepas as a party thereto. Besides a defence on the merits, that the furnishings for which decree had passed against M'Coag, were for that party's own behoof, and not for behoof of the vessel, it was pleaded, 1. That Derepas, as owner of the vessel, and one of the obligants to the bond of caution, ought to have been made a party; and, 2. That the arrestment was inept, inasmuch as the canal-basin, where the vessel lay when arrested, was not within the limits of the river Clyde, and consequently not within the jurisdiction of the water-bailie, which could only be exercised—in terms of the charter conferring it,—"*infra fluvium de Clyde, ubi mare fluit et refluit.*" In regard to the first of these defences, the water-bailie, after certain procedure, and a judgment allowing a proof as to the other points, pronounced an interlocutor, granting incident diligence to M'Donald and Galloway, for citing Derepas; but they declined doing so, and intimated this to the opposite agent, by the following note from Galloway:—" Mr M'Donald and I will not be at the expense of citing Mr Derepas in the above case, and we now require you to proceed with the pursuer's proof, in terms of last interlocutor." The proof accordingly proceeded, and ultimately the water-bailie decerned in the furthcoming as libelled, " in respect it appears from the evidence adduced that the basin where the vessel in question was arrested is not an inland fresh-water basin of the canal, but the sea basin at the western termination of the canal, by which the canal communicates with the sea or frith of Clyde, and into which the tide flows when the gates separating it from the sea are open, as into a wet-dock." Of this decree M'Donald and Galloway brought a suspension, in which Lord Fullerton, Ordi-

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May 30, 1834.

2d Division.

Ld. Mackenzie.

T.

M'Donald v.

Parlane.

No. 285. nary, pronounced the following interlocutor, adding the subjoined note : *
 May 30, 1834. —“ Finds that the arrestment of the vessel, which led to the procedure
 M'Donald v. terminating in the decree now under suspension, was laid on by the au-
 Parlane. thority of the water-bailie of the river Clyde : Finds it proved that the
 vessel was lying, at the time of the said arrestment, in a basin of the
 Forth and Clyde Canal, above the ordinary level of the river, and sepa-
 rated from it by a lock through which vessels must descend in passing
 from the said basin into the river : Finds, therefore, that the vessel was
 not within the jurisdiction of the water-bailie, and therefore suspends the
 letters simpliciter, and decerns ; finds the suspender entitled to expenses,
 and allows an account thereof to be given in, and to be taxed by the
 auditor.”

Parlane reclaimed, and the Court having some difficulty as to the point
 decided by the Lord Ordinary, and, at the same time, considering that
 the other defence founded upon Derepas not having been cited, might
 afford grounds for deciding the cause, recalled his Lordship's interlocutor
 hoc statu, and remitted to Lord Mackenzie, in place of Lord Fullerton,
 now removed to the First Division, to hear parties on the whole cause.

Lord Mackenzie, after hearing parties, pronounced this interlocutor :—
 “ Finds that it was not competent to proceed in the furthcoming at the
 instance of the charger, without calling as defender John Derepas, the
 owner of the smack Margaret libelled, and one of the cautioners for
 loosing the arrestment libelled, and that therefore the whole proceedings
 therein are incompetent : Therefore suspends the letters simpliciter, and
 decerns ; finds the respondent liable to the complainers in expenses,
 subject to modification.” †

* “ The jurisdiction of the water-bailie is exercised ‘infra fluvium de Clyde, ubi
 mare fluit et refluxit,’ &c. The vessel, at the time of the arrest, was lying in a basin
 of the Forth and Clyde Canal which, though sometimes called the sea basin, from
 the circumstance of its being the basin nearest its western outlet, is truly part of
 the canal, being an artificial excavation above the ordinary level of the river, and
 separated from it by a lock. In these circumstances, it does not appear to the Lord
 Ordinary that the occasional overflow of the Clyde into the basin in very high floods
 and very high tides, can be held, in sound construction, to constitute this a part of
 the Clyde, so as to subject it to the jurisdiction of the water-bailie.

“ It was also maintained in argument by the charger, that before the canal was
 made, the tide went beyond the limits of this basin ; that its situs was therefore
 originally within the jurisdiction of the water-bailie, and that there was nothing in
 the canal acts limiting that jurisdiction. But, in the first place, the proof contains
 no evidence of the fact ; and, 2dly, the conclusion appears to the Lord Ordinary to
 be erroneous in law. For, even if this or any other part of the line of the canal did
 run within the former tideway, the necessary effect of the embankments and locks,
 or other operations authorized by statute, was to exclude the Clyde, ‘ubi mare
 fluit et refluxit,’ and consequently to exclude the water-bailie's jurisdiction.”

† “ NOTE.—The Lord Ordinary thinks that he cannot competently find any other

Parlane again reclaimed, contending, that at all events M'Donald and Jalloway, by declining to cite Derepas, when allowed by the water-bailie, and permitting the proof to proceed, were barred from insisting on the objection.

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To this it was answered, that defenders were not bound to be at the expense of citing a party who ought to have been made a co-defender by the pursuer; and that when their plea was repelled in the inferior court, their only course was to allow the cause to go on to a final issue, and then insist on the objection in a suspension, as they had done.

THE COURT adhered.

J. M'GILL, — C. FISHER, S.S.C. — Agents.

DONALD LINDSAY, Pursuer. — *Penney*.
SIR WINDHAM C. ANSTRUTHER, Defender. — *Speirs*.

No. 286.

Entail—10 Geo. III. c. 51.—Decree having been obtained by an heir of entail in reversion against the next substitute, in an action of declarator to which the substitute was duly cited, but in which he made no appearance, constituting a certain amount of debt for improvements, as made under the 10th Geo. III. c. 51, and no appeal having been taken within the time allowed by the statute—held, on the substitute succeeding, and being sued for payment by the representatives of the former heir, that he was not entitled to plead alleged defects in the notices and procedure in making the improvements for the value of which the decree had been given.

In March, 1820, the tutors of the late Sir John Carmichael Anstruther, minor, proprietor of the entailed estates of Elie, &c., in Fife, and Carmichael, &c., in Lanarkshire, intending to make certain improvements,

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more. But his opinion is, that in case the action in which the proof was taken could be held to be competent, then there is sufficient proof that articles to the value alleged by the charger were furnished by him to M'Coag, as necessaries for the use of the smack Margaret, he being at that time master of the smack, and therefore that the owner of the vessel was bound to the charger for the price of these articles, although it be not alleged that the smack was hypothecated for the same. It is, however, ruled, and not proved, that at the time when the charger raised his original action against M'Coag alone before the water-bailie, M'Coag was master of the said smack, or that the smack was within the jurisdiction of the water-bailie, and therefore the Lord Ordinary thinks that it was not competent in the said action to obtain a decree affecting directly the owner or vessel, or on which arrestment of the said vessel could immediately proceed, even in the case of her afterwards coming into the jurisdiction of the water-bailie. There is not in any view proof sufficient to enable the Lord Ordinary safely to decide whether the Canal Basin at Bowling Bay was within the limits of the river Clyde and jurisdiction of the water-bailie or not, and if this point were necessary to be decided, farther evidence must be had; but it is not necessary, because the arrestment was incompetent in either view."

No. 286. and to take advantage of the provisions of the 10th Geo. III. c. 51, for rendering three-fourths of the outlay a burden on the succeeding heir of entail, served notices on the defender Sir Windham Anstruther, then the next heir in the order of succession. The improvements were afterwards executed, and of date 12th December, 1828, two decrees were obtained against Sir Windham in separate actions of declarator, raised by the tutors in this Court, as to the estates of Elie and Carmichael respectively, and to which he was duly cited, finding that the expense laid out in improvements amounted to £3520, 3s. 4½d. for Elie, &c., and £4382, 15s. 5d. for Carmichael, &c., and that Sir Windham Anstruther, and, failing him, the next heir who should succeed to the entailed estates, were liable to the heirs, executors, or assignees of Sir John, in the respective sums of £2640, 2s. 6d., and £3287, 1s. 6d., being three-fourths thereof. Sir Windham had not made appearance in these processes, but no steps were taken to bring the decrees under appeal. In 1831, Sir John died, and was succeeded by Sir Windham, against whom the pursuer Lindsay, accountant in Edinburgh, who had been appointed judicial factor on Sir John's estate, brought an action for payment of the sums above-mentioned.

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In defence, Sir Windham pleaded—

1. That part of the improvements had been made within the three months after the notice required by the 10th Geo. III., and ought not to have been allowed as a charge against the heir; 2. That part was on Lady Anstruther's locality lands, as to which the minor could not be held an heir "in possession," in terms of the statute; and, 3. That the notices were too vague and general, and not in the terms required by the statute; and as to this he contended, that if the notices were not exactly in terms of the statute, all the subsequent proceedings were inept, including the decrees in the former actions of declarator.

To this it was answered, that Sir Windham having been duly cited to the actions of declarator, and not having taken an appeal, within the twelve months allowed by the statute, against the decrees therein pronounced, constituting the claims now sued for, he could not go back on any alleged irregularities of the procedure, these decrees being conclusive against him.

The Lord Ordinary pronounced this interlocutor:—"Finds, that on 12th December, 1828, a decree was obtained at the instance of the tutorship of the late Sir John Carmichael Anstruther against the defender, as next heir of entail, declaring that, in consequence of the sums expended, in virtue of the 10th Geo. III. c. 51, upon the estate of Carmichael prior to 11th May, 1826, the next heir of entail was liable in the sum of £3287, 1s. 6d., and that, on the same day, a similar decree was obtained, in virtue of sums expended on the estate of Elie prior to 11th December 1827, for the sum of £2640, 2s. 6d.: Finds, that the defender did not succeed to the said estates, as next heir of entail; and

allege that he was not duly cited to the processes in which said decrees No. 286. were pronounced, and as the said decrees were not brought under review ^{May 31, 1834.} within the statutory limitation, repels the defences, decerns, in terms of *Hay v. Collier*. the libel, against the defender, for the sums contained in the said decrees, with interest from the term of Whitsunday, 1831."

THE COURT adhered.

FOTHERINGHAM and LINDSAY, W.S.—KEE and DICKSON, W.S.—Agents.

JAMES HAY, Pursuer.

No. 287.

MRS SARAH COLLIER, Defender.—*Macdowall*.

Title to Pursue—Expenses—Poor's Roll.—Question whether a bankrupt, who was pursuing a process of cessio bonorum, and who raised an action of damages, was entitled to pursue without finding caution for expenses.

HAY raised an action of payment and damages against Mrs Sarah Col- ^{May 31, 1834.} lier, who pleaded as a preliminary defence, that Hay was bankrupt, and ^{1st Division.} in cursu of taking the benefit of the cessio, and that, therefore, he must ^{Ld. Corehouse.} find caution for expenses, before being allowed to pursue.¹ ^{B.}

The Lord Ordinary, "in respect it is admitted that the pursuer has committed an act of bankruptcy, and raised a process of cessio bonorum, and that he was insolvent so late as December last, and in respect that he does not offer to instruct that he is now in solvent circumstances, ordained him to find caution for the expenses to be incurred by the defender in this process."

Hay reclaimed; and, in the meantime, his case was laid before the lawyers for the poor, who reported that there was no probabilis causa litigandi. Hay failed to appear in support of his reclaiming note, and the Court pronounced this interlocutor: "In respect that the lawyers for the poor have reported that there is no probabilis causa litigandi, and that he has failed to appear, &c. refuse the desire of the reclaiming note."

A. C. HOWDEN, W.S.—J. and W. DYMCKE, W.S.—Agents.

¹ *Manuel and Co.*, Jan. 21, 1826 (ante, IV. 381); *Fairley's Trustees*, March 6, 1830 (ante, VIII. 666); *M'Ghie*, June 1, 1832 (ante, X. 604).

No. 288. JOHN THOMSON (Cashier of Royal Bank), and SIR JAMES GIBSON-CRAIG, Petitioners.—*Robertson*.

May 31, 1834.
Thomson v.
Wight.

ROBERT WIGHT, Respondent.—*Neaves*.

Bankruptcy. — Circumstances in which the Court fixed the commission of a trustee on a bankrupt estate at the sum of £40, 1s. 2d., being at the rate of 5 per cent on the amount of his intromissions.

May 31, 1834. **WIGHT**, accountant in Edinburgh, was appointed trustee on the company estates of **D. and R. Blackie, W. S.**, and shipowners. The sum realized from the company estates was insufficient to pay expenses, even exclusive of the commission due to the trustee. At a meeting of the commissioners on 29th July, 1833, the following minute was entered in the Sederunt book:—"The commissioners having considered this matter, under all the circumstances of the case, and in respect of the decision *Boaz v. Craig's creditors*,¹ find that the trustee is not entitled to more than 5 per cent on the amount of his intromissions, and that in full for commission and all other trouble in the business of the sequestration, and find that the intromissions of the trustee amount to £801, 3s. 7d., and the commission to be allowed him to the sum of £40, 1s. 2d. sterling." The trustee (who had previously offered to submit the matter to Mr Guthrie Wright and Mr Girvan) recorded his dissent, and a general meeting of creditors was called, at which a commission of £210 was awarded.

The Royal Bank and Sir James Gibson-Craig, creditors of the bankrupts, presented a petition and complaint, and contended that the sum voted by the commissioners was the proper remuneration to the trustee. In answer, Wight maintained, that any invariable rule to pay a trustee by an allowance of a per centage on the funds realized, though it might in general be fair and salutary, would occasionally be most unjust, because it might happen that a trustee was inevitably involved in laborious and responsible professional exertions for a length of time, which might ultimately realize little or no proceeds, and yet without any fault of his; that there was nothing in the bankrupt statute imposing any such rule of per centage; and that every question of a trustee's remuneration was necessarily a question of circumstances. And he alleged that a payment, according to such a scale as that proposed by the petitioners, would be wholly inadequate to his remuneration, as he had been employed above 1510 hours on the affairs of the estate.

LORD BALGRAY.—I do not think it possible to lay down any general rule for all cases, as to the rate at which a trustee should be remunerated. In most cases, I should think the allowance of 5 per cent on the sums recovered, was a proper

¹ Dec. 3, 1829 (ante, VIII. 175).

rance, both because it will operate as a stimulus to the trustee to do his No. 268.
zealously, and induce him to consult all prudent economy in the admini-
stration of his office. But it may happen that the bankrupt was carrying on exten- May 31, 1834
sive concerns, such as cotton mills, &c., at the moment of his bankruptcy, and Thomson v.
which, in particular circumstances, require to be carried on for some time by the Wright.
trustee. There have been repeated instances of special cases in which this Court
had occasion to sanction such a proceeding, as perfectly compatible with the
working of a sequestration. In this manner it may happen that a trustee is
overburdened in a business inferring much responsibility, and making a great demand
on his time and attention, while the proceeds realized may turn out to be but
small, although no blame is imputable to him. In such circumstances, I should
think it highly unjust, not to make an exception from the general rule, and to
adopt some other mode than that of a per centage in fixing the remuneration for
the trustee. But it is impossible for the Court to say whether the allowance
granted by the commissioners is adequate or not, without farther enquiry; and I
would propose that a remit, before answer, should be made to the auditor of
the estate.

The other Judges concurred in this proposal, and the Court

"Before answer, remitted to Mr Guthrie Wright, as auditor of Court, to
consider the respondent's accounts qua trustee, and to report what sum,
in his opinion, the respondent is fairly entitled to charge in name of com-
mission, as trustee on the sequestrated estate of D. and R. Blackie."

Mr Wright having returned the subjoined report,*

"David and Robert Blackie carried on business for some years as writers in
Edinburgh, under the firm of D. and R. Blackie, and their affairs having become
embarrassed, a sequestration was awarded against them, both as a company and as
individuals. The respondent, Mr Wright, was appointed interim-factor on the
estate, but a competition having arisen between him and Mr W. H. Kerr, account-
ant in Edinburgh, for the office of trustee, an arrangement was come to by which
Mr Wright was appointed trustee on the company estate, and Mr Kerr on the indi-
vidual estates of David and Robert Blackie.

David Blackie had been concerned with certain newspapers and periodical
publications called the Chronicle, Evening Post, and Literary Gazette, and it
did appear that a considerable sum was expected to be derived by the creditors
from the sale of these publications, as well as the printing establishment connected
with; but as it was at first doubtful whether this property belonged to the
company or to David Blackie as an individual, Mr Wright took a charge of the
estate for some time, by direction of the creditors, and advanced various sums
in carrying it on. It was, however, soon ascertained that these concerns belonged
to David Blackie individually, after which the management and sale of them, of
course, devolved upon Mr Kerr, as the trustee on his estate, and the sums ad-
vanced by Mr Wright were accordingly repaid to him by that gentleman, amount-
ing with interest, to £333, 2s. 4d. It does not appear, however, that Mr Wright
then made any claim, or received any remuneration for the trouble he had
expended on these matters, although he seems to have had a good right to do so,

No. 268.

THE COURT unanimously found that the allowance of the trustee should be fixed in terms of the report.

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Wight.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—CAMPBELL and TRAILL, W.S.—Agents.

for as all the benefit of them went to David Blackie's creditors, the claim for remuneration for his trouble lay evidently against them, and not against the company creditors, who derived no advantage from them at all.

"In fixing the amount of Mr Wight's commission as trustee on the company estate, however, it appears that the commissioners had included the sums advanced by him for carrying on the printing business, so that in fact he has been allowed 5 per cent on these sums. Whether that is an adequate remuneration for his trouble in that business, the auditor has no means of judging, but if he is entitled to any further allowance on that account, it is humbly thought that a claim for it ought to lie against the estate of David Blackie, and a reservation to this effect ought perhaps, therefore, to be inserted in the interlocutor to be pronounced by the Court.

"But except for the circumstance of David Blackie having been connected with this printing and publishing business, and Mr Wight having thus had some extra trouble in regard to it, the auditor can see nothing in this case which distinguishes it from any ordinary sequestration. The Messrs Blackie were young men, who had been only a few years in business, and, unfortunately for them, their business was very small, insomuch, that at the time of their failure, they gave up the whole outstanding debts due to them as a company as only amounting to about £1300, while, as usually happens in such cases, not one-third of that sum was ultimately realized from them.

"Mr Wight has alleged that he was employed for upwards of 1510 hours in these affairs, of which 157 hours are said to have been occupied in regard to the printing business. For the purpose of affording him an opportunity of explaining how such a very large portion of time should have been thus consumed, the auditor fixed a meeting for hearing the parties, at which Mr Wight was requested to attend, and to bring with him the sederunt book kept under the sequestration, the books of the bankrupts, the states of accounts mentioned in the answers to the petition and complaint as having been made up by him, together with any other papers or documents which could tend to show the nature and extent of his trouble. A meeting was accordingly held, at which all these books and papers were produced and examined, and Mr Wight was allowed the fullest means of giving every explanation in his power. It is unnecessary to go into minute details, but the auditor regrets to say that that gentleman was altogether unsuccessful in satisfying him that any thing like the time alleged to have been spent could have been necessarily or beneficially occupied in the business, for the following reasons:—

"1st, The sequestration was awarded on 21st July, 1829, and it was admitted that the Messrs Blackies, with two of their clerks, were employed for nearly three months afterwards in posting and bringing up their books, and making out the accounts to be rendered to the clients; and accordingly, several sums were charged to Mr Wight's accounts as paid to these two clerks (Ferguson and Liddell) for doing this business.

"2d, The ledgers of the bankrupts show that the whole

MISS JEMIMA WOOD, Petitioner.—*Ivory.*

No. 289.

Judicial Factor—Minor—Bastard.—Curators appointed to an illegitimate child, ^{May 31, 1834.} whose father had left property to her without naming curators, on a petition merely, ^{Wood.} as requisites of the act 1672, as to citing next of kin, &c., being inapplicable to such case.

A PETITION having been presented by Miss Jemima Wood, a natural child, to whom her father had left considerable funds without nominating

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ated up by Messrs Blackies' clerks; and notwithstanding the great time said to have been occupied by Mr Wight in this business, it ought to be observed that the latest portion of the accounts in the ledger are at this moment unsummed and unbalanced, and very few traces appear of Mr Wight having done any thing to remedy.

"Sd. With regard to the particular accounts which Mr Wight states he made up, and upon which so much stress is laid in the answers, viz. those of Mrs Drummond, Mr Birtwhistle, Mr Bruce of Balchristie, and Colonel Gordon, the auditor calls himself called upon to say, that the extent of his trouble in these, as well as other matters, appears to him to be very much exaggerated. These accounts are all entered in the ledger, but not in a perfect state, as Messrs Blackie appear to have had many transactions in accommodation bills with their clients, which are not regularly entered in the books, and in the states of accounts made up by a trustee these were all introduced, as far as they could be traced or discovered, but the auditor cannot understand how Mr Wight should have been occupied for nearly the length of time he describes in making out these states.

"Upon the whole, the auditor is humbly of opinion, that there is nothing in this case (beyond what has been already adverted to in regard to the printing and publishing concerns) to warrant a departure from the ordinary rule respecting the remuneration of trustees, which has been sanctioned by the Court in the case of *tax* and others, noticed in the petition and complaint. It appears to him, with great deference, that it is of the utmost importance to maintain that rule; and, if in the present case were to be made an exception, there would in fact be an end to it. Nothing has occurred in this trifling sequestration, that might not reasonably have been expected when Mr Wight accepted, or rather competed for the office of trustee. In most instances of bankruptcy, the books of the bankrupts are in a confused state, and there is a good deal of trouble in winding up the affairs; but if the statement of the trustee, that a more than usual portion of his time has been occupied in the business, were to be held as a reason for departing from the general rule, it seems clear that each case would fall to be judged of on its own merits,—and at a premium would thus be held out for procrastination, and the person who did a business most tardily would be most liberally rewarded.

"By the minute of the commissioners of 29th July, 1833, the trustee's commission was fixed at the sum of £40, 1s. 2d., being at the rate of 5 per cent on the amount of his intromissions; and in the trustees' accounts, which were docketed and sanctioned by the commissioners, he is allowed credit for various sums as paid to two clerks, amounting to £70, 7s. 6d. The accounts for these payments are called for at the meeting of the parties with the auditor, and it appeared from

No. 289. curators, with concurrence of her mother, praying the Court to appoint curators, and dispense with the citation of next of kin required by the act 1672, c. 2, as inapplicable to the case of natural children, their Lordships appointed a minute to be given in, "stating the peculiar circumstances of the case upon which the present application is founded." A minute was thereafter lodged, stating, that there were no peculiar circumstances attending this case, but that the application was rested on the general rule settled in the case of *Young*,¹ that it was competent for the Court at once, on a petition, to appoint curators with the common powers to natural children.

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Graham.

THE COURT accordingly appointed curators as craved.

CAMPBELL and MACDOWALL, Agents.

No. 290.

WILLIAM GRAHAM, Raiser.
Claimants.

WILLIAM JARDINE GRAHAM.—*Jameson*.
ELIZABETH and ROBINA GRAHAM.—*Marshall*.
MRS ROBINA LAWRIE OF GRAHAM.—*G. G. Bell*.
MRS ELIZABETH JARDINE OF GRAHAM.—*Cunninghame*.
MRS MARGARET WRIGHT OF JARDINE.—*Reid*.
MRS SARAH JARDINE OF CARRUTHERS, and OTHERS.—*Reid*.

Testament—Clause.—A testator conveyed his heritable property to his eldest daughter in liferent, and her son, and the heirs of his body, in fee, declaring the property subject to the burden of his debts, legacies, and provisions; and further conveyed all his moveable estate to the son, "and his foresaids:" the son confirmed executor to the testator, but died intestate, having uplifted part of the moveable estate, and leaving a widow and a son and two daughters—circumstances in which held, 1. That the liferent of the testator's daughter was free of any burden of annuities or the interest of provisions; 2. That the son's whole moveable estate, in-

them that they were not accounts to Mr Wight's clerks, but to himself, and were liable to serious objections. But it seems unnecessary to go into this matter, as the petition concludes as follows:—"The petitioners are indifferent about any other charge than the trustees' commission of £210, and if your Lordships reverse the resolution of the general meeting of the creditors, and adhere to the finding of the commissioners, that is all the petitioners will require." The above alleged payments to Mr Wight's clerks are therefore only noticed in order to show that by adhering to the finding of the commissioners, the trustee will not only receive the above sum of £40, 1s. 2d. of commission, but at all events one-half of the above sum of £70, 7s. 6d., more than he would be entitled to if he were brought to a strict account, and this sum the auditor humbly conceives to be an adequate compensation, even if the salutary rule above adverted to were to be ~~the same~~ and the question were to be judged of on the principle of quantum.

¹ Feb. 19, 1818 (F. C.)

cluding the part left by his grandfather, and never uplifted by him, fell to be divided into three portions, whereof one belonged to his widow as *ius relictæ*, and the other two as legitim and dead's part to his two daughters, to the exclusion of his son, unless he should collate the heritage; and, 3. That the debts and provisions left by the testator burdened equally the heritable and moveable estate left by him, in proportion to their respective values.

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Graham v.
Graham.

THE late William Jardine of Priesthead had three daughters, Elizabeth, married to John Graham, provost of Lochmaben, and Sarah and Jean, married respectively to Robert Carruthers and Alexander Harkness. By deed of settlement, executed in 1820, Mr Jardine, on the narrative of the "love, favour, and affection" which he had for his "eldest daughter, Elizabeth Jardine, spouse of John Graham, late provost of Lochmaben, and for her eldest surviving son, Matthew Graham, and the other persons after mentioned," conveyed his whole heritable property "to and in favour of the said Elizabeth Jardine, my eldest daughter, in liferent, in case of her surviving me, for her liferent use alienably, and to her said son, Matthew Graham, and the heirs of his body, whom failing, to the whole children of the marriage between the said John Graham and Elizabeth Jardine, in fee,"—"but always with and under the several conditions, reservations, provisions, and burdens after specified, which are declared to be real burdens and encumbrances affecting the foresaid lands and others, with the pertinents thereof, and appointed to be insert in the infeftments to follow hereon, until the said burdens shall be lawfully and validly renounced and discharged." The burdens and provisions were thus expressed:—"Primo, I do hereby burden the said lands and others, and the said Matthew Graham and his foresaids, or other successors to me therein, in fee, in virtue hereof, with the payment of all my just and lawful debts, deathbed and funeral expenses: In the second place, I hereby appoint to be paid over to William Jardine Harkness, my grandson, only son of my daughter, Jean Jardine, and Alexander Harkness in Gotterbie, the sum of £500 sterling, at the expiration of five years after my decease, or so soon after said five years as he shall arrive at 21 years of age, with interest upon said sum, from and after my death, at the rate of 4 per cent per annum, till paid; and failing my said grandson, I appoint the interest, at the rate aforesaid, to be paid to my said daughter, Jean, his mother, yearly, during all the days of her life, and at her death, that the principal sum shall divide into two equal parts, and be payable to the children of my other two daughters, the said Elizabeth and Sarah Jardine, spouse of Robert Carruthers at Watchhill, near Lochmaben: In the third place, I hereby appoint to be paid over to the said Sarah, my daughter, the interest of £400 sterling, at the foresaid rate of 4 per cent yearly, during all the days of her lifetime, from and after my death, and at her death, or at the expiration of five years from my decease, in case of her death before that period, the said principal sum shall be paid over and be divided equally among all the

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No. 290. children (with the exception of the said Sarah Jardine and Robert Carruthers), as soon as they come respectively of age; the interest of the said sum, at the rate aforesaid, being payable to the said children, in whole or in part, until fully paid, from and after the death of their said mother, or my own death, in the event of her predeceasing me: Fourthly, I appoint that the sum of £100 sterling be paid to each of my other grandchildren, the said Matthew and Janet Carruthers, who are hereby excluded from any share of the above provision to the children of my daughter last mentioned, and the said Robert Carruthers, and that the interest, at the rate aforesaid, of these two sums, be paid over to the said Sarah Jardine, during all the days of her life, and thereafter, or after my death, in case of her predeceasing me, to my said two grandchildren, Matthew and Janet Carruthers, until they respectively arrive at majority, when the principal is declared to be respectively payable; and failing both or either of them, or any one or more of the other children of the said Sarah Jardine and Robert Carruthers, without lawful issue, the principal sum or provision of the said child or children dying without lawful issue, shall fall to, and be divided in equal parts among the whole surviving children, or the descendants of such as may have died, without any distinction between the said two grandchildren, Matthew and Janet, and their other brothers and sisters: In the fifth place, I hereby further burden the said subjects, before disposed, and appoint my successor, accordingly, to make payment to Margaret Wright, my present wife, of a free yearly annuity of £20 sterling, payable in equal portions, at the terms of Martinmas and Whitsunday, beginning the first term's payment at the first term of Martinmas or Whitsunday that may happen after my decease, with a fifth part more of penalty and liquidate expense in case of failure, and that from the time of my death, so long as she may survive me and continue my widow, with the enjoyment during her widowhood, as said is, of the house and garden possessed by Janet Gillespie, lying within the burgh of Lochmaben, being part of the property before disposed, all agreeable to a postnuptial contract of marriage entered into between the said Margaret Wright and me, of date the 1st of April, 1807: And, lastly, I appoint the sum of £10 sterling to be paid to Jean Gibson, my servant, and niece of my first wife, one year after my decease; and all these sums I not only appoint to be paid by the successor to me, in virtue of the present settlement, but declare the several subjects are specially burdened with the payment thereof, and these burdens are appointed to be engrossed in the infestments to follow hereon."

Immediately after this, the deed of settlement proceeded as follows:—
 "Moreover, I do hereby dispoise, convey, and make over, to and in favour of the said Matthew Graham and his foresaids, whom failing, the said whole children of the marriage between the said John Graham and Elizabeth Jardine, All and Sundry goods, gear, debts, and ~~sundry affluents~~ and all and sundry my stock, crop, household furniture, &c

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 raham.

hing falling under the description of moveables, whether due by bond, No. 290.
 bill, or account, or otherways, or wherever situated, which may be due ^{May 31, 1834}
 and addebted, or pertaining and belonging to me at the time of my ^{Graham v.}
 leath," excepting only certain articles left to the disposal of his wife. ^{Graham.}
 And the deed proceeds—"Farther, I hereby constitute and appoint the
 said Matthew Graham my sole executor and universal intromitter with
 my goods and gear, with power to give up inventories and confirm the
 same, and to do every thing necessary, as accords of law."

Subsequently, Mr Jardine made certain slight alterations on the special provisions in the deed by diverse codicils, one of which contained this clause:—"And all the provisions declared to be payable to the several persons, in terms of the preceding disposition and settlement, and alterations now and formerly made thereon, I declare to be real burdens on my subjects therein conveyed, until paid and discharged."

Mr Jardine died in 1820, being survived by Mrs Margaret Wright, his wife, and by his three daughters, all of whom had children. His estate consisted of the lands of Priesthead, &c., yielding a rental of about £50 per annum, an heritable bond for £300, and moveable property to the extent of £2727.

Elizabeth Jardine (Mrs Graham), his eldest daughter, immediately entered into possession of the heritable property; and her son, Matthew Graham, confirmed executor to his grandfather, and gave up inventories to the amount above mentioned, but he made up no titles to the fee of the heritable property. He intromitted with and uplifted or changed the securities of the moveable funds to the extent of all except £932, and as to £300 of this he raised an action for payment, and obtained decree, but had not succeeded in recovering it in 1830, when he died intestate, leaving a widow, Mrs Robina Lawrie or Graham, an only son, William Jardine Graham, and two daughters, Elizabeth and Robina, all in minority.

Shortly after his death, his widow raised an action to have it found that her *jus relictæ* affected his whole moveable funds, including that portion still lying on the securities wherein it had been invested by Mr Jardine. In this action she succeeded; but other questions having arisen, the raiser, William Graham, brother of Matthew, and who had been confirmed as his executor dative, brought the present process of multiplepinding to have these questions determined.

Claims were lodged for the following parties:—

1. Mrs Carruthers and her children, and the children of Mrs Harkness, now deceased, for their respective provisions under Mr Jardine's settlement, which they claimed to have found to be burdens on the whole estate left by him, heritable and moveable.

2. Mrs Margaret Wright, or Jardine, the testator's widow, for her annuity, which she in like manner claimed to have found to be a burden on the whole estate.

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3. Mrs Elizabeth Jardine or Graham, the testator's eldest daughter, who claimed her liferent free of the burden of the interest of any of the provisions or of the annuities, with other minor matters not necessary to be noticed.

4. Mrs Robina Lawrie or Graham, widow of Matthew Graham, for the third of his moveable estate, as *jus relictæ*, with maintenance to the first term after his death, and aliment for the children disbursed by her.

5. Elizabeth and Robina Graham, younger children of Matthew Graham, who claimed, (1.) One-third of his whole moveable estate, (including that portion of the funds left by Mr Jardine not uplifted by their father,) as legitim; and, (2.) Another third as dead's part; both disburdened of any of the provisions in the deed of settlement, of which they claimed to be relieved by their brother, William Jardine Graham, as the heir in the fee of the heritage left by Mr Jardine. And,

6. William Jardine Graham, who claimed the whole moveable estate left by Mr Jardine, or, at least, so much of it as had remained unuplifted by his father, on the ground that the destination thereto formed a substitution to his father, and not a conditional institution, and that, as to the portion not uplifted, there had been no evacuation of the substitution; and he farther claimed to be relieved of the annuities and the interest of the provisions by his grandmother, the liferentrix of the heritable property, and proportionally of the principal sums, out of the moveable estate to which he should be found not entitled; and farther, in the event of his being found not entitled to any part of the moveable estate, by virtue of the destination in Mr Jardine's settlement, he claimed, as one of his father's children, to share with his sisters, without collating the heritage, in respect he had not succeeded therein to his father, who never made up titles, but took it directly under the settlement of his great-grandfather, Mr Jardine.

The principal questions argued were,—

1. Whether the destination as to the moveable estate in Mr Jardine's deed of settlement constituted a conditional institution evacuated by Matthew Graham's survivance of the testator, or a substitution; and if the latter, whether it was not evacuated wholly by Matthew's confirmation as executor, and thereafter marrying and having children, whereby certain legal rights were created as to his moveable property, or, at least, partially, in regard to those portions of the funds uplifted by him.

2. Whether the burdens affected the whole estate of Mr Jardine, heritable and moveable, or only the heritage.

3. Whether the liferent provided by Mr Jardine to his eldest daughter was free of any burden of annuities, or the interest of provisions. And,

4. Whether, in order to take a share of the moveable estate of Matthew Graham his son was bound to collate with his sisters the heritable property left by Mr Jardine.

The Lord Ordinary pronounced this interlocutor:—

the deceased William Jardine of Priesthead, by his disposition and deed of settlement, dated 4th April, 1810, conveyed his heritable property therein mentioned to his eldest daughter, Elizabeth Jardine, 'in liferent, for her liferent use allenary, and to her son, Matthew Graham, and the heirs of his body; whom failing, to the whole children of the marriage between Elizabeth Jardine and her husband, John Graham, in fee.' Finds, That these heritable subjects are declared to be conveyed under the several provisions and burdens after specified, 'which are hereby declared to be real burdens and encumbrances affecting the foresaid lands;' and then he burdens 'the said lands and others, and the said Matthew Graham and his foresaids, or other successors to me therein in fee,' with his debts and various provisions, settled chiefly upon his children and grandchildren; and, after the enumeration of these, he again adds, 'And all these sums I not only appoint to be paid by the successor to me, in virtue of the present settlement, but declare the several subjects are specially burdened with the payment thereof; and these burdens are appointed to be engrossed in the infeftments to follow hereon:' Finds, That in the same deed, and by a subsequent clause in it, Mr Jardine also conveyed his whole moveable funds 'to the said Matthew Graham and his foresaids; whom failing, the said whole children of the marriage between the said John Graham and Elizabeth Jardine:' In respect whereof, finds, 1mo, That the burden of the debts and provisions is specially laid upon the heritable property and Matthew Graham, and his heirs or other successors in the fee of the lands, to whom also the moveables are conveyed, thus affording an immediate fund for payment of the said burdens, during the total liferent, of the lands, if he should be survived by his daughter Elizabeth: 2do, That Elizabeth Jardine, and the liferent right which she has in the heritable property, are not burdened with any of the debts or provisions, so that she is not liable even for the interest, and is entitled to enjoy her liferent free from any such burden: 3tio, That the destination of the moveables being in the same terms as the destination of the lands, and in the same deed, it seems to have been the intention of the maker of the settlement to create a substitution as to the moveables in like manner as there is so far as regards the heritage; and therefore, that William Jardine Graham, the eldest son of Matthew Graham, now deceased, is entitled to succeed not only to the fee of the heritable estate, but also to take up the moveable estate, in virtue of the substitution, in so far as it is not evacuated: 4to, That, in so far as the securities for the personal property have been changed, or the money uplifted, the substitution has been evacuated; and as Matthew Graham died intestate, his two younger children, Elizabeth Jane, and Robina Grace Graham, succeeded, as next of kin to such part of the moveable estate of Mr Jardine as was uplifted by their father: 5to, That it having been already found by Lord Newton, in a process at the instance of Mrs Graham, the widow of Matthew Graham, that her claim of *jus relictæ* cannot be affected by the

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substitution as to the moveable property, even where it was not uplifted by Matthew Graham, finds it unnecessary to decide that claim: 6to, That the fund for legitim, in like manner, cannot be diminished by the substitution in the moveable succession being held effectual in part, and that these two claims of *jus relictæ* and legitim must be deducted proportionally from the moveable estate, according as it falls to the son or the younger children: 7mo, That, as was agreed on at the bar, interest shall be payable on whatever sum shall be found due under the *jus relictæ*, from the death of Matthew Graham, till the first term after, when the widow's legal claim is held to be payable; and this sum of interest is to be accepted as the aliment of the widow for said period: 8vo, That the claim of the widow of Mr Jardine, for her annuity, lies against the lands, and William Jardine Graham, or other successor therein, and he is liable to pay this and the other debts and provisions declared to be real burdens, without relief from the liferentrix or his sisters; and on these grounds prefers the claimant, Mrs Elizabeth Jardine or Graham, to the liferent of the heritable property, as well as to the interest during her life, at the rate of four per cent, per annum, of the sum of £300, in lieu of an equal sum which was lent to William Brown, Newmains, and invested heritably at the death of William Jardine, but was uplifted in manner stated in the Minute for Mrs Graham: Prefers the other daughters of William Jardine, and their respective children, to the sums provided to them severally in liferent and fee, by his settlement and codicils, payable (so far as not already paid) at the terms, and on the events therein specified: Prefers Mrs Margaret Wright or Jardine, his widow, to her annuity of £20, and others therein provided to her; and in respect that the heritable property may not, during the subsistence of the liferent and minority of the heir, be convertible into an available fund: Ordains the raiser to retain or set apart, out of the moveable estate intromitted, or to be intromitted with by him, a sum sufficient to satisfy the said annuity, and liferent provisions while payable, and the capital sums provided to the testator's grandchildren, as the same shall become payable, and that before making payment to the widow or children of Matthew Graham, of their respective shares; but finds the widow and younger children of Matthew Graham entitled to relief from the heir and the heritable estate for any payments out of the moveable estate found to belong to them, all in terms of the findings herein, and to him his right of collation unprejudiced; and prefers the claimant, William Jardine Graham, to the fee of the heritable estate contained in the settlement of the deceased William Jardine, and also to that part of the moveable estate which was not uplifted by his father, Matthew Graham, but still remains on the original securities: Prefers the claimants, Elizabeth Jane and Robina Grace Graham, as the younger children of Matthew Graham, who died intestate, to one-third of the moveable property belonging to their father at the time of his death, and also to that part of the moveable property of their grandfathers

ifted by their father, or where the original securities were changed, No. 290.
 er deducting the legitim and jus relictæ proportionally from the move-
 es uplifted, as well as not uplifted: Prefers Mrs Robina Laurie or May 31, 1834.
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 aham, in terms of Lord Newton's interlocutor, to the third of the
 veable property left by Matthew Graham, in right of her jus relictæ,
 th interest on the amount from the death of her husband, by way of
 ment, till the first term after her husband's death, and interest there-
 er on the amount, till paid; and also to the sum of £12 for mournings;
 l further, to the sum of £ , by way of aliment for each of her chil-
 en, out of the funds falling to them on their father's death, payable
 lf-yearly, and per advance: Finds no expenses due to any of the
 imants, and decerns: And before fixing the amount of aliment for the
 ildren, appoints parties to be heard thereon, and on the state of the
 e or available funds."

William Jardine Graham, the heir, on the one hand, and his sisters on
 e other, having reclaimed on the main questions, as well as Mrs Matthew
 d Mrs John Graham, on minor points, the Court, after advising Cases,
 onounced the following interlocutor:—"Find that Mrs Elizabeth Jar-
 ne or Graham is entitled to the free liferent of the whole heritable pro-
 erty left by her deceased father, William Jardine, excepting the subjects
 which Mrs Margaret Wright or Jardine has the enjoyment during her
 idowhood; and that the whole moveable property in question belongs to
 e widow and younger children of the late Matthew Graham, in the pro-
 utions of one-third to the widow as jus relictæ, and the remaining two-
 thirds to the younger children as legitim, and dead's part, (subject to the
 air's right to collate, if so advised.) But that the moveable as well as heri-
 able property conveyed by the settlement of William Jardine, is subjected
 e the debts and special provisions contained in that settlement, including
 he annuity thereby provided to his widow; and that the heir, and the
 widow and younger children of Matthew Graham, are therefore entitled
 e mutual relief from the payment of such debts and provisions with
 which the whole succession has been burdened, in proportion to the rela-
 tive value of the heritable and personal property devolving on them
 respectively; and with these alterations and variations, adhere to the
 interlocutor reclaimed against, and find no expenses due, and remit to the
 Lord Ordinary to hear parties, and to determine any questions relative to
 he amount or value of the heritable and personal property, and the spe-
 cific amount or proportion of the debts and provisions to be borne by the
 air, and the widow and younger children, respectively, and any other
 emaining points in the cause."

No. 291.

ROBERT FERRIE and OTHERS, Pursuers.—*Keay—More.*May 31, 1834.
Ferrie v.
Baird.MRS JANE BAIRD or JACKSON, and TRUSTEES, Defenders.—*Skene—Whigham.*

Trust—Faculty.—A party, by trust-deed of settlement, conveyed his property to four trustees, and the acceptors or survivors, whereof a majority to be a quorum, with power, in the event of any declining to act, or dying, to “add and assume” other proper persons in their “place;” two only accepted, and they, by deed of assumption, assumed three in place of the two who declined—Held *ultra vires*, and that the assumption of all the three was void.

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2d DIVISION.
Ld. Moncreiff.
R.

THE late Thomas Jackson, by trust-deed of settlement, conveyed all his property, heritable and moveable, in trust to James Jackson his nephew, Thomas Slater his son-in-law, John Morrison his nephew, and Thomas Jackson his son, “or to such of them as shall accept hereof, and to the survivors or survivor of the said acceptors, as trustees or trustee, for the ends, uses, and purposes, and with the powers after specified, the major number of the said trustees accepting and in life, for the time, being always a quorum, and to their or his assignees.”

Mr Jackson also appointed his “said trustees and their foresaids” to be curators to his two youngest daughters, and the deed farther contained this clause: “And farther, in case of any of my said trustees declining to act, or in case of the decease of any of them, before the purposes of this trust are fulfilled, the surviving or remaining trustees, or their quorum, shall have full power to add and assume such other proper persons as they shall judge fit to be trustees along with them, in place of those who may die or decline to act; and such trustees so to be named and assumed, shall possess the same powers and privileges as are hereby conferred on the trustees above named.” On the death of Mr Jackson, which happened in 1830, only two of the four trustees named by him, viz. his son Thomas Jackson, and his nephew Morrison, accepted. Some time thereafter, however, these two parties executed a deed of assumption, whereby they assumed as trustees amongst with themselves three other persons, viz. Robert Ferrie, John Gemmel, and the late Alexander Mein; and on the death of Mein, a second deed of assumption was executed by Jackson, Morrison, Ferrie, and Gemmel, in favour of William Johnston. Thereafter Ferrie, Gemmel, and Johnston, the assumed trustees, setting themselves forth as “three and a quorum of the trustees of the said deceased Thomas Jackson, senior,” raised an action against Thomas Jackson, the son, and the defenders, Mrs Jackson, his wife, and the trustees under her contract of marriage, the object of which it is unnecessary here to advert to. In defence, it was inter alia pleaded by Mrs Jackson and the trustees, that the pursuers were not entitled to insist in the action as trustees of the late Mr Jackson, inasmuch as the deeds of ~~assumption~~ in their favour were invalid, being *ultra vires* of the two or

trustees, who, under the powers in the trust-deed, could only assume two in place of the two who had declined to accept, but could not, as they had declined, assume three.

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Ferrie v.
Baird.

The Lord Ordinary ordered minutes of debate on this point.

Pleaded for the defenders—

Faculties or powers must be strictly interpreted. Here the power of assuming new trustees is only given in the special event of any of the trustees named by the truster declining to act or dying, and the power so given in such case is to elect others "in place of those who may die or decline to act." This, on a fair construction, clearly limits the power to the assuming a single trustee for each who should die or decline, and cannot admit of the assumption of more, so as to increase the number of trustees beyond that fixed upon by the truster. No doubt, if there were room for distinguishing between that part of the act of assumption which was within, and that which was beyond the powers of the trustees, it would only be held invalid quoad excessum; but here, though they might validly have assumed two new trustees, they, by one and the same act, assumed three, and there are no termini habiles for any two of them being fixed on as validly assumed, and not the third, so that the vitium of the act necessarily attaches to the whole appointment.

Pleaded for the pursuers—

There is no express limitation as to the number of trustees who may be assumed, the power being general, "to add and assume such other proper persons as they shall judge fit to be trustees along with them;" and the statement that these are to be "in place of those who may die or decline to act," infers no limitation as to their number, because, however numerous, they would be equally "in place" of those who might die or decline, while the use of the word "add" implies, on the other hand, that an increase of number was contemplated.

On advising the minutes, the Lord Ordinary made avizandum therewith to the Inner-House, issuing at the same time the subjoined note.*

* " The question here reported is of importance for the regulation of all such trusts. The trust-deed contains no general power of assuming trustees. The only power given is limited to the case of one or more of the trustees named, dying by death, or declining to accept; and the power is simply a power to the remaining trustees, upon that emergency, to add or assume such other persons as they may think fit to be trustees along with them, in place of those who may die or decline to act. The Lord Ordinary can entertain no doubt of the plain meaning of this provision, viz. that if one died or declined, another might be assumed, and if two died or declined, two others might be assumed. But here two had declined, and the remaining two have assumed three. If they had power to do this, they had power to assume six or a dozen,—that is, the power given for supplying the deficiency in a particular case, is, upon the emergence of that event, converted into a general power of assumption. The question is, Whether this is consistent with the will of the testator? or, Whether there is any law for such a construction, or any precedent to support it? The Lord Ordinary is of opinion, that it is contrary to the plain in-

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THE COURT sustained the objection to the instance of the pursuers, and remitted the cause to the Lord Ordinary, reserving all questions of expenses.

WM. YOUNG, W.S.—PEARSON, WILKIE, and ROBERTSON, W.S.—Agents.

No. 292.

MRS MARION COLLIER and HUSBAND, Pursuers.—*Sandford*.
WILLIAM PATERSON, Defender.—*Hunter*.

Citation—Process—An execution of citation was written on a sheet of paper, containing no part of the summons, but stitched up under the same cover with it, and the pursuer was not designed—held, that the execution could not be sustained.

June 3, 1834.

1st Division.
Ld. Corehouse.
R.

MRS COLLIER and husband raised an action of relief against William Paterson. Along with the summons a blank leaf was stitched up, upon which no part of the summons was written. The messenger wrote his execution on this leaf, which bore that he, “by virtue of the before written libelled summons of relief and payment, raised at the instance of the before designed Marion or May Collier, and Charles Donald, her husband, for his interest, passed, and in his Majesty’s name and authority, lawfully summoned, warned, and charged the also before designed William Paterson to compare,” &c.; a short copy, &c., “was left within the dwelling-house of the said William Paterson at Kettle, with a servant, to be delivered to him, in respect I could not find himself personally.”

Paterson did not aver that the blank leaf was not originally stitched up along with the summons, but having pleaded as a preliminary defence,

tention of the testator; and that the attempt to twist the word ‘add’ into such a meaning, is a perversion of its obvious sense. It must be taken with reference to the special case provided for; the newly named persons are to be ‘added or amended,’ to act along with the remaining trustees, ‘in place of those who may die,’ &c. There is no addition to the original number supposed. And as he thinks this contrary to the evident intention of the testator, so he knows of no law or authority by which it is sanctioned.

“If the nomination of three was incompetent, the Lord Ordinary does not see how it can be at all supported, because it cannot be known which two would have been preferred, or whether any of them would have been named without the third. There is a broad assumption of law in the minute for the pursuers, which the Lord Ordinary cannot at all assent to. The law is, that faculties are of strict construction, and must be precisely executed; and if he mistakes not, the rules of the law of England as to powers are still more strict. The distinction seems to be correctly stated in the minute for the defenders. There may be an excess, which is clearly separable from the general exercise of the power; and, in that case, the Court will only reduce quoad excessum: But if the transgression of the power is inherent in the whole act itself, the Court will not interfere to make a new act of exercise of the power.

“The assumption of Mr Johnston seems to be, in any view, inad-

There was no regular citation, the Lord Ordinary ordered minutes of No. 292, and reported them to the Court.

asked by the defender—

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A citation is null, because, 1. At common law, and according to practice, it was essential that an execution should be inseparably joined with the summons to which it related, or should bear internal evidence, from its own tenor, of being connected with one individual, and no other. If this rule were not enforced, executions might easily be shifted from one summons to another, and occasion would be given to dangerous frauds, in making false interruptions of prescription.

As this execution did not design the parties, nor even state the contents of the summons and its signeting, it could not be sustained as the execution under that summons.¹ 2. The statute 1672, c. 6, had made it imperative "that, in all time coming, all executions of summonses shall distinctly express the names and designations of the parties, pursuers and defenders, and that it shall not be sufficient that the same do relate generally to the summonses, otherwise the execution shall not be sustained." This enactment applied to all executions without exception; and it had been found, after considerable difficulty, not to apply to cases where the execution was indorsed on the summons, this was because the intention and intentment of the statute did not reach these cases, and the law had accordingly been interpreted according to its true spirit in applying them. But, for the same reason, the statute must reach the case where the execution was written on a sheet of paper, which was only joined with the summons by a thread, and could be detached from it, and applied to any other, at any time, if a party chose.² Accordingly, recent decisions had fixed that an execution, like the present, was

asked by the pursuer—

According to ancient practice, and also modern practice, to a very great extent, the execution was correct. By Act of Sederunt, July 8, 1672, had been enacted that a blank sheet should be stitched up with the summons, in order that interlocutors might be written upon it; and scribes, very generally, wrote executions on that sheet, so that if the sheet were now to be held invalid, the decision would affect previous judgments, and the rights of property, to a very great extent. 2. The statute had already been narrowed in its application, so as not to apply to a case where an execution was indorsed on the summons. It

Attach. c. 2 and 3; 4 Ersk. 1. 4; Balf. p. 305, c. 10 and 11—p. 309, c. 1, c. 33 and 34; 4 Stair, 38. 12.

See Obs. p. 440; 4 St. 38. 13.

Kinglassie, Nov. 26, 1680 (3742); 4 St. 35. 14; Wallace, Feb. 1687 (unbar, &c., Feb. 20, 1755 (3746); Kames, Sel. Dec. p. 111; Office of Stewart, Jan. 13, 1831 (ante, IX. 261); Crichton, Nov. 16, 1832 (ante,

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arson.

ought equally to be held as not applying to the present case, where it was not averred that the blank sheet bearing the execution was not originally stitched up with the summons. In the recent case of Watt, an execution, precisely similar, had been sustained.¹

LORD BALGRAY.—The execution in this case is evidently written on a sheet of paper which is entirely distinct from the summons, and independent of it. It is on a separate sheet. In regard to such a case, I think the statute 1672, c. 6, must apply. The words of the statute are most precise, and it seems consistent with common sense that they should receive full effect, where the sheet of paper, bearing the execution, is only stitched to the summons, and contains no part of it. In the case of Watt, I apprehend the sheet had been viewed as forming part of the summons. But I cannot help doubting whether the Court had duly considered all the authorities when they decided that case. I think the execution in this case cannot be sustained.

LORD GILLIES.—My opinion is the same, and I think the enactment of the statute quite clear and unambiguous. The only exception is, where there is an execution on the same sheet of paper with the summons; but here the sheet bearing the execution is not the same. It contains no part of the summons. It is merely connected with it by stitching, and, quomodo constat, that this sheet was, from the first, in the same condition as when the summons is produced in Court? I have looked at the case of Watt, and the report of it would seem to imply that the Court proceeded on a *petitio principii*. It was assumed that the sheet bearing the execution had been originally stitched to the summons. How did this appear? It is only from the admission of parties that this could have been shown to the Court. In this case, as the execution is contained in a sheet which forms no part of the summons itself, and the parties are not designed, I think it cannot be sustained. But, on considering the state of the decisions, I conceive it would be expedient for your Lordships to consult with the Judges of the other Division before deciding, so that the point may now be definitively settled.

LORD PRESIDENT.—I concur with both of your Lordships, and I should have formed a clear opinion on the subject but for the case of Watt. I think, in respect of that case, we should consult the Judges, as proposed by Lord Gillies.

The case was postponed until the Judges of the other Division were consulted, after which the Court “sustained the preliminary defence, and assolied the defender, and decerned; and found him entitled to expenses.”

J. KNOX, S.S.C.—GIBSON and HECTOR, W.S.—Agents.

¹ Watt, Feb. 10, 1827 (ante, V. 334).

JOHN LEITCH, Advocate.—*Neaves*.
WILLIAM THOMSON, Respondent.—*Napier*.

No. 293.

June 3, 1834.
Leitch v.
Thomson.

Process—Admiralty—Caution—1 Will. IV. c. 69.—In maritime causes transferred from the Court of Admiralty by the 1st Will. IV. c. 69, it is imperative on the Court to ordain the pursuer to find caution de damnis et impensis, if required, though he have not insisted for caution judicatum solvi on the part of the defender.

LORD MACKENZIE reported a point which had arisen in a maritime cause, as to the finding of caution by the pursuer de damnis et impensis. The respondent, Thomson, had raised an action before the Sheriff of Lenfrewshire, as in place of the Judge-Admiral, under the 1st Will. IV. c. 69, for payment of wages as a mariner, alleged to be due him by the advocate, Leitch. He did not require that Leitch should find caution judicatum solvi, but Leitch did so voluntarily, and then demanded that Thomson, on his part, should find caution de damnis et impensis. On this point the Sheriff pronounced the following interlocutor:—"In respect that it does not appear to be imperative on the Sheriff by the Act of Parliament referred to (1st Will. IV. c. 69), to order caution in every case instituted in his Court, in virtue of that statute; and in respect that the pursuer does not demand the defender's finding caution, and the enforcing of that measure in the present process might operate as an exclusion of the pursuer's case from being heard, dispenses, in this process, with caution." After a proof, and several other interlocutors, Leitch brought the cause up to this Court by advocacy, and contended, inter alia, that Thomson was bound to find caution de damnis et impensis. Lord Mackenzie reported the point verbally to the Court.

Neaves, for Leitch.—The statute 1st Will. IV. c. 69, transferred to the Sheriff and the Court of Session the Admiralty jurisdiction, as it stood in the persons of the Judge-Admiral and his deputies, with all the rules of their Courts, one of which was, that while a defender might be compelled to find caution judicatum solvi, a pursuer might in like manner be compelled to find caution de damnis et impensis; and there is nothing in the phraseology of the statute declaring that the Judge "may" appoint caution to be found, to alter the previous rule of the Admiralty Court, as it only imports that it is not imperative on the Judge proprio motu, or unless craved by the party; but that, if craved, caution must be found now as before the Judge-Admiral, was decided in the case of Gillies.¹

Napier, for Thomson.—Admitting that the 1st Will. IV. transferred the Admiralty jurisdiction, with all its legal rules, there is nothing in the statutes originally establishing the Court of Admiralty, that makes it imperative on the Judge in all cases to require caution to be found when craved by the party. The Act 1681 declares it to be the "privilege" of the Judge-Admiral to require caution, and this

¹ Gillies v. Smith, Jan. 19, 1832 (ante, X, 209).

No. 293. power was necessary, from the character of the parties pleading before him, who were frequently foreigners, but there is nowhere any authority making it imperative on him to require this; and as to the alleged rule of practice to compel a pursuer to find caution de damnis et impensis, it was limited to the case where he, on his part, had required from the defender caution judicatum solvi, but did not extend to the case where no such demand had been made. Here the defender volunteered to find such caution, in order to embarrass a poor pursuer by a demand for caution de damnis et impensis. As to the case of Gillies, it did not apply. Caution had there been found under an order in the Inferior Court—the cautioner afterwards died, and the only question was, whether this Court should ordain new caution to be found in implement of the original order.

· LORD CRINGLETIE.—I was Judge-Admiral for many years, and the rule of Court undoubtedly was always to order caution when required, and in practice, in *initio litis*, it was held imperative.

LORD GLENLEE.—Was the practice so where the pursuer did not require caution of the defender *judicatum solvi*, but the defender found it voluntarily?

LORD CRINGLETIE.—I do not think there were any cases of that kind, as execution judicatum solvi was always asked.

LORD JUSTICE-CLERK.—I have not much difficulty in the case. The practice of the Admiralty Court being clear, it is not, in my opinion, affected by the word "may" in the act transferring the jurisdiction to the Sheriff, but remains exactly as it was before the Judge-Admiral. I have no idea that the Sheriff can dispense with caution; and as to the plea of hardship, I do not think any thing of it.

LORD MACKENZIE.—My own opinion was, that caution must be found.

Napier.—Does the Court allow juratory caution as sufficient?

Court.—We do not decide that.

THE COURT instructed the Lord Ordinary to require the respondent to find caution de damnis et impensis.

CAMPBELL and M'DOWALL, S.S.C.—J. STUART, S.S.C.—Agents.

No. 294. WILLIAM DUNCAN, W.S., Advocate.—*Jameson—J. Anderson.*
JAMES CUNNINGHAM, Respondent.—*Skene—Neaves.*

Bankruptcy—Acquiescence—Proof.—An account for work performed by a tradesman was lodged on a sequestrated estate, with a claim and oath of verity, and no objection stated to it; and the claimant was counted as a creditor to the amount thereof in various proceedings, and particularly in an application by the bankrupt for discharge, but he never was discharged—held, in an action raised against him about twenty years after the account was first lodged, that he was not entitled to object to a particular item of it as not sufficiently specific, and to throw the burden of establishing it upon the creditor.

June 3, 1834. THE estates of the respondent Cunningham, nurseryman at ~~County~~
 Division. Bank, having been sequestered in 1811, a claim was given in ~~the~~
 Redwyn. nued by the usual oath of verity, for James Doda, wright

or £135, 14s. 10d., as the balance of an account for fitting up green-houses, &c., at Comely Bank, and an account was produced with the claim, the first item being in these terms:—"1810, Nov.—To an account rendered for wright-work, &c., £111, 10s. 1d." Cunningham never was discharged, and the estates of Dods having been sequestrated, the advocate, Duncan, W.S., who was appointed trustee thereon, raised, in 1831, an action against Cunningham, for payment of the account above mentioned, before the Sheriff of Edinburgh. In defence, Cunningham pleaded that the account, and especially the first article, was vague, and not sufficiently specific, and that the onus of establishing it lay on Duncan. The Sheriff pronounced an interlocutor, which, with reference to this plea, was in these terms:—"Finds, that in calling in question the claim libelled, the defender was and is still entitled to demand a full specification of the first item of the account libelled, such specification not having been produced or recovered, though it appears from Dods's affidavit to have been once rendered the defender: Therefore, before farther procedure, ordains the pursuer, within six weeks, to lodge a full specification of said first item."

Thereafter the Sheriff found Duncan not entitled to produce a full specification of this item, without payment of certain expenses, and, on his failure to implement this order, he assoilzied Cunningham. Duncan hereupon brought an advocacy, in which the Lord Ordinary pronounced the following interlocutor, embodying the whole facts of the case:—"Advocates the cause, and finds that the defender having been sequestrated in September, 1811, the late James Dods gave in a claim and affidavit, dated 6th November, 1811, claiming to be ranked as a creditor for the sum of £135, 14s. 10d.: Finds, that on 6th December, 1811, the defender, with concurrence of his trustee, presented a petition to the Court for approval of composition and discharge, referring to a report by the trustee, in which report, the claim of James Dods for the above sum is stated, and he is reckoned as a creditor, both in number and value, agreeing to the discharge: Finds, that this petition having been opposed, the Court refused the application on 12th May, 1812, and removed the trustee on account of his reprehensible conduct relative to said composition: Finds that the defender, in the year 1821, again presented a petition, with concurrence of his new trustee, for approval of composition and discharge; and in the report of the trustee James Dods is stated as one of "the creditors who have lodged grounds of debt, with oaths of verity, and been ranked on the sequestrated estate," and his debt is stated at £135, 14s. 10d., and he is counted in the number of creditors giving the statutory concurrence to this application; but this application was also refused by the Court, and the defender is still an undischarged bankrupt: Finds that the present action was raised at the instance of the pursuer in February, 1831, when, for the first time, the

No. 294.

June 3, 1834.
Duncan v.
Cunningham.

No. 294. *defender objected to the amount of the claim, not denying the employment, nor pointing out any specific objectionable articles in the account, but solely because the claim commences with this article, '1810, Nov.—To an account rendered for wright-work, &c., £111, 10s. 1d.,' and calling upon the pursuer to produce the items of said account: Finds that there is no book in existence kept by the late James Dods which contains any account from the year 1806 to November, 1810, but it appears, that they have probably been destroyed without any blame imputable either to the pursuer or the late Mr Dods: Finds that the presumption of law is, that an account was duly rendered at the time, and this presumption is fortified by the statement in the claim that it was so; and further, the presumption is, that this claim was only admitted by the trustee, and founded on by the defender, after being examined, compared with the account rendered, and found correct: Finds that the account having been so long unchallenged, and so often judicially founded on as correct, it cannot be supposed that the account-books for so many years were destroyed for the purpose of excluding the means of verifying this item in the claim, and that it is now too late, under all the circumstances, to insist that the claim must be rejected, because not supported by a full specification of the particulars taken from the tradesman's books, as it seems just that the onus of showing that the account is incorrect should fall upon the defender, to whom the account was rendered, and who has so long and so solemnly acquiesced in its accuracy, and founded upon it, but who points out no mistake or inaccuracy in it; therefore, alters the interlocutors of the Sheriff, in so far as they are submitted to review, and decerns in terms of the conclusion of the libel: Finds expenses due."*

Cunningham reclaimed; but the Court, without requiring the counsel for Duncan to be heard in answer, refused his reclaiming note.

W. DUNCAN, W.S.—RYMER and SCOTT, W.S.—Agents.

No. 295. PHOENIX INSURANCE COMPANY, Pursuers.—*Jameson—Ivory.*
JOHN YOUNG, Defender.—*D. F. Hope—Buchanan—Patterson.*

Account—Acquiescence—Agent and Principal.—Circumstances in which the agent of an Insurance Company having for nearly fourteen years taken credit in his quarterly accounts for his own commission at the rate of 5 per cent, not allowed at the end of his employment to claim an additional 2½ per cent as short charged.

June 5, 1834. THE Phoenix Insurance Company of London, in 1819, appointed the defender, Young, to be their agent in Edinburgh, without any written agreement, and took from him a bond with cautioners, binding him duly to execute his office, and account for his intromissions. In June, 1832, he ceased to be their agent, and on their instituting against him

June 5, 1834.
Phoenix Insurance Company
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ount and reckoning, he claimed credit for two sums, which, if allowed, would have turned the balance in his favour. No. 295.

The one was an amount of commissions alleged to have been short-charged during the whole period which he was in the service of the Company; and as to this it appeared that, during all that time, he had rendered quarterly accounts, in which he uniformly took credit for his commission at the rate of 5 per cent on the policies effected by him, while he now maintained that he was entitled to $7\frac{1}{2}$ per cent, on the averment, that when he was engaged by Mr Richter, the accountant of the Company, that gentleman had represented that 5 per cent was the highest allowance made to their other agents in Scotland, and that he had accepted the situation on the faith of that representation alone, whereas he averred that the allowance to the other agents was $7\frac{1}{2}$ per cent, and, in some instances, more. June 5, 1834.
Phoenix Insurance Company
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The other sum for which he claimed credit was the amount of certain advances alleged to have been made by him for the funeral expenses of the late Lord Elibank, and of which he contended he was entitled to be reimbursed, as creditor funerarius, out of certain funds belonging to his lordship in the hands of the Company. The funds in question, it appeared, consisted of the amount of a life policy, effected by Mr Scott, accountant, Lord Elibank's trustee, with the Provident Life Office, and which had been transferred to the Phoenix Company (who had lent money to his lordship), under an arrangement with Mr Scott's representatives, made at a meeting where Young was present, and to which arrangement he was a consenting party without having intimated any preferable claim as creditor funerarius, the transference being made under this condition, that the Phoenix Company "should guarantee and relieve Mr Turner (Mr Scott's partner), and Mr Scott's representatives, from all claims against him or them, by any creditors of Lord and Lady Elibank, or others who may be able to establish claims upon said policies." The Lord Ordinary pronounced this interlocutor, adding the subjoined note: *—"Finds no

* " A case might be figured (though, after such a course of dealing, with a good deal of difficulty) where a proof might be allowed such as the defender asks, and to the effect of giving him a claim for bygone commission. If it were distinctly averred that when A was appointed agent of the company for the Edinburgh district, B, who, on behalf of the company, settled the terms of the agreement, promised a commission at the highest rate of any other agent, and, in order to induce him to accept of five per cent, assured him that this was the highest rate of commission; and that on this express assurance A agreed to accept of these terms of remuneration, and he soon afterwards ascertained that he had been deceived, and that the highest rate of commission was seven and a half per cent, and if he immediately made a demand for this remuneration, the Lord Ordinary thinks it ought to be intimated to. But what is averred in the 1st and 2d articles of the defender's statement, falls very short of such a case. At first sight, the charging of 3s. on every policy instead of 2s., which took place in 1822, and which was allowed, gives a

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statement on the record sufficiently specific as to the alleged misrepresentation by Mr Richter, who, in 1818, settled the terms on which the defender was to act as Edinburgh agent for the pursuers, to entitle him, at this distance of time, after so many quarterly settlements of accounts, in which five per cent is stated and admitted for commission, and after the agency is withdrawn, to insist upon a proof that he was deceived into an acceptance of said commission, and that he is now entitled, on proving that other agents have a higher commission, to open up all these settlements, and to claim, back to the commencement of the agency, a commission of seven and a half per cent on the amount of all premiums received: Finds as to the claim set up by the defender as creditor funerarius of the late Lord Elibank, that under that character he has not established his claim so as to entitle him to obtain payment under his right of retention from the pursuers, in respect that the minute of 4th August, 1830, on which he founds his right, authorizes the payment of two policies of insurance by the Provident Life Office to the pursuers, on the condition merely of their agreeing to guarantee and relieve Mr Turner, and the representatives of Mr Scott, from all claims against him or them by creditors of Lord or Lady Elibank, or others who may be able to establish claims on said policies; and that the defender has not established any claim against Mr Turner, or Mr Scott's representatives, or on said policies; and although, according to his present statement, he had then disbursed these expenses, and was at that moment creditor funerarius, and was present at the time, he did not intimate at that meeting his claim, or state his preference, that it might have been taken into account in the settlement then made of these policies: Therefore, repels the defence, and decerns against the defender for the sum of £302, 6s. 7d., with interest from the date of citation, and till payment: Finds the pursuers entitled to expenses."

Young reclaimed, and contended, that he ought to have been allowed to prove his allegation as to the nature of his agreement with Richter, by examination of that gentleman.

LORD JUSTICE-CLERK.—I am quite satisfied that the interlocutor should be adhered to. There is no allegation of deception by Richter, but merely of a

degree of plausibility to the defender's plea; but it rather appears that Mr Young, having ascertained, as he thought, an inaccuracy in one part of Mr Richter's representation, should have ascertained if he was accurate in the most important particular; so that if he was to insist on these higher terms, he might give the company an opportunity of dispensing with his services if he declined to continue at the former rate of remuneration, and that he was not entitled to lie by, either with the information obtained, or without obtaining what was within his reach, and to which his attention was now called, in order to make a claim when the agency was terminated ten years afterwards, and for all bygone years, when he had ~~been~~ ^{been} ~~been~~ ^{been} to suppose that he had no such claim upon them."

understanding on the part of Young. When, however, we look at his own conduct for such a long course of years, every quarter charging commission at 5 per cent, it is impossible to allow him to say, at the end of his service, that he will claim $7\frac{1}{2}$. He can no more claim $7\frac{1}{2}$ than 15. As to the other point, it will be enough to reserve to him to claim in a multiplepointing on this fund in the hands of the Company.

The other Judges concurring,

THE COURT adhered under the reservation referred to.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—JOHN CULLEN, W.S.—Agents.

WILLIAM GIBSON and Mandatary, Pursuers.—*Rutherford—Miller.* No. 296.
DUNCAN STEWART, Defender.—*D. F. Hope—Cunninghame—Marshall.*

Pactum Illicitum—Partnership.—Though action has been refused to one socius against another, for a share in an illegal adventure, he may maintain a claim of accounting and repetition as to advances, which, although resulting consequentially from the adventure, were in themselves tainted by no illegal consideration.

SEQUEL of the case reported ante, VI. 733, and IX. 525, which see. June 6, 1834.
In 1806, an American ship, called the Washington, was fitted out, and despatched by Gibson from Liverpool to the river Congo, in Africa, on a slaving voyage. Duncan Stewart was named supercargo, and held one-eighth share in the joint adventure. When off the coast of Africa, she took in a store of arms and gunpowder from a British vessel, the Croydon, which had been despatched from Liverpool, and she was immediately seized, as a prize, by an English privateer. After much judicial procedure, the Washington was condemned as lawful prize by the king in council. Parties were at issue whether the sole cause of condemnation was the quantity of arms and powder which were on board of the Washington; and also whether it was exclusively imputable to either Gibson or Stewart, that she had been brought within the penalty of confiscation. A heavy loss arose upon the adventure, and very considerable disbursement was made, subsequently to the seizure, in adopting judicial proceedings for the recovery of the ship, and making occasional advances to Stewart, who was occupied for above a twelvemonth in superintending these proceedings, and looking after the vessel. Gibson raised an action in 1822 against Stewart, concluding for a balance of £1272, as due on account of his eighth share in the adventure. Stewart pleaded, that as the adventure was illegal, the Court could not sustain an action by one socius against another, in respect of a share in such adventure. The Court “sustained the defence founded on the illegality of the adventure, and absolved the defender from the conclusions of the libel, so far as the same relate to the sum of £1272.” There remained other two conclusions of the libel as to which the cause was remitted to the Lord Ordinary.

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Gibson v.

Stewart.

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D.

No. 296. These conclusions were respectively for £1132, 9s. 4d., and £139, 16s. 6d.; and they had been libelled on, as due to the pursuer "in consequence of the adventure." The questions which were involved in discussing these claims were of a special nature, except in so far as the general objection was stated against the claims that they truly resulted from the illegal adventure, and that the summons had libelled on their being due "in consequence of the adventure." The principal item claimed consisted of advances for judicial proceedings in Admiralty, relative to the vessel, which had been twice paid, and the second payment had got into the hands of the defender. Part of the advances was for clothing, lodging, &c., or cash to the defender while engaged in looking after the vessel. The whole advances were of a date subsequent to the seizure of the vessel.

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M'Donald.

The Court did not regard these advances, though consequentially resulting from the adventure, as being in themselves contaminated by any illegal consideration; and in the accounting, they sustained the chief part of the claims made by the pursuer, but remitted to the Lord Ordinary, to hear farther as to certain items, and as to a claim of compensation made by the defender in respect of the remuneration alleged to be due to him for laborious and responsible services performed in the employment, and for the behoof of the pursuer, for a considerable period after the seizure of the vessel.

LORD GILLIES.—It might be one of the consequences of having engaged in this adventure, and having shared in its disastrous issue, that one party was obliged to borrow £1000 from the other; but it would be impossible to maintain that he is not to be liable to repay the sum, because he would not have required to borrow it except for the illegal adventure.

The other Judges concurred, and, in the circumstances, pronounced the judgment above mentioned.

J. MACKENZIE, W.S.—J. T. MURRAY, W.S.—Agents.

No. 297.

JOHN FRASER, Advocate.—*Keay—W. Bell.*
W. M'DONALD and G. JACKSON, Respondents.—*Murray.*

Lease—Sheriff Court Process—Reparation.—Competent in a summary petition by a landlord against his tenant before the Sheriff, for the purpose of having him interdicted from pursuing a course of management inconsistent with good husbandry and the stipulations of his lease, to conclude for damages, in so far as injury should be suffered by his actual deviation.

June 6, 1834.

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Jd. Mackenzie.
F.

THE advocate, Fraser, held a farm from the respondent, M'Donald, under a lease containing certain specific conditions as to the course of cropping, besides a general obligation properly to cultivate and manure to dung and manure the lands. The term of removal —

ay, 1832, as to the houses and grass, and the separation of the ensuing crop as to the arable land. M'Donald having granted a new lease, to commence at the term of Fraser's removal, to the other respondent, Jackson, a summary petition was, in November, 1831, presented by these two parties, to the Sheriff of Perthshire, setting forth that Fraser had violated, in his mode of cropping and cultivating the farm, the rules of good husbandry, and the special stipulations of the lease; and in particular, that he was preparing for a set of crops for the ensuing season, being the last of his possession, which would leave the farm in a condition greatly different from that in which he was specially bound by his tack to leave it, and praying the Sheriff to find that he had contravened the stipulations of the tack, as well as the rules of good husbandry—to prohibit him from having the lands otherways managed and cropped during the last year, than was conditioned for by that tack, so far as could now be effected—to appoint an inspection by men of skill, for the purpose of reporting on the state of the farm, and the damage arising from the violation of the lease and the rules of good husbandry—and, finally, to find him liable in the damages which might be so ascertained. A record was made up and closed, and thereupon an inspection was ordered, but not till the end of April, 1832, by which time the crops for that season had been laid down by Fraser. The inspectors having reported that the farm had not been cropped according to the rules of good husbandry, and the conditions of the lease, and that it would require £85 to put it in the condition in which it ought to have been left, the Sheriff, in December, 1832, decerned for that sum as the amount of damage due. Fraser thereupon brought an advocacy, in which he contended, *inter alia*, that it was incompetent to introduce a conclusion for damages in the summary application presented to the Sheriff.

The Lord Ordinary pronounced this interlocutor:—"Finds that not only under the rules of good husbandry, but under the terms of the lease libelled, and particularly under that clause thereof requiring the advocator properly to cultivate the whole lands, and lay the same down by rotation with grass and green crops, the advocator was bound so to manage the farm, as not only not to take two white crops running, and to leave, at termination of the lease, eighteen acres of two-year-old grass, properly laid down, but also to leave a reasonable proportion of the farm, from which a white crop had not been taken in that last year, so that the cultivation of the farm by the incoming tenant might proceed in some rotation not out of the ordinary course of good husbandry: Finds, that previous to the last year of the lease, a petition was presented to the Sheriff by the respondents, the landlord, and incoming tenant of the farm, praying to have the advocator interdicted from violation of his lease in that year, with a conclusion also for damages, in so far as the interdictal remedy might not be sufficient: Finds that this petition, to the above effect,

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No. 297. *was not incompetent: Finds that the proceedings on this petition did not terminate in judgment by the Sheriff till after the last year of the lease was past, when the interlocutor complained of was pronounced: Finds, that at the date of that interlocutor, it was proven by the admissions in process, as well as by the reports, and testimonies on oath of the reporters, that the obligations of the lease were in the last year violated by the advocator in various respects, and particularly in having a proportion of the farm grossly excessive in white crop in the last year, by which the farm was too much exhausted: Finds, that for this wrong the advocator was liable in reparation to the landlord, or to the incoming tenant, as deriving right from the landlord, by payment of such a sum as would be sufficient to restore the farm to the condition in which it ought to have been left: Finds that the amount of the said sum is proven to have been not less than the sum awarded by the Sheriff: Therefore, remits the cause simpliciter to the Sheriff, and decerns: Finds the advocator liable to the respondents in expenses."*

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Tenant.

THE COURT adhered.

GEORGE BRUNTON, S.S.C.—HENRY TOD, W.S.—Agents.

No. 298. SAMUEL CATTERNS (Scott's Trustee), Advocator.—*D. F. Hope—M'Neill.*
HUGH TENNENT, Respondent.—*Rutherford—Alison.*

Lease—Hypothec.—A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water: and the rent for the premises was fixed, but the amount of the consideration for the steam-power and water was left to the determination of arbiters—held, that his right of hypothec over the *invecta et illata* in the premises let, was available in security for the whole consideration, including that for the power and water.

June 6, 1834. THE respondent, Tennent, was proprietor of certain premises in Glasgow, occupied by himself, on which he had erected a steam-engine, and also of certain adjoining premises, which, prior to 1830, had been used as a brewery. On the 4th May of that year, he addressed to Arthur Scott, bleacher in Glasgow, with reference to the latter premises, a missive letter in these terms:—"Sir,—I am willing to give you a lease, for ~~five~~ years, of the ground and buildings pointed out to you at Wellpark—lately occupied as a brewery—at the yearly rent of seventy-five pounds sterling, rising every subsequent year £3 during the lease—of which ground and buildings I shall furnish you with a plan, to be subscribed by each of us—also the garden, with the additional ground at and near the

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country-house, at the further rent of £5 per annum during the lease, but with liberty to myself to take possession of said garden-ground at the expiry of five years from this date, upon giving you six months' notice, in writing, when said rent of L.5 shall cease. No. 296.
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“ I will allow you a private entry to these premises—for your family only—from the road which leads to the house occupied by myself so long as I find it agreeable, which private entry is to be shut up whenever I require you to do so; entry to the premises to be given immediately, and the rent to commence from Whitsunday first; which, together with the amount to be charged for water, steam, and steam-power, is to be paid at the usual terms of Martinmas and Whitsunday. The premises are not to be occupied for any other purposes than those of bleaching, dyeing, rinsing, singeing, callendering, or distilling of spirits, without my permission in writing.

“ Whatever alterations you may require in the buildings for your operations are to be done at your own expense, none of which are to be to the injury of the houses as they at present stand. Said buildings are to be kept and left by you in good tenantable condition, till the termination of the lease.

“ I also engage to furnish you, during the lease, with the whole power of the said steam-engine at present on my premises, and to put a shaft through the wall into the premises to be occupied by you, to which you will connect your machinery, which is to be fitted up on the most improved principle, and that will, in the opinion of the referees, be least hurtful to my engine. The time of keeping the said power in motion to be twelve working-hours per day, and to be paid for according to the rent to be fixed upon by the gentlemen afterwards named as referees, whether you occupy it for the whole twelve hours or not. I am not, however, to be liable for stoppages that may be occasioned by necessary repairs, and in consequence of any thing going wrong with the engine from which you derive said power, except by making up lost time. And, if need require, I am to have two weeks per annum for repair of engine and boiler, without any deduction from the rent to be charged for said steam-power. Whatever extra time you require said steam-power, an extra price to be charged accordingly. Any odd time arising from stoppages of the engine, beyond the specified time for repairs, to be settled for at the end of the lease. I reserve to myself the power of letting or using the extra power of the engine for my own purposes, at any time which does not interfere with the twelve hours abovementioned—it being however understood, that I am to have liberty to use the engine during these twelve hours—for a few minutes only—occasionally to the extent of half a horse-power, for pumping worts, &c.

“ I also engage to give you as much water as I can, at a rent to be fixed upon by the referees afterwards named, but from which rent I do

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per cent is to be deducted from the price charged by the Glasgow Water Company—which water is to be pumped by you out of the wooden cistern at your own expense—for which purpose I will give you the use of the pumps already on the premises, which you are to keep up. I further engage not to charge you for the power necessary to pump the water.

“ I farther agree to give you the injection water from the engine, which you will conduct into your premises, the rent for which injection water is also to be fixed by the referees.

“ It is understood that the minimum power of the engine for which you are to pay rent is not to be less than that of three horse-power, from the commencement to the termination of the eighth year of the lease, and that from the commencement of the ninth year, till the termination of the lease, the minimum power for which you are to pay rent shall not be less than six horse-power.

“ The price to be paid by you yearly, from the commencement, and during the continuance of the lease, for the steam, steam-power, and water, together with any difference of any kind—should any unfortunately arise between us—as well as any increased supply of water which you may require from time to time, to be referred to the decision and final determination of Mr Rolland, of the Glasgow Water Company, and Mr James Allan, of the house of Messrs Peter Brown and Company, merchants in Glasgow, with liberty to them, in case of need, to appoint an umpire, whose decision shall be binding upon us; and in case of death, or unwillingness of any of these gentlemen to act, that we shall name other gentlemen to act in their place, whose award, or their umpire, shall be equally binding on us. I am, &c.

“ I omitted to mention, that I reserve the water of the well on the premises to be let to you entirely to myself, and that I shall have liberty at all times to clear it, as well as to repair the drains from the brewery, which pass through said premises. It is understood that nothing is to be removed from the premises that was there at the time of your entry.”

This offer was accepted by a counter missive, of date 3d July, on the part of Scott, who entered into possession of the premises, which he converted into a bleaching and dye-work, the steam-power and supply of water being communicated as stipulated in the missive. In April, 1831, the affairs of Scott having become embarrassed, Tennent presented a petition to the Sheriff of Lanarkshire, for sequestration of certain effects on the premises let to Scott, and recovery of others which had been removed, and for sale of them in satisfaction of a term's rent due, including the consideration for the steam-power and water. The Sheriff granted sequestration, and thereafter a long litigation ensued between Tennent and the respondent Catterns, who subsequently was appointed trustee of the estates of Scott, which were sequestrated under the bankruptcy statute.

One point discussed was, as to the regularity of certain proceedings for No. 298.
fixing, under the reference in the missive, the amount of the consideration
to be paid for the steam-power and the water; and as to this a proof was
allowed, on advising which the Sheriff found that the amount had been
regularly fixed by arbiters duly chosen, in terms of the missive. The main
question, however, and that to which alone it is necessary here to advert,
was, how far the landlord's hypothec was available in security of that
portion of the consideration stipulated for in respect of the supply of the
steam-power and water. As to this it was

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Pleaded for Tennent—

The missives of set do not contain two separate contracts, one of lease, and the other for supply of steam-power and water, but form one indivisible contract of lease of the heritable premises, with the use of the power and water, as appendages or accessories thereof; and the rent, though separately specified on account of the parties not having, at the date of the missives, agreed on the value of the power and of the water, is substantially a slump rent for the heritable premises, with these accessory advantages. Being thus of the nature of rent, and the proprietor of the power and of the water being also the proprietor of the heritable premises let, and within which the effects sought to be subjected to the hypothec are situated, the right of hypothec is available to him in security of the full amount of that rent.

Pleaded for Catterns—

Though embodied in one missive, and forming parts of one contract or agreement, the stipulations as to the use of the heritable premises, and for the supply of power and water, are in their own nature totally distinct; the stipulation for the use of the former being of the nature of lease, and that for the use of the power and water, of the nature of location or hiring.¹ It is only in security of the consideration for the use of an heritable subject, that the right of hypothec can possibly be available. It can have no reference to the consideration for the use of a power arising not from machinery fixed in the premises, and so rendered heritable, and part of the heritable subject let, but from machinery in separate premises altogether, and forming no part of that subject. Such separate and independent power can never become the proper subject of a lease, though the fixed sources of power as heritable accessories of property may; and consequently the consideration stipulated for, whether denominated by the parties "rent," or, as it is in the missives in this case, "price," can never be secured by the peculiar privilege of the landlord's hypothec, which is limited to what is in its strict legal sense termed "rent," or the annual consideration for the use of heritable property. There might, no

¹ Auld v. Baird, Jan. 31, 1827 (ante, V. 264).

: Finds, in the circumstances of this case, that the landlord's right No. 298.
 does not give him a preference for the rent or sum paid for June 6, 1834.
 of the steam-engine which he undertook to furnish, and for the Catterne v.
 which he engaged to give to the tenant of the ground and houses Tennent.
 that it only covers the separate rent paid for the said premises:
 and, recalls the interlocutor submitted to review; finds that the
 which the hypothec is available, amounts to £80, with interest
 from Sunday 1831, and till paid, for which, and for the expense of
 action, authorizes the Royal Bank at Glasgow to make payment
 to the pursuer and respondent from the deposit receipt for £190, 14s. 6d.
 and to the pursuer and respondent his other claims against the
 ; and to him his defences, as accords."
 not reclaimed.

JUSTICE-CLERK.—From the first moment of reading the record, I enter-
 greatest doubts of the Lord Ordinary's interlocutor, and, after hearing
 arguments, my opinion is fully confirmed. I admit that it is incumbent to look
 to the terms of the contract, but it is on examining all the parts of it
 in my opinion. Then, looking to the missive, it is clear that it is not an
 of the houses, &c. alone, but amongst with advantages, without which it
 be used for the purposes intended, viz. the use of water, and power of
 engine in the adjoining premises, the landlord furnishing the shaft to
 use the power, and the same person being the landlord of the whole.
 Though the contract specifies separately the payment for the houses, and
 rent of the power to be fixed by referees, I have no hesitation in saying,
 remises with these advantages are an unum quid as to the lease, and we
 exclude the hypothec because the rent is separately specified. The
 therefore, comes to this, Is this person entitled to use the power and

particularly Scott, acquiesced in, and communicated with, the referees.
 In circumstances, if this had been a competent process, the Lord Ordinary
 would have sustained the awards.

expenses, the Lord Ordinary cannot help thinking, that, although the
 has been successful in the action on a ground of law, his conduct of the
 has made him liable for the expenses in the inferior court. The proceed-
 in court he has examined with attention. If the advocator had confined
 himself solely to the question of law, and craved the opinion of the Court
 probably the expense would not have been great. But, by the innu-
 merations taken during the proof, the advocacy, and the numerous reclaim-
 ations in the inferior court, in almost all of which he was unsuccessful, he
 occasioned a very great expense. Even in the former advocacy he
 was initially unsuccessful also, his main plea being, that the reference could only
 be by writ or oath of party. No doubt the respondent, on the other hand,
 made incompetent pleas in this process of sequestration. But after the
 report of the Sheriff, referring so strongly to the practice, the Lord Ord-
 inary inclined to hold that he was so much to blame in bringing forward
 in a matter where, as yet, there is little authority to be a guide, as
 the right to expenses incurred by the conduct of the cause in the inferior
 court, as the successful party must, of course, be entitled to the expenses in this

No. 298. water without the landlord having the benefit of his hypothec? According to all principles, the landlord being proprietor of all, his hypothec applies to the whole, as to every thing within these premises. I have no doubt, therefore, that the interlocutor of the Lord Ordinary should be altered. This case has no connexion whatever with that of Auld.

June 7, 1834.
Wright's Trustees v. Hamilton's Trustees.

LORD GLENLEE.—I agree. I will not deny that there is something so pleasing in nice distinctions, that at first sight I was rather taken with that in this case, but I am now satisfied that the Sheriff's interlocutor is right. The consideration comes here as near a slump rent as possible, and, if the lease had been extended after the award of the referees fixing the consideration for the steam-power and water, it would have been so. Then suppose one creditor of the landlord had adjudged the lease, and another had arrested, the adjudger would have carried the whole consideration, if it be rent, but if not, he would only have carried that specially stipulated for the premises. I cannot doubt that the adjudger would have carried the whole here; and if it be once settled that it is all rent, then it follows that the hypothec applies.

LORDS MEADOWBANK and CRINGLETIE concurred.

THE COURT accordingly altered, and returned to the judgment of the Sheriff.

T. LEBURN, S.S.C.—G. LYON, W.S.—Agents.

No. 299.

WRIGHT'S TRUSTEES, Pursuers.—*More—Monteith.*

HAMILTON'S TRUSTEES, Defenders.—*D. F. Hope—Sandford.*

Cautioner.—A was bound to B in a collateral obligation for payment of interest on an heritable bond, in which C was the debtor; A was also a creditor of C, and he and B both acceded to a trust-deed by C, whereby they and the other creditors according bound themselves not to do diligence against him,—held, that A was not entitled to plead B's accession, as done without his consent, and so relieving him from his collateral obligation to B.

June 7, 1834.*
2d Division.
Ed Medwyn.
R.

JAMES HAMILTON, W.S., purchased, in 1809, the estate of Kames from the trustees of Lord Bannatyne, who allowed £20,000 of the price to remain as a burden on the lands, Hamilton granting two heritable bonds of corroboration for £10,000 each. In 1811, the late Mr Wright of Glenlyon agreed to advance £4000, on an assignation to that extent to one of the bonds, on condition of the late Mr Robert Hamilton, James Hamilton's brother, granting a collateral obligation for payment of the interest. Lord Bannatyne's trustees accordingly executed an assignation of one of these bonds in favour of Mr Wright to the extent of £4000, and Robert Hamilton, at the same time, executed a bond bearing as follows: "And seeing that the said sum of £4000 sterling was advanced and paid by the said Thomas Wright, upon condition of my becoming bound for the regular payment of the interest in manner after mentioned, therefore I, the said Robert Hamilton, do hereby become bound and obliged, like

* Lord Mackenzie took his seat in the Inner-House, upon the removal of the late Lord Craigie.

, by these presents, without prejudice to the above-recited heritable bond of corroboration, and disposition, and assignation to the same, in so far as respects the said sum of £4000 sterling, penalties and annualrents fore-
 id, in any manner of way, but in corroboration thereof, bind and oblige
 yself, my heirs, executors, and successors whomsoever, to content and
 y to the said Thomas Wright, his heirs, executors, and assignees, the
 said annualrent of £200 sterling, being the annualrent presently cor-
 responding, or such other annualrent, less or more, as by the law for the
 e shall effeir and correspond to the foresaid principal sum of £4000
 rling, and that yearly and termly, at the shop of the said Thomas
 right in Stirling, as the same falls due, beginning the first payment of
 said annualrent at the term of Whitsunday next for the time prece-
 ing, and the next at Martinmas thereafter, and so forth half-yearly during
 non-payment of the said principal sum, with £20 sterling of liquidate
 nalty for each half-year's failure in the punctual annual payment of the
 d annualrent."

No. 299.

June 7, 1831.

Wright's Tru-
tees v. Hamil-
ton's Trustees.

In 1815, the affairs of James Hamilton having fallen into disorder, he
 mitted to a meeting of his creditors, held on the 11th October of that
 ar, the draft of a trust-deed for their behoof. At this meeting there
 re present Mr Wright, and Mr Gibson, W.S., as mandatary for Ro-
 rt Hamilton, who was a creditor of his brother independently of the
 lateral obligation above mentioned, and the minutes bore, that " the
 eting approved of Mr Hamilton's executing the said trust, and unani-
 mally agreed to accede thereto, and to grant a supersedere, recommend-
 ; to the absent creditors to concur in the measure." The proposed trust-
 d was accordingly executed by James Hamilton, conveying his estate to
 John Campbell, quartus, W.S., and failing him by death or resigna-
 n, to such person as the creditors might appoint. One purpose of the
 st was, that £600 a-year should be paid preferably out of the rents of
 mes to James Hamilton, and it was provided that the creditors, by
 eding thereto, should be bound not to do diligence against him, or take
 arate measures against his estate; but the deed also contained a clause,
 laring " that the accession of any of the said creditors thereto shall
 rays hinder or prejudice in any action or diligence competent to them,
 inst any other person or persons bound with me for payment of the
 l debts; but they shall, notwithstanding thereof, or of their accession
 eto, be at liberty to use all manner of diligence they may think fit
 inst any such co-obligants." A corresponding deed of accession was
 the same time prepared, bearing as follows:—" And considering that
 , the said creditors, are satisfied that the foresaid disposition and trust-
 d is the most speedy and least expensive method of making effectual
 funds for our payment, and for dividing and paying the same to us, do
 by accede and agree to ratify and approve of the foresaid trust-right
 l disposition, granted by the said James Hamilton, and whole powers
 reby committed to the said trustees, in the whole articles, heads, and

No. 299. clauses therein contained, and consent that the same take effect to all intents and purposes, and hereby bind and oblige us, and those who may hereafter have right to our respective debts, to conform thereto, and to the proceedings to be had in pursuance thereof, in every respect as we are severally concerned: And farther, we do hereby agree, covenant, and oblige ourselves, and those for whom we act respectively, that we or our constituents shall not raise, commence, or follow forth any action, suit, diligence, or execution, for arresting, attaching, or seizing, the person of the said James Hamilton, or the estate, subjects, sums, debts, and effects, belonging to him, during the subsistence of this trust." This deed was subscribed by nearly all the creditors, and among the rest by both Wright and Robert Hamilton. Mr Campbell having, after about two years, resigned the office of trustee, Wright was by the creditors chosen in his place in January, 1818, and he continued to manage the trust-estate till his death in May, 1824, on which event Mr Strachan, W.S., was appointed interim manager or factor. During the period when Wright acted as trustee, he took credit in his account for the interest on his own debt of £4000, as it periodically fell due, and of course no demand was made on Robert Hamilton under his collateral obligation; but in the year 1826 some communing and correspondence took place between the latter and Strachan, acting as agent for Wright's representatives, which, though containing no evidence of any positive demand having been made for actual payment of the interests falling due since 1824, referred to his collateral bond as a subsisting obligation on which they relied for these interests, and in 1831 they pressed him for payment. Their demand having been resisted, they in 1832 raised the present action for enforcing it against the defenders, trustees of Robert Hamilton, who had in the meantime deceased. Besides a plea founded on the septennial limitation of cautionary obligations, afterwards abandoned, and an allegation that Wright's representatives had intromitted with the rents of Kames after his death, which they failed to prove, the trustees pleaded in defence—

1. Wright, by acceding to the trust-deed, whereby £600 a-year of the rents of the estate was diverted from the payment of the interests of the debts, and a supersedere of diligence granted to the principal debtor, liberated Robert Hamilton, he not having consented thereto, for although he, as a creditor on his own behalf, acceded to the trust so far as his particular debt was concerned, that cannot import a consent to the accession by Wright as to the £4000, for the interest of which he was bound collaterally.

2. By not intimating that the interests as they fell due after 1824 were not paid, the representatives of Wright had lost recourse; and,

3. The intromissions of Strachan under authority of the creditors were sufficient to liquidate the interests of the real debts on the estate, and if the creditors have failed to recover from him, they alone must suffer, and not any collateral obligants.

To this it was answered—

No. 299.

. Robert Hamilton having agreed to the trust, and recommended to other creditors to accede, and having himself acceded, it is impossible him to plead that Wright's accession was without his consent.

June 7, 1834.
Wright's Trustees v. Hamilton's Trustees.

. The correspondence in 1826 clearly shows that Robert Hamilton then made aware that he was looked to for the performance of his lateral obligation, as to the interests falling due after 1824, although at forbearance was shown in not actually pressing him for payment;

. Strachan was authorized to act by certain individual creditors, not including Wright's trustees, and they consequently are not responsible for his intromissions.

The Lord Ordinary reported the cause on cases.

LORD CRINGLETIE.—Two of the original pleas for the defender have been a up, viz. prescription, and that there was intromission by Wright's representative after his death. As to the other point, the plea as to the cautioner not getting notice, it does not apply, for it is clear to me that Mr Hamilton knew perfectly well that, after Wright's death, there was no payment of interest; and all argument on negligence, being based on an erroneous assumption of facts, is needless. It is also said here that Mr Wright signed the deed of accession. Mr Hamilton himself approved of the trust-deed, and acceded. Wright was present at the meeting when Gibson, on the part of Mr Hamilton, approved of the deed, and Mr Hamilton, afterwards acceding, ratified this, and it is impossible he can say that Wright thereby gave time without his consent. There is one point, however, I have some doubt about. Strachan was appointed by the creditors to introduce and did intromit, and the money was lost by him; but if the creditors do not get security from their factor, is Mr Hamilton to suffer by this? I think not; though what extent this is to operate we do not see, but it may easily be ascertained.

LORD JUSTICE-CLERK.—I feel with Lord Cringletie that we cannot preclude the question as to Strachan's intromission, and the effect of the loss by him. As for the rest, I concur with his Lordship.

The other Judges agreed.

The Court accordingly pronounced this interlocutor:—"Repel the defences founded on the nature of the late Mr Robert Hamilton's obligations under the bond referred to, and on the want of due notice to him of the non-payment of the interest after Mr Wright's death; but, before farther answer, remit to the Lord Ordinary to enquire into the nature of Mr Strachan's appointment to collect the rents of the estate of Kames, and the extent of his intromissions, and the effect of any liability incurred by those who appointed him, and thereafter to do as his Lordship shall see cause, reserving all questions as to expenses."

No. 300.

GEORGE ARNOTT, Petitioner.—*Rutherford—Sandford.*THOMAS HARDIE and OTHERS, Respondents.—*M^cNeill.*

June 7, 1834.

Arnett v.
Hardie.

Bankruptcy—Sequestration.—After an application for approval of composition has been given in, it is still competent for additional creditors to claim and assent to the composition, so as to be taken into account by the Court in determining whether the requisite concurrence has been obtained.

June 7, 1834.

2^D DIVISION.
Ld. Moncreiff.
R.

THE estates of George Arnett having been sequestrated under the bankrupt statute, he, after some time, offered a composition to his creditors. The offer was entertained by a first meeting, and unanimously accepted by a second, held on the 7th June, 1833. Thereafter a petition was presented to the Court by Arnett, praying for approval of the composition, and for discharge, accompanied by a report from the trustee, setting forth that the offer had been accepted not only by nine-tenths of the meeting, but by nine-tenths of the whole creditors who had ranked. In opposition to this petition, appearance was made for Hardie and other creditors, who objected to the trustee's report, and contended that certain alleged creditors, whose concurrence had been taken into account by the trustee, ought not to be considered, and that without them there was not the requisite concurrence. While the objections of Hardie, &c. were under discussion before the Lord Ordinary, certain creditors, who had not previously ranked, lodged claims, with oaths of verity, and concurred in the acceptance of the composition, and this was set forth in a supplementary report by the trustee. With reference to these new creditors, Hardie, &c., besides certain special objections to their claims, contended, that after the application for approval had been given in to the Court, it was incompetent to alter the state of matters by new claims and concurrence; but that the application must be judged of according as there was or was not, at the time of presenting it, the concurrence required by the statute, of nine-tenths of the whole creditors then ranked.

To this it was answered, that although, in regard to a simple discharge after a dividend, under the 59th section, the statute requires that there shall be a concurrence of four-fifths to warrant the application being made, so that if such concurrence do not exist at the time of the application being presented, it must be invalid, the provision of the act as to a discharge on a composition is entirely different. This matter is regulated by the 61st section, which only requires the consent of nine-tenths of the meeting for considering the offer, in order to authorize the application to be made, and then provides, that if the Court "shall find the proposition reasonable, and that the same has been consented to, not only by nine-tenths in number and value of the creditors who attended by themselves, or others authorized by them, at the meeting last mentioned, but by nine-tenths of all the creditors who have produced gross

terests and oaths of verity, an act and order shall be pronounced," &c. No. 900.
 Under this provision, therefore, the *application* is perfectly valid, if nine-
 tenths of the meeting have concurred, although nine-tenths of the whole
 editors may not have done so; while, in deciding on the application, the
 Court are not to consider the state of matters simply at the date of the
 application, but whether it shall have been made out to them, when called
 on to give judgment, that nine-tenths of the whole creditors who have
 claimed concur in accepting the offer; and, consequently, it must always
 be competent to adduce new claims, whether assenting or dissenting,
 though made subsequent to the date of the application.
 The Lord Ordinary reported the point to the Court on minutes of
 date, issuing at the same time the subjoined note.*

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 Hardie.

" Though each of the parties refuses to make a distinct admission to that effect, seems to be nearly certain that the question, whether the composition is to be approved of, and the discharge granted, will depend on the decision to be given on the question discussed in these papers. And therefore, and as it may be doubtful whether the Lord Ordinary has power to decide the point, it seems to be most proper to report the case in its present state. The question is certainly of great importance, and the Lord Ordinary thinks it not without difficulty. The inclination of his mind is, that the new oaths of verity, and the additional concurrence of creditors, is inadmissible, if the claims are good in themselves. But, at the same time, he is sensible to the difficulties represented by the objectors. There is an important difference between the case of an application for approval of composition and charge, and the case of an application for a discharge of the bankrupt simply. The one depends on the 59th section of the statute; the other on the 61st. But the material difference appears to the Lord Ordinary to make against the plea of the objectors, and to be such as completely to reconcile and render consistent the statements of the law in the different passages quoted from Mr Bell's work. By the 61st section, it is provided, that ' after the period assigned for the second dividend, it shall be lawful for the bankrupt, with concurrence of the trustee, and four-fifths of the creditors in number and value, to apply to the Court ' for a discharge, &c. ; and Mr Bell says on this, that ' it is an indispensable requisite to the admission of a petition, that it shall be accompanied with the consent of four-fifths in number and value of the creditors who have claimed. ' In the body of his work, he also says, in reference to this case of discharge, on the 61st section :— ' After the concurrence is once obtained, and the petition duly presented, the appearance of new claimants who might, by their dissent, at first have stopped the application, will not operate as a bar to the Court proceeding to give judgment. ' (B. II. p. 441.) This must be the inevitable consequence of the very words of the statute in that section, because the concurrence of the four-fifths of those who have claimed is an essential quality in the application itself; and as the application cannot be made till after the period for the second dividend, it seems to be according to the principle of the statute, that neither assent nor dissent of new claimants, after the application, could be admitted to alter the merits of the application in that point, though any creditor may appear to oppose it on other grounds. It was on this principle that the Lord Ordinary gave his opinion in the case of How, referred to by the objectors; and he believes that the point was not brought under the notice of the Court. The 61st section is framed on an entirely different principle. It does not require that an application for approval of composition and discharge shall be made with the

No. 800.

June 7, 1834.
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 Hardie.

LORD JUSTICE-CLERK.—I have no doubt that the Lord Ordinary has taken the just view of this case. In compositions, there must be two previous meetings,

express concurrence of nine-tenths of the creditors who have claimed. The order of proceeding is quite different. It provides, that in case, at a certain meeting of the creditors, the bankrupt shall offer a composition, with caution 'to the satisfaction of nine-tenths of them, both in number and value, assembled at the said meeting,' and the composition shall be such as these nine-tenths think reasonable, the trustee shall advertise another meeting with very specific notice; and if at that meeting 'it shall be the opinion of nine-tenths of the creditors there assembled, both in number and value, that the offer should be accepted of, a report of the proceedings relative thereto shall be forthwith made up by the trustee, and transmitted to the clerk of the sequestration, &c., for the approbation of the Court.' This is the nature of the application; and up to this point of the clause there is nothing said of nine-tenths of the whole creditors concurring. But the act goes on to provide, that if the Court, on considering the report, and hearing objections, if any, 'shall find the proposition reasonable, and that the same has been assented to, not only by nine-tenths in number and value of the creditors who attended by themselves, or others authorized by them, at the meeting last mentioned, but by nine-tenths of all the creditors who have produced grounds of debt, or interests, and oaths of verity, an act or order shall be pronounced to that effect,' &c. The Lord Ordinary cannot enter into the idea of the petitioner, that it is only where objections are stated that it is necessary for the Court to see that nine-tenths of the whole creditors assent. He rather thinks that the Court would not be warranted in any case to make the order, without apparent evidence of this fact. But this is clear, that it is not necessary that the trustee's report, in the first instance, should bear any thing as to the consent of nine-tenths of the whole creditors. What he is required to report, is the proceedings of the two meetings, showing, of course, that nine-tenths of the creditors assembled at the last meeting assented to the composition. In practice, no doubt for convenience, the trustee generally reports the concurrence of nine-tenths of the whole creditors who have claimed. But in the case of *Pentland v. Paterson*, December 8, 1827, it was expressly held by the Court that this was not necessary, and that, strictly, the trustee was required to report the acceptance by nine-tenths in the second meeting, 'without waiting for the absolute concurrence of nine-tenths of the whole creditors,'—in which it is necessarily implied, that that concurrence might be obtained after the report by the trustee. But if so, it is difficult to see why the concurrence or consent must be confined to those who had previously claimed, if individuals, being true creditors, make their claims before the Court come to determine whether there is a concurrence of nine-tenths of the creditors or not. Mr Bell states expressly, both in his commentary on the 59th section, and in the body of his work (B. II. p. 468), that 'even after the report of the trustee, any creditor may enter a claim and dissent, and require his dissent to be reckoned in the question of concurrence. It may be doubtful whether the question was decided in the case of *Kilpatrick*, though it is at least strongly implied. But it seems to be, at any rate, just and reasonable in itself. And surely, if a new creditor dissenting is entitled to alter the state of the concurrence, new creditors assenting must, in justice, be reckoned also. In general, therefore, the Lord Ordinary, for these reasons, is strongly inclined to think, that, according to the fair construction of this clause of the statute, the new claims, and oaths of verity, and an additional report by the trustee, if necessary, are admissible. Very possibly a question of expenses may arise in this, or in other cases; but that is a point of which the Court have power to judge."

and the sanction of nine-tenths of the number present must be had. This authorizes the application to be made, though nine-tenths of the whole is required before approval, but certainly not before the application. It is clear, therefore, that it is competent to obviate the objections, by showing that nine-tenths of the whole creditors have concurred, and therefore I am for repelling the objection.

The other Judges concurred.

The Court repelled the objection argued in the minutes, and appointed the special objections to the particular claims to be revised.

Petitioner's Authorities.—2 Bell, 468; Gilchrist, Feb. 26, 1826 (2 W. & S. 22); Pentland v. Paterson, Dec. 8, 1827 (ante, VI. 226).

Respondents' Authorities.—2 Bell, 441; How, Nov. 12, 1833; Kilpatrick, July 5, 1827, (ante, V. 895).

D. FISHER, S.S.C.—J. T. MURRAY, W.S.—Agents.

JOHN M'FARLANE, Pursuer.—*Anderson.*

THOMAS WHITSON, Defender.—*Shene—Buchanan.*

No. 301.

Cautioner.—A party having obtained the consent of a creditor temporarily to liberate an incarcerated debtor, on his giving an obligation to return him to prison under the diligence, or pay the debt, held, in an action for payment on the allegation that the debtor was not returned, that it was not sufficient to aver that the debtor had been presented to the jailor, who did not receive him as a prisoner, no intimation to the creditor being alleged to have been made.

THE pursuer, M'Farlane, in August, 1832, incarcerated one Anderson in the jail of Perth, in virtue of diligence raised upon a bill of exchange, on which Anderson was one of several co-obligants. Anderson was a voter in the county of Perth, and having promised to support Lord Ormelie at the general election, which took place in December, 1832, the defender, Whitson, who acted as one of his Lordship's agents, applied to M'Farlane to allow him to be liberated, in order to give his vote at the election. M'Farlane agreed to this, on the one hand, Whitson, on the other, granting him a letter in these terms:—"Perth, 21st December, 1832.—Dear Sir,—As you have agreed to liberate William Anderson, tenant at Burnside of Marlee, from jail for eight days, I hereby engage that he shall, at the end of that period, return to jail upon your diligence, and that without putting you to any expense. If he fails to do so, I engage to pay the debt. I am, dear sir, yours truly," (Signed) "THOMAS WHITSON." (Addressed) "John M'Farlane, Esquire, of Denhead." On receiving this letter from Whitson, M'Farlane delivered to him the following order for liberation, addressed to the jailor:—"Perth, 21st December, 1832.—Sir,—I authorize you to liberate William Anderson, incarcerated in your jail at my instance. I am, Sir, your obe-

June 10, 1834.

2d Division.
Lord Medwyn.
F.

No. 301. dient servant," (Signed,) "John M'Farlane." Whitson accordingly gave this letter to the jailor, who thereupon liberated Anderson. Some time thereafter, M'Farlane, alleging that Whitson had failed to implement his obligation that Anderson should return to jail under his diligence, raised the present action, concluding against Whitson for payment of the debt for which Anderson had been incarcerated. In defence, Whitson made the following statement as to his having returned Anderson to jail:—"Before the end of the eight days Anderson returned to the jail, and having presented himself at the jail door, told the jailor, John Simpson, that he was come to deliver himself up again. To this the jailor at first replied, that he could not receive him, as he held a letter from the incarcerating creditor consenting to his liberation, and had no authority to imprison him again, and that he had nothing to do with their private arrangements. But upon some farther discussion the jailor admitted him into the jail, where he remained for some time, but was afterwards allowed to go at large. At this time the caption was still in the hands of the jailor, and also the letter from the pursuer authorizing Anderson's liberation." He farther averred that Anderson had, in the month of February thereafter, raised a process of cessio, in which he obtained decree, and to which he had cited M'Farlane; but that the latter had not given him (Whitson) intimation of it; and also that M'Farlane had received partial payments of the debt from certain of the co-obligants, and discharged one of them without any communication with him. These statements were denied by M'Farlane, who farther pleaded, in regard to the alleged presentation of Anderson at the jail, that, even admitting the statement of Whitson to be correct, it did not amount to an implement of his obligation, which was, to return Anderson "under the diligence," whereas the jailor had refused to receive him as a prisoner under the diligence, and Whitson had made no intimation to M'Farlane to enable him to secure his detention.¹



The Lord Ordinary pronounced this interlocutor:—"In respect that although the defender states that Anderson the debtor presented himself to the jailor at the jail of Perth, and said he was come to deliver himself up, and that after some demur on the part of the jailor, who at first declined to receive him, he was at last admitted into prison by the jailor, where he remained for some time; he does not aver (as called upon by the counter statement to do) that Anderson was received as a prisoner, or that any application was made by Anderson or the defender to the Magistrates to receive him as a prisoner, or any notice given to the pursuer that he had not returned to jail, as the Magistrates and their jailor had declined to receive him as a prisoner: Finds, That Ander-

¹ Laird of Pitcurr v. Laird of Dun, Feb. 19, 1679 (2 Brown's Supplement, 240).

son has not returned to jail in terms of the defender's obligation No. 301. of 21st December, 1832: Therefore, decerns against the defender, as libelled."*

June 10, 1834.
Peebles v.
Grahame.

Whitson reclaimed.

LORD JUSTICE-CLERK.—We are all agreed that the obligation has not been fulfilled by Whitson, he having taken no steps to bring Anderson under the diligence, and that the interlocutor therefore is right as to this point, but that there must be a remit to the Lord Ordinary to consider the pleas which his Lordship has not decided.

THE COURT accordingly adhered to the interlocutor, except in so far as regarded the decerniture, which they recalled, and remitted to the Lord Ordinary to hear on the pleas undecided.

JAMES HATTON, W.S.—JAMES BURNES, W.S.—Agents.

CHARLES PEEBLES, Pursuer.—*Jameson—Ivory.*
ARCHIBALD GRAHAME, Defender.—*Monteith.*

No. 302.

Sale.—A sold to B the interest in certain lands in Upper Canada, assigned to him by C, by a Scotch deed, it being stipulated that the price should be repaid if B, within nine months, should show an opinion of a lawyer of Upper Canada that the conveyance to A by C was not effectual—held, that production of an opinion by a lawyer of Montreal, in Lower Canada, was sufficient implement of the stipulation to entitle B to repetition.

ALEXANDER PATERSON, of Hobart Town, Van Dieman's Land, being in Scotland in March 1828, executed, on the 14th of that month, in favour of the defender, Archibald Grahame, writer in Glasgow, to whom he was indebted in a certain sum, a deed of disposition and assignation, in the Scotch form, of his right and interest in a property in Upper Canada, under the will of one Allan Paterson, and as entitled to succeed to the shares left by the will to his sisters, Elizabeth and Helen, deceased. In December, 1832, Grahame, in consideration of

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2D DIVISION.
Ld. Medwyn.
T.

* * The Lord Ordinary was willing to have allowed a proof as to the fact of Anderson having returned to the jail and entered it as a prisoner, if the defender's counsel would have stated that that was what was meant to be averred, and what was offered to be proved. But this was declined, and therefore the Lord Ordinary, on comparing the 6th statement with the answer, holds that the defender does not allege that Anderson was received into jail as a prisoner. Although the caption remained in the jailor's hands, yet the letter of 21st December, 1832, authorizing liberation, prevented the jailor from receiving the debtor again as a prisoner without some farther proceeding, which it was the defender's duty to attend to. The pursuer was to be at no farther expense in compelling his return, nor, of course, was to take any trouble, unless at least he was called upon for that purpose. The 4th and 5th pleas in law were not insisted in at the bar."

No. 302. £130 paid him by the pursuer, Peebles, also a writer in Glasgow, executed a conveyance in favour of Peebles of his right and interest under Alexander Paterson's disposition and assignation, the bargain being qualified by a condition as to repayment, thus set forth in a letter from Grahame to Peebles, of date January 18, 1833:—"When you purchased the debt due to me by Mr Alexander Paterson of Van Dieman's Land (one of the heirs of the late Allan Paterson of Matilda, Upper Canada, and claiming to represent his deceased sisters, Elizabeth and Helen Paterson), as specified in an assignation and disposition and assignation in trust after mentioned, in your favour, for the sum of one hundred and thirty pounds, it was specially understood and agreed to by me, that, in the event of my title, upon which the said assignation, and disposition and assignation in trust, proceeds, being held by a respectable lawyer in Upper Canada, to be consulted by you, insufficient and ineffectual to enable you, in concurrence with the other heirs of the deceased Allan Paterson, to effect sales of his lands of Matilda and others, situated in Upper Canada, and to discharge the proceeds thereof, I should, in that case, and instantly upon said opinion being communicated by you to me, any time within nine months from the 13th day of December last, repay to you the said price of £130, with the interest arising thereon, to the date of payment, at the rate of four per cent per annum. I, in consequence of said understanding and agreement, and in consideration of the said sum of £130, now paid to me, have deposited in the hands of William Paterson, Esq., residing in Glasgow, a disposition and assignation of the said debt, containing an assignation of the trust conferred upon me by the said Alexander Paterson, for recovery of his share of the said Allan Paterson's estates, bearing the date hereof, to be delivered to you on the expiry of the said period, or sooner if required by you; and I do hereby become bound, at any time, upon your producing to me such opinion within the period foresaid, and before you have taken delivery of the said disposition and assignation, to repay to you, at one and the same time with the said disposition and assignation being given up to be cancelled, the foresaid sum of one hundred and thirty pounds, with the interest arising thereon as aforesaid; and further, it was understood and agreed upon, that should the said Alexander Paterson have executed a conveyance, or other deed of assignment of his interest, in whole or in part, under his said uncle's deed of settlement, in favour of any third party, and that the same is held to be preferable to the title executed by him in my favour, I, in like manner, on receiving notification thereof from you, within the period of one year, bind and oblige myself to repay you the foresaid sum of £130, and interest thereon as aforesaid. In case of our differing in opinion on the construction of this letter, it is understood that we shall refer the same to the principal town-clerk of the city of Glasgow."

Peebles immediately transmitted the deeds to a ~~gentleman~~

Montreal, who returned him this answer:—"I have, moreover, consulted my homme d'affaires, a notary of the highest repute in Montreal, who is in daily habit of drawing out conveyances of property, situated as your own, in the Upper Province, on subject of the transfer deed before me,—and his opinion decidedly is, that the deed in question is not sufficient, or that it would not, in the Upper Province, be deemed valid. To this person's opinion, however, we need not attach any faith, in a few days, I shall obtain, in writing, the best legal advice to be had in Montreal, and immediately transmit the same for your future guidance."

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Thereafter, the same person transmitted an opinion from Mr Grant, lawyer of Montreal, before whom the deeds had been laid, which, after fixing a proper form of conveyance, proceeds thus:—"In answer to the question, submitted to me, relative to the mode of conveyancing in selling lands in the province of Upper Canada, I have to inform you, that the same must be executed conformably to the laws of England, by deed of 'lease and release,' and 'bargain and sale,' with a memorial of bargain and sale, according to the form above."

This opinion was communicated to Grahame on the 12th August, the previous answer from Peebles's correspondent having been transmitted to him before, and a demand was made for repayment of the \$30. This Grahame refused, on the ground, 1. That the lawyer consulted was not an Upper Canada lawyer, as stipulated for, but a lawyer of the Lower Province; and, 2. That the opinion had reference merely to the point, whether the deeds constituted a valid transfer of the land, and not to that which was truly in view of the parties in their bargain, i. e. whether Alexander Paterson's interest was so conveyed to Grahame to enable him, in conjunction with the other heirs of the property, to dispose of it, and grant a discharge. Thereafter, Peebles had the whole deeds and papers laid before Mr Parkin, an English counsel, who returned the following opinion:—"I have perused the will of the late Mr Allan Paterson, the power of attorney from his devisees, the assignations from Alexander Paterson to Mr Grahame, and from Mr Grahame to Mr Peebles, the letters from Mr Grant of Montreal, including copy of an opinion of a Mr J. C. Grant, and Mr Grahame's letter to Mr Peebles, of the 18th of January, 1833, and I am of opinion, that Mr Peebles is entitled to claim repetition of the price, as I think that the securities are insufficient and ineffectual to enable Mr Peebles, in conjunction with the other heirs of the deceased Allan Paterson, to effect sales of his lands in Matilda, in Upper Canada, and to discharge the proceeds thereof." and that the opinion of Mr J. C. Grant shows that this is the case, inasmuch as it points out, as a necessary mode of conveyancing, a form of conveyance different from the one which has been adopted.

"The interest of Mr Alexander Paterson in the lands of Matilda is of the nature of real estate, and not personal estate, and must therefore

No. 302. be conveyed as real estate. The assignation would pass the debt, but not the security, or rather supposed security, for it, as the share of Mr Alexander Paterson in the lands of Matilda was not, in fact, effectually charged with the debt by the deed of assignation made to Mr Grahame. I am inclined to think that that deed of assignation would operate as an agreement to charge the lands with the debt; but this is by no means a sufficient title. It may be at any time defeated by a mortgage, or conveyance to a party who has not notice of the agreement; and a performance of the agreement cannot be enforced without any delay, difficulty, and expense.

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“ Application should be immediately made to Mr Alexander Paterson, to execute a conveyance in the English form, (namely, by lease and release, and bargain and sale, as stated by Mr J. C. Grant,) of his share and interest in the lands, so as to give effect to the security intended to be made to Mrs Helen Paterson, and Mr Grahame, by the deed of assignation of the 14th March, 1828.”

Grahame still refusing to repay the £130, and declining to enter into a formal submission to the town-clerk of Glasgow, Peebles raised this action, concluding for repetition, which Grahame resisted, on the grounds already mentioned.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—“ Finds that the pursuer has sufficiently implemented the condi-

• “ It was well known to the parties that Alexander Paterson's title was not complete (letter 24th October), but the agreement was, that the title from him to the defender was to be effectual to convey his right (of course when completed) so as to enable the pursuer, under the conveyance from the defender to the pursuer, in concurrence with the other heirs of the deceased Allan Paterson, to effect sales of the lands of Matilda, and to discharge the proceeds. It appears that a copy of the conveyance by Paterson to the defender was sent by the pursuer to Montreal. He intimates his intention of doing so (letter 3d December, 1832), and subsequently mentions that he had done so (letter 13th December, 1832). Mr Grant consulted ‘ a notary of the highest repute in Montreal, and who is daily in the habit of drawing out conveyances of property situated in the Upper Province,’ and his opinion was, that it would not be valid (letter 26th March, 1833). He says, ‘ in the meantime, should you incline to close with Mr Grahame's offer,’ which shows, that the deed sent to Mr Grahame, and laid before the notary, was the title to the defender, and not the defender's conveyance to the pursuer, as it had been sent before the bargain was completed, and while the negotiation was going on. After the disposition and assignation is subscribed by the defender, in terms of the letter of 18th January, 1833, the pursuer also sends a copy of this to his correspondent, Mr Grant (letter 21st August, 1833); and on 13th August, 1833, the pursuer sends to the defender the opinion of a lawyer at Montreal, showing that the title is not sufficient as a conveyance of real property in Upper Canada. The defender having objected, that this opinion was simply as to the abstract point as to the form of conveying lands from a seller to a purchaser, but not as to the validity of the conveyance of Alexander Paterson to the defender; and as the opinion bore, that the conveyance must be conformable to the laws of England, the whole ~~document~~ was laid before an English counsel, and his opinion, which was transmitted

tion stated in the letter of 18th January, 1833, to entitle him to repetition of the price paid for a conveyance of Robert Paterson's debt, and the share of Allan Paterson's succession; therefore decerns in terms of the libel, finds expenses due, allows an account thereof to be given in, and remits to the auditor to tax the same, and to report."

No. 302.
June 11, 1834.
Shotton v.
M'Neill.

Grahame reclaimed, but the Court adhered.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—T. GRAHAME, W.S.—Agents.

SHOTTON, MALCOLM, & Company, and Mandatary, Pursuers.—*Skene—Currie.* No. 303.

MALCOLM M'NEILL and Trustee, Defenders.—*Rutherford—Speirs.*

Title to Pursue—Adjudication—Mandate.—Circumstances in which the Court repelled preliminary defences stated against a first adjudication, involving a question as to the title to pursue.

SEQUEL of the case reported ante, p. 609, which see. Under the remit to the Lord Ordinary, his Lordship allowed the defences against the summons of adjudication to be received, on payment of £6, 6s. The defender objected to the pursuer's title, under the following circumstances. Shotton, Malcolm, and Company, of Bombay, and their surviving partner, Shotton, gave a mandate to Mr Burnett, W.S., on 9th December, 1831, to recover a debt due by Captain Malcolm M'Neill of Gallochilly. Burnett was empowered to take all legal steps necessary for recovering the debt; and an action of constitution was raised in name of the Company and their mandatary, and decree for

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1st DIVISION.
Ld. Fullerton.
D.

on 13th September, 1833, showed that the deed was ineffectual, as being made out in the Scots form, to convey Paterson's share of his uncle's estate. This seems to have fulfilled the condition of laying before the defender, within nine months, an opinion that the title was invalid. The only objection is, that the lawyer consulted in America was in Montreal, and not in Upper Canada. It is believed that many of the lawyers, who practise in the Upper Province, reside in Montreal, as being a much larger and more important place than the capital, and very near the boundary of the Province. The notary consulted clearly did so, although employed in conveyancing for the Upper Province; and as the opinion of the Canadian lawyer has been confirmed by Mr Parkin, the Lord Ordinary thinks it sufficient, when there is no averment, and no probability, that a lawyer in Upper Canada would give a different opinion. The Lord Ordinary at first doubted, whether the proper deed had been laid before Mr Grant. He was misled by the letter of 21st August, 1833. But on looking attentively into the correspondence, he is now satisfied that Paterson's conveyance to the defender was submitted for opinion. Besides, it is clear that the same objection which applies to the one, applies to the other, and both deeds were laid before Mr Parkin."

No. 303. £470 was obtained against M'Neill on 20th November, 1833. Thereafter, on 31st December, a summons of adjudication was raised in name of the Company and their mandatary; and on 15th February, 1834, a letter was addressed to Burnett in these terms:—"Sir,—As the attorneys appointed by the trustees and creditors of Shotton and Company of Bombay, conformably to the resolutions unanimously passed at a meeting of the said creditors, held on the 20th day of last month, at the St Paul's Coffee-house, London, authorizing us, the professional agents of the said trustees, to recover the debts due to the insolvent estate, we hereby authorize you to prosecute, follow forth, and pursue to a conclusion, all actions and diligences originally commenced under the mandate granted by Mr Shotton in your favour, of date the 9th of December, 1831; and if necessary, to assist us and our constituents as parties therein." The mandate farther expressly empowered Burnett to proceed with the action of adjudication. On the part of the defender, it was pleaded that there was no evidence of there being a sufficient title to pursue, which was essential in a process of diligence. The letter instructed the insolvency of Shotton, Malcolm, and Company's estate, and that the estate had passed into the management of the creditors and trustees; while it did not prove the authority of the attorneys who granted the mandate, or what was the constitution of the meeting of creditors at which they were said to have been appointed.

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Shotton v.
M'Neill.

The pursuers answered, that if they had not produced the letter of 15th February, no objection could have been taken to the title to pursue, as the defender referred to no evidence, in support of the objection to the title, save what was contained in that letter; that it must be presumed, on the same authority which stated the insolvency, that the creditors sanctioned the action; and that it would be a strange effect, if a letter, avowedly granted for no other purpose than to strengthen the pursuer's title, which was otherwise unimpeached, should have the effect of cutting it down.

The Lord Ordinary "repelled the preliminary defences; refused to recal the interlocutor of intimation of the 16th instant, and decerned; and in respect the defender states, that he is not to acquiesce in this interlocutor, found him liable in the expenses of discussing the preliminary defences."

The defender reclaimed, but the Court adhered, and awarded expenses.

J. H. BURNETT, W.S.—CUNNINGHAM and WALKER, W.S.—Agents.

JAMES STEWART, Pursuer.—*D. F. Hope—Forsyth—Robertson.*
MISS MARGARET STEWART, Defender.—*Skene.*

No. 304.

June 11, 1834
Stewart v.
Stewart.

Process—Jury Trial.—1. Where an issue has been prepared before the Lord Ordinary, and a party wishes to bring it under the review of the Inner-House, it must be done by motion, and not by reclaiming note. 2. Though the Lord President had been present along with the Lord Ordinary, at chambers, in preparing an issue, he is competent to bring it under the review of the Inner-House.

In following out the interlocutor, pronounced at a previous stage of June 11, 1834, his cause,¹ it became necessary to send two issues to be tried by a jury. An objection being taken to the draft of issues proposed by the Jury clerks, the parties were heard, at chambers, before the Lord Ordinary in the cause, and the Lord President. Two issues being framed on the terms approved of by their Lordships, and being signed by the Lord Ordinary, the defender, who was dissatisfied with one of the issues, presented a reclaiming note to the Court, craving an alteration of that issue. The pursuer objected that this was incompetent, 1st, because review should have been applied for by motion, in terms of the Jury Court A.S., and not by reclaiming note; and 2d, Because the Lord President had been present along with the Lord Ordinary at adjusting the issues, and this excluded the review of the Inner-House. The defender answered, 1st, That he was ready to bring the issues before the Court by motion, unless the pursuer consented to hold his reclaiming note as equivalent to a motion; and 2d, That, before the Jury Court merged in the Court of Session, it would have been competent for him to have brought the issues under the review of a full bench in the Jury Court, even though the Lord Chief Commissioner had assisted in framing them, and it was now equally competent to bring them before the Inner House for review, although the Lord President had assisted at their preparation.

The Court held it competent to review the issues, the pursuer consenting to hold the reclaiming note as coming in place of a motion. Lord Gillies expressed an opinion, in which the other Judges concurred, that a reclaiming note was an incompetent mode of bringing the issues under review. On hearing parties, their Lordships approved of the issues as they stood.

C. and D. STEWART, S.S.C.—WORTHESPOON and MACK, W.S.—Agents.

¹ Jan. 29, 1833; ante, XI. 327.

No. 305.

PATRICK MILLER, Pursuer.—*Greenshields—Cunninghame.*WILLIAM MILLER, Defender.—*Shene—Wilson.*

June 11, 1834.

Miller v.
Miller.

Marriage-Contract—Provisions to Children—Appeal.—Construction of a judgment of the House of Lords, involving questions as to the power of a father to make gifts and provisions in favour of younger children, after having become a party to his eldest son's contract of marriage, and stated the provisions to the younger children at a limited amount.

June 11, 1834.

1st Division.
Ld. Corehouse.
B.

THE late Patrick Miller of Dalswinton, at the marriage of his eldest son, Patrick Miller, junior, on 5th October, 1804, became a party to the marriage-contract, and bound himself to dispoise to his son his lands of Dalswinton, &c., and the whole heritable and moveable estate that might belong to him at his death, "under the burden always, however, of the debts of the said Patrick Miller, senior, and provisions made by him for his younger children and grandchildren."

Mr Miller, senior, had four younger children, and the provisions in their favour then stood in this situation: By a deed of settlement, in 1790, he had provided a sum of £7000 to each of them. He executed a deed of alteration in January, 1803, for the purpose of stating the provision to each at a sum of £10,000, but deducting therefrom certain advances or payments already made for behoof of the respective children. In particular, Mr Miller had made considerable advances for his second son, William Miller, in buying a commission in the army and otherwise, and the following clause was inserted in the deed of alteration respecting his share: "I hereby in so far revoke and alter my foresaid disposition and settlement, that I now declare the said provision of £7000 to the said William Miller is hereby diminished and restricted to £4000, which, with the sums paid for commissions, and £1000 borrowed for him, and two legacies of £1000 each, thereafter bequeathed to his two children, make £10,000; and of the said £3000, so taken off the provisions of the said William Miller, the heir succeeding to me and my said lands and estate are hereby discharged." By a codicil, in June, 1803, the provision to William Miller was restricted by the further deduction of L.1100, being a sum paid by his father to purchase a commission of majority in a dragoon regiment.* The sum which thus stood provided to Major William Miller at Patrick's marriage in 1804, was £2900; and there was besides a provision of £2000 between two of his children.

In 1810, Mr Miller, along with his son the Major, granted a bond to Mr Keith for £800, being a debt due by the Major, from whom he

* It was stated at the bar, that the deed restricting the £10,000 of ~~Miller~~ Miller contained a reserved power to alter and revoke.

took a discharge of the provisions due to him, pro tanto, in the event of his having to retire that bond. He afterwards gave up that deed to the Major as cancelled, and parties were at issue whether the bond was paid by Mr Miller in his lifetime, or by his trustees after his death.

No. 305.
June 11, 1834.
Miller v. Miller.

Subsequently to the marriage of his eldest son, Mr Miller made several large additional provisions to his younger children. Among others, he executed a bond, in 1811, for £8000, in favour of the Major, payable after the granter's death; and it was declared, that although advances made, or engagements undertaken by him on account of the Major, should exceed the amount of his provisions by existing settlements, no claim should be competent for them, but the full sum of £8000 should be paid nevertheless. In 1815, Mr Miller further bound himself to pay £10,000 to the Major after death, and declared that this was over and above all other provisions. And on the 17th July, he granted the following letter to a law-agent, relative to the expenses of an action of damages, raised by one Hislop against Major Miller: "I consider myself as answerable for the expenses of the lawsuit betwixt him and Hislop; and I therefore consider myself bound to pay you the expenses of the lawsuit, between my son the Major and Mr Hislop." These expenses amounted to £554, 12s. 7d.; they were paid after Mr Miller's death by his trustees—the action not having been concluded in his lifetime. He executed a trust-settlement on the 29th July, by which, inter alia, he discharged the younger children of all the payments or advances made for them, both prior and subsequent to the date of the deed of alteration, 1803. These had been entered to their debit in his books, and he now declared that the vouchers of these were cancelled and delivered up.

There were three acceptances by Major Miller, drawn by his elder brother, Patrick, and indorsed by him to his father, who discounted them with a banking company. They amounted to £912, 1s. 2d., and apparently the original bills were granted antecedent to the date of the trust-settlement of July, 1815. These bills were retired after Mr Miller's death by his trustees.

Mr Miller also became bound for £300 on account of the Major, to a creditor named Hutton. Parties were at issue whether this sum was paid by Mr Miller, or, after his death, by his trustees.

When Mr Miller died, his heir, Patrick Miller, raised an action of reduction, to set aside every deed by which any additional provision was granted, exceeding those which were in force at the date of the marriage-contract, 1804, as being in defraud and contravention of his rights under that contract. After much procedure, the cause was taken to appeal, and the House of Lords, on 30th July, 1822, pronounced this judgment: "Find, that by the provisions contained in the contract of the 5th of October, 1804, entered into by the late Patrick Miller deceased, on the marriage of his eldest son, the respondent, Patrick Miller, he bound and obliged himself, his heirs and successors, to provide, secure, and dispo-

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and make over, heritably and irredeemably, the estate of Dalswinton, and his whole other estate, real and personal, that might belong to him at the time of his death, under burden always of the debts of the said Patrick Miller, the father, and provisions made by him for his younger children and grandchildren; and find that the exception contained in the said marriage-contract, of provisions made by him for his younger children and grandchildren, ought not to be construed to extend to enable him, by gratuitous provisions in favour of his younger children and grandchildren, to defeat the intent of the said marriage-contract, with respect to the provisions thereby intended to be made in favour of the respondent, Patrick Miller, and his wife and children; but find, that inasmuch as the provisions made by the said Patrick Miller for his younger children and grandchildren, by deeds executed previous to the said marriage-contract of the 5th of October, 1804, were made to take effect only on his death, the same were not in their nature provisions for his said children and grandchildren during his life; and that, therefore, any gifts or payments of money given, or made by him to, or for, such younger children or grandchildren, in his lifetime, which were not in the nature of permanent provisions for them, ought not to be considered as in extinction or satisfaction of the provisions so made for them previous to the said marriage-contract of the 5th of October, 1804, and intended to take effect on his death; but find, that the several provisions made by the said Patrick Miller deceased, for his children and grandchildren, by deeds executed after the said marriage-contract of the 5th of October, 1804, ought to be considered as in fraud of the said marriage-contract, so far as they exceed the provisions made for such younger children and grandchildren respectively, by deeds executed before the date of the said marriage-contract, and so far as such children or grandchildren are respectively interested therein, except so far as any provisions, so made for such grandchildren, may be deemed to have been substituted in lieu of provisions made for their respective parents before the date of the said marriage-contract; but that the same, so far as the same ought not to be considered as in fraud of the said marriage-contract, ought to be considered as in satisfaction, or in part satisfaction of the provisions made for such younger children and grandchildren, by deeds executed before the date of the said marriage-contract, according to the nature and amount of the provisions so made after the date of the said marriage-contract: and the Lords further find, that the obligations which the said Patrick Miller deceased entered into after the date of the said marriage-contract, for the benefit of any of his children, for valuable considerations, although effectual as debts against the estate of the said Patrick Miller deceased, ought to be considered as provisions for such children, and taken in computo of the sums claimed by them respectively, under the provisions made for them respectively, by deeds executed by the said Patrick Miller.

re or after the date of the said marriage-contract, of the 5th of October, No. 805.
804."

This judgment was applied, and the cause remitted to Lord Al-
ray, who found, "1. That all the provisions made by Mr Miller after
the 5th October, 1804, must be considered as in fraudem of the marriage-
contract, in so far as they exceed the provisions previously made, except
in so far as such provisions are made in favour of grandchildren, which
may be deemed to have been made in lieu of provisions for their respec-
tive parents, before the date of the marriage-contract. 2. That the sub-
sequent provisions after the 5th October, 1804, are to be held as in satis-
faction, or part satisfaction, of the provisions made for Mr Miller's chil-
ren and grandchildren, by deeds executed before the date of the con-
tract; and that any sums paid to third parties, or obligations granted to
them, for behoof of the said children and grandchildren, and which are
held as effectual debts against the estate, must be imputed pro tanto of
the provisions to which the defenders would have been entitled, as made
previous to the date of the contract of marriage. 3. That inasmuch as
the provisions made by the said Patrick Miller for his younger children
and grandchildren, by deeds executed previous to the contract of mar-
riage, were made to take effect only on his death, the same were not in
their nature provisions for the children and grandchildren during his life;
and that, therefore, any gifts or payments of money given or made by
him to or for such younger children or grandchildren, which were not in
the nature of permanent provisions for them, ought not to be considered
in extinction or satisfaction of the provisions so made for them previous
to the said marriage-contract of the 5th October, 1804, and intended to
take effect on his death."

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After a remit to an accountant, and a judgment by Lord Meadowbank,
against which all the defenders reclaimed, the Court remitted the whole
cause to Lord Corehouse. Their Lordships afterwards disposed of a
branch of the cause, relating to the children of Thomas Hamilton Miller,
the third son, and also to the children of Major Miller's second marriage.¹
The Court, at the same time, remitted all the other points in the cause
to the Lord Ordinary, and the following questions, between the pursuer,
Patrick Miller, and the defender, William Miller, were now disposed of.

The Pursuer pleaded—

It is fixed by the judgment of the House of Lords, that the late Mr
Miller had no right to add gratuitously to the amount of the provisions
which were in force at the date of the marriage-contract. There is
only one exception, where the provision to a grandchild was substituted
in lieu of a valid provision to its parent, as to which the pursuer had no
interest or right to object. Although certain gifts or payments of money,

¹ Nov. 14, 1833 (ante, p. 31).

No. 305. taking effect in the lifetime of the grantor, were held not to be in fraud of the marriage-contract, still, both from the express words of the judgment of the House of Lords, and from the reason of the thing, it was only those gifts or payments "which were not in the nature of permanent provisions for them," that were to be so considered. And wherever Mr Miller had contracted onerous obligations for behoof of any child, which formed a good debt against his estate, its amount was to operate pro tanto as an extinction of the provision in favour of such child. Applying these principles, it was clear—

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1. That the provision to Major Miller was effectually restricted to £2900, at the date of the marriage-contract, 1804, and no addition in the nature of a provision could be made to it. Mr Miller, senior, could not revoke or discharge the deed of restriction to any effect, to the prejudice of the pursuer, as such deed would be just an addition to Major Miller's provision, contrary to the judgment of the House of Lords. Neither could Mr Miller, senior, afterwards discharge the advances made to buy commissions in the army; for nothing could be more of the nature of a permanent provision than that which gave a man professional status, and improved his professional income. The bond for £800 was also of the nature of a permanent provision, both from its amount, and from its having been granted only upon taking a discharge, pro tanto, from Major Miller of his provision. This being its true character, the attempt to change it afterwards into a gift was in defraud of the marriage-contract. But, farther, it was one of those onerous obligations undertaken for behoof of a child, which was directed to be deducted from the amount of his provisions.

2. For the last mentioned reasons, the acceptances of Major Miller for £912, 1s. 2d., which were retired by Mr Miller's trustees after his death, must be imputed against the Major's provision. There was no effectual discharge applicable to them. And on the same grounds, the cautionary obligation to Hutton, and the expenses of Hislop's action, should also be imputed in satisfaction of Major Miller's provision.

Pleaded by Major Miller—

According to the true meaning of the judgment of the House of Lords, the criterion whether a gift or payment of money was in defraud of the marriage-contract, did not consist in the amount of such gift or payment, but in the fact of its taking effect during Mr Miller's lifetime, or being postponed till after his death. If the former, it was a gift—if the latter, a provision; and, to this effect, the discharge of any obligation for a son, or of any document of debt taken in respect of an advance made for a son, was just tantamount to a gift. It followed, therefore,

1. That although Mr Miller had restricted Major Miller's provision to £2900, at the date of the marriage-contract, he had power to discharge this restriction, and revive the amount of the original provision. ~~The amount~~ for the purchase of commissions having been discharge

though subsequently to the marriage-contract, were converted into a gift, No. 305. and the original provision of £10,000 was in so far revived. For the same reason, the general discharge executed by Mr Miller in 1811, and again in his last trust-settlement in 1815, had the effect of converting into gifts any obligations otherwise imputable against the defender. In particular, the Major's discharge of his provision, to the extent of £800, in reference to the bond to Mr Keith, having been given back to him as cancelled, and the whole transaction bearing date long after the marriage-contract, it resolved into a gift of £800, which could not be impeached.

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2. The acceptances for £912, 1s. 2d., were directed to be discharged by Mr Miller, and that made them truly a gift, though the acceptances happened not to be retired until after Mr Miller's death; and the expenses of Hislop's action were in the same situation, as well as the payment to Hutton.

The Lord Ordinary pronounced this interlocutor: " Finds, that the provisions made by the late Patrick Miller of Dalswinton, in favour of the defender, Major William Miller, by deeds in force at the date of the pursuer's marriage-contract in 1804, amounted to £2900, exclusive of the sum provided to the children of Major Miller's first marriage: finds that the said Patrick Miller was not entitled to enlarge that provision of £2900, after the execution of the pursuer's marriage-contract, either by granting additional provisions, to take effect at his death, to the said Major William Miller, or by recalling the revocation and restriction contained in his settlement of 6th January, 1803, and the codicil annexed to it of the 6th June in the same year: finds that the three bills accepted by Major Miller in favour of the pursuer, and indorsed by the pursuer to his father, the late Patrick Miller, amounting to £912, 1s. 2d., and the contents of which, as is alleged, were advanced by the late Patrick Miller to Major Miller, the expenses in the action at Hislop's instance against Major Miller, for which the late Patrick Miller became cautioner, and which were paid by his trustees, and the sum of £300, for which Patrick Miller became bound on account of Major Miller, to John Hutton in Dumfries, are to be considered as gifts made by him in his lifetime to or for Major Miller, and not as in their nature permanent provisions, and therefore that they are not to be imputed in extinction or satisfaction of the above-mentioned sum of £2900, or any part thereof." *

* "NOTE.—When a father becomes a party to the marriage-contract of his eldest son, and binds himself to provide his estate to that son, and the heir of the marriage, it is settled law, that notwithstanding this obligation, he is entitled to make suitable and adequate provisions for his younger children, whether they be of a date previous or subsequent to the contract. In the pursuer's contract of marriage, his father, the late Mr Miller, became bound to provide his whole heritable and moveable estate to the pursuer and the heir-male of his marriage, with other substitutions; but he did so expressly under the burden of his debts, and of the provisions made

No. 805. His Lordship afterwards found, in regard to the bond for £800 to Mr Keith, "in respect that the bond in question for £800, and the discharge by the defender, Major Miller, of his provisions to the same amount, were both granted subsequently to the date of the pursuer's contract of

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by him for his younger children and grandchildren. Before this cause went to the House of Lords, the Lord Ordinary and the Court appear to have held that the reservation inserted by Mr Miller in his own favour, if it did not enlarge, at least did not restrict the power which would otherwise have belonged to him at common law, but was to be considered rather as a declaration of that power; and therefore they proceeded to enquire, whether the provisions he had made for his younger children were suitable and adequate. In doing this, it is believed that they did not intend to say that the rights of the parties were not to be governed by the marriage-contract, or that the Court itself was entitled to look into the affairs of the father, and to determine, not what he had given, but what he ought to have given to the parties. They thought they were bound, notwithstanding the clause of reservation, to perform the duty, which, without question, they would have been driven to perform if that clause had not been inserted. But in the House of Lords a different construction has been put on the clause of reservation, and apparently on the principle, *expressa nocent, non expressa non nocent*, it was held there that the clause did operate as a limitation of Mr Miller's powers to provide for his younger children and grandchildren; and though he might have substituted one provision for another, that he could not make provisions exceeding in amount those which he had made for them prior to the date of the marriage-contract. This judgment relieves the Court from a difficult and unpleasant task, which in similar cases they are generally compelled to undertake.

"As between the pursuer and Major Miller, therefore, the first enquiry is, what were the provisions made for Major Miller prior to the date of the pursuer's marriage-contract, understanding by the word 'provisions,' as it is defined in the judgment, provisions of a permanent nature, and which were to take effect at the death of Mr Miller. It appears from Mr Miller's deeds, that he had resolved that each of his younger children should have £10,000 either in the shape of advances during his life, or by succession at his death. Accordingly, Mr Miller had originally settled on Major Miller and his family £9000, which, with £1000 advanced for his behoof, amounts to that sum. Subsequently, however, in consequence of farther advances, Mr Miller, by his deed of alteration in January, 1803, and the codicil annexed to it in June following, restricted Major Miller's provision (exclusive of £2000 to the children of the Major's first marriage) to £2900, declaring his estate disburdened of all other provisions formerly made for that son. This was the state of Major Miller's provisions at the date of the pursuer's contract of marriage, and to that sum alone he would have been entitled if his father had died the day after the contract. Now, it is admitted that, in terms of the judgment of the House of Lords, Mr Miller could not enlarge that provision directly by subsequent deeds of provision to take effect at his death, but it is contended that he could do so indirectly, by recalling the deeds of restriction which he had executed before the marriage-contract, and by holding the advances to Major Miller, on account of which the restriction had been made, not as payments of previous provisions, but as gifts independent of them. It appears to the Lord Ordinary that this is not a sound construction of the judgment of the House of Lords. It is thought that the provisions, by deeds executed previous to the contract of marriage, ~~thereby restrict the~~ as fixing the limits of Mr Miller's power, must be held to import ~~that~~ which were not only executed before the marriage-contract, but

marriage: found that the late Mr Miller was entitled to give up or annul the discharge, and to hold the contents of the bond as a gift inter vivos to the defender; and therefore found that the said sum is not to be imputed in payment pro tanto of the defender's provision."

No. 305.

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Miller v.
Miller.

intence, and in force at its date. If £9000 had been originally provided to Major Miller, and if his father subsequently, but before the date of the marriage-contract, had cancelled, or thrown into the fire, the deeds settling that provision, with the exception of one to the amount of £2900, without assigning any reason for doing so, it must have been that sum of £2900, and not the sum of £9000 originally contemplated, which would have formed the measure of Major Miller's provision after the contract. But it can make no difference in the case, that his father, instead of cancelling or destroying the deeds, without assigning a reason, chose to revoke them to a certain extent, for a very satisfactory reason which he did assign. There would, indeed, have been a difference, if, while he allowed the deeds of provision for £9000 to remain in force, he had merely debited Major Miller in his books with advances of money; for such advances would only have constituted debts which he might afterwards have discharged or not as he thought fit. But that is not the species facti; the advances are placed to the Major's debit, but they are likewise made the ground, in the settlement and codicil 1803, for the express revocation to that extent of the previous settlement.

"Holding £2900 as the amount of Major Miller's provision, which did not admit of enlargement by any deed, subsequent to the marriage-contract, of the nature of a permanent provision, and which was not to take effect during his father's life, it remains to be enquired, whether any or what deduction must be made from that sum, on account of the advances or engagements of Mr Miller for behoof of Major Miller, after the date of the contract; and here also the Court is relieved from a difficulty often very embarrassing in similar cases, for it is usual to enquire, whether gifts or payments of money, by the father to a younger son, though confessedly made by deeds inter vivos, and taking effect during the father's lifetime, are, nevertheless, reducible as contra fidem tabularum on account of exorbitancy. But in this case, the House of Lords have found, that 'any gifts or payments of money given or made by him to or for his younger children during his life, which were not of the nature of permanent provisions for them, ought not to be considered as in extinction or satisfaction of the provisions made for them previous to the pursuer's contract of marriage; and intended to take effect on the death of the deceased,' without any reference to their amount. The first deduction for which the pursuer contends, is the sum of £912, 1s. 2d., being the amount of three bills accepted by Major Miller in favour of the pursuer, and indorsed by the pursuer to his father. Holding the pursuer's statement to be correct, that the amount of these bills was paid by Mr Miller to the Major, and that the bills were retired by Mr Miller's trustees after his death, it appears to the Lord Ordinary that this sum was not of the nature of a permanent provision, but, on the contrary, that it was, in the strictest sense of the words, a gift or payment of money given or made by him to or for behoof of his son in his lifetime, and therefore, in terms of the judgment of the House of Lords, that it ought not to be deducted. The second deduction claimed by the pursuer, is for £554, 12s. 7d., being the expenses of Hielop's action against Major Miller, for which his father had become cautioner. For the same reason, it is thought that this sum ought not to be deducted. It was not of the nature of a permanent provision, it was a gift to a younger child, made by a deed which took effect during his life. It is true the money was not actually paid during his life, but by his trustees after his death; but it was or might have been exigible during

No. 305. Both parties reclaimed.

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LORD BALGRAY.—This case has been frequently before us in its several branches. The judgment pronounced by the House of Lords supplies the principles which must guide our decision. There is one clause which deserves especial attention in this case; it is that which declares that “any gifts, or payments of money, given or made by him to or for such younger children or grandchildren, in his lifetime, which were not in the nature of permanent provisions for them, ought not to be considered as in extinction or satisfaction of the provisions so made for them previous to the said marriage-contract of 5th October, 1804, and intended to take effect at his death.” In consequence of this declaration, I think the whole question raised here may be resolved into this, whether, taking all the circumstances into view, the sums in dispute were gifts, or were of the nature of permanent provisions. I cannot regard them in any other light than as gifts, in the same manner that the Lord Ordinary has done.

LORD PRESIDENT.—I am of the same opinion. If it be conceded that Mr Miller, senior, had the power, at a given date, to make a gift of a sum to a son, or to make a payment in money for his behoof, I think he is equally entitled to discharge a cautionary obligation which he might have undertaken for his son, although it may have been, that originally he had intended not to make a present

his life, which forms the true criterion between provisions and gifts, as contradistinguished in the judgment. That the banking company with whom the three bills, in the former instance, were discounted, did not require Mr Miller to retire them during his life, though they were entitled to do so; and the accident, that Hlop's action was not brought to a close before Mr Miller's death, appear, on principle, to be quite immaterial. In both cases, the benefit was intended to be taken by Major Miller while his father lived, and before he could avail himself of the provision made for him by the mortis causa settlements, and they were, therefore, essentially gifts de presenti.

“It must be admitted, however, that one difficulty attends this construction, arising from the general terms in which a subsequent clause in the judgment of the House of Lords is expressed. It is there found, ‘That the obligations, which the said Patrick Miller deceased, entered into after the date of the said marriage-contract, for the benefit of any of his children, for valuable considerations, although effectual as debts against the estate of the said Patrick Miller deceased, ought to be considered as provisions for such children, and taken in computo of the sums claimed by them respectively, under the provisions made for them respectively, by deeds executed by the said Patrick Miller deceased, before or after the date of the said marriage-contract of the 5th of October, 1804.’ According to the letter of this finding, it comprehends every onerous obligation undertaken by Mr Miller to third parties for behoof of his younger children, whether prestable in his lifetime or not; but, as explained by the context of the judgment, it seems to refer to obligations to third parties, which were to operate as permanent provisions to children and grandchildren, and so conceived as not to take effect till the grantor's death. Of this nature is the settlement made by Mr Miller in Mr Hamilton Miller's contract of marriage with Miss Ram, upon that lady and the children of the marriage, to which in particular this finding in the judgment seems to refer. Any other construction, it is thought, would confound the distinction previously taken, between ~~provisions and gifts de presenti~~ provisions and gifts de presenti, and render the judgment in principle ~~inconsistent~~ with itself.”

of the amount in the obligation, but to impute it to his son's provisions. I think he was entitled to make a pure gift; and the freeing his son from an obligation in which he was cautioner, and directing it to be discharged, was just tantamount to a gift. No. 305.
June 11, 1834.
Grant v.
Dunbar.

LORD GILLIES.—I concur in all the views of the Lord Ordinary.

LORD MACKENZIE.—I concur entirely with the Lord Ordinary. His Lordship's note expresses my opinion out and out.

THE COURT refused both reclaiming notes, and adhered.

R. RUTHERFORD, W.S.—A. WILSON, W.S.—Agents.

WILLIAM GRANT, Suspender.—*Cunninghame*.
THOMAS DUNBAR, Charger.—*Rutherford—Moir*.

No. 306.

Process—Proof.—After a remit of consent to men of skill to report on the genuineness of a subscription challenged as forged, incompetent to allow a proof.

SUSPENSION by Grant of a charge on a bill of exchange by Dunbar, upon the allegation, inter alia, that the name, "William Grant," subscribed to the bill, was not his genuine subscription, and he proponed imputation of it as a forgery. The Lord Ordinary, of consent of parties, remitted to two engravers, to compare the signature to the bill with others admitted to be genuine; and they having reported that the signature to the bill was in their opinion the genuine subscription of Grant, his Lordship repelled the reason of suspension, founded on the allegation to the contrary, and appointed parties to be heard on the other reasons. June 11, 1834.
2d DIVISION.
Ld. Medwyn.
T.

Grant reclaimed, and contended, that he should be allowed a proof, and that the report of the engravers was not to be held conclusive.

LORD MEADOWBANK.—I am satisfied, on inspecting the signatures, that the engravers are right; but I would not foreclose the party, on payment of all expenses, though the remit was of consent.

Rutherford.—It is a question of very grave importance, after the judgment in the House of Lords in the case of Dixon, repented by the Court in other cases since, if a consent to remit to men of skill can be opened up, although it might be competent, on cause shown, to remit to the same persons to reconsider their report.

LORD JUSTICE-CLERK.—It seems to me quite out of the question to allow this matter to be opened up. The consent to refer the question of genuineness to men of skill was a judicial compact, and it is impossible now to allow a proof.

LORD MEADOWBANK now acquiesced; and the other Judges concurring,

THE COURT adhered.

GARRIG and MORTON, W.S.—H. INGLIS and DONALD, W.S.—Agents.

No. 307.

HENRY PAUL, Pursuer.—*Jameson—Neaves.*June 11, 1834.
Paul v. Jeffrey.WILLIAM JEFFREY (Cuthill's Trustee), Defender.—*D. F. Hope—
Penney.*

June 11, 1834. SEQUEL of the case mentioned ante, X. p. 75, which see. On its re-

2d Division.
Ld. Mackenzie.
R.

turning to the Lord Ordinary, his Lordship remitted to an accountant, who reported, that there were no trust funds other than the securities sought to be adjudged, amounting in all, principal and interest, to £7216; that, besides the debt due to Mr Paul, and the advances by Cook and Cuthill out of their private funds, there were debts owing by the trust to the extent of £7730; that the superadvances by Cook beyond those by Cuthill amounted to upwards of £10,000; and that the sum due Paul was very considerable. During the accountant's investigations, Cook died; and Paul, who was a joint pursuer, craved to be sisted in his place, under a deed of mutual disposition and assignation executed by them in favour of the survivor, and to carry on the action in his own name alone. This was opposed, so far as concerned Cook's interest as trustee, on the ground, that he could not convey such interest. The Lord Ordinary repelled this objection, and allowed Paul to be sisted and to carry on the action in his own name alone; and, on advising the report of the accountant, his Lordship pronounced the following interlocutor, adding the subjoined note: *—" Finds that the sums contained in the securities libelled are applicable, preferably, not only for payment of any balance due to the pursuer, Henry Paul, in his own right, on account of the trust-estate libelled, but also for payment of the advances made by the late James Cook on account of the trust-estate, beyond the advances made by Archibald Cuthill on account of the same, as also, towards the out-

* " The finding only gives expression to what was the opinion of the Court implied in the remit. The Lord Ordinary is not satisfied that, in any particular, the report is wrong. But in the views of the case which have been taken by the Court, it seems very desperate for the defender now to object, since he cannot overturn the result in favour of the pursuer, without showing clear funds in the hands of Mr Paul, equal, at least, to the whole surplus advanced by the late Mr Cook, and the whole outstanding debts, which Mr Paul has right to pay preferably out of the funds, before letting any thing go to Mr Cuthill's trustee, of whatever kind. There was, so far as the Lord Ordinary recollects, nothing said before him originally, about these outstanding debts. The case was rested on the superadvances of Mr Cook, which the Lord Ordinary originally regarded as merely superadvances by a trustee for a trust-estate, creating *jus crediti* against that estate only, not against any co-trustee; a view which was rejected by the Court, which held the superadvances to have been made for Cuthill himself, as partner in, or interested in the trust-estate. But these outstanding debts seem relevant, when insisted on, under the summons and record.

standing debts of the trust; and, in that view, repels the objections to the accountant's report, and decerns in favour of the present pursuer, Henry Paul, in terms of the libel, but this without prejudice to any accounting that may hereafter take place between him and those interested in the trust under his charge."

Jeffrey having reclaimed,

THE COURT pronounced this interlocutor:—"Find that the sums contained in the securities are applicable, in the first place, for payment of the outstanding debts of the trust; in the second place, in relief and repayment of any superadvances made by James Cook; and, in the third place, for any balance due to the pursuer Henry Paul in his own right, and, until this variation, adhere to the interlocutor of the Lord Ordinary submitted to review."

CAMPBELL and MACDOWALL, S.S.C.—J. MURRAY and A. HOWDEN, W.S.—Agents.

DAVID LANG and JAMES MARTIN (Treasurer and Tacksman of the Inchbelly Road Trustees), Advocators.—*Jameson—Neaves.* No. 308.
JOHN GOURLAY and Co., Respondents.—*D. F. Hope—W. Bell.*

Jurisdiction—Road.—An application under 4 Geo. IV. c. 49, for the removal of a toll-bar, and to interdict the levying of toll there, having been presented to the Sheriff, within six months after a table of rates was put up, and posts with a chain thrown across a road, and the Sheriff having pronounced judgment in terms thereof, an advocacy held incompetent.

ON 3d August, 1830, John Gourlay and Co., distillers near Glasgow, presented a petition to the Sheriff of Lanarkshire, stating that they had occasion to use a road called Stewart's Road, or Keppoch Hill Road; that it was not comprehended under any Parliamentary road-trust, and was not liable to have toll-bars or gates placed on it; that the trustees on the Inchbelly road had unwarrantably erected a toll-bar or gate upon the road, and their tacksman, James Martin, was forcibly levying dues; that by 4 Geo. IV., c. 49, § 49, it was enacted, "that if the trustees of any turnpike-road shall erect any toll-bar where they have not any power, by virtue of any Act of Parliament, so to do, it shall be lawful for the Sheriff of the shire, where any such bar is erected, upon complaint in a summary way, to hear and determine therein, and to order such bar to be removed;" and that the bar had farther been unwarrantably put up, as the public notices required by the act were not given. They therefore prayed the Sheriff "to grant warrant to remove the toll-bar or gate complained of, and interdict, prohibit, and discharge the said trustees, and the said James Martin, from erecting toll-bars, or levying toll there, or at any other part of the said road."

In defence, the trustees stated that the toll-bar was a check or side bar,

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1st DIVISION.
Ld. Corrhhouse.
D.

No. 308. which had been erected more than seven years before this application was presented, upon a way branching off the Inchbelly road, and that that way had been, for above forty years, under the control of the trustees, who had spent considerable sums towards its repair. They therefore pleaded, 1. That as the toll had been erected, and dues levied, for more than seven years, it could not be challenged in a summary form; 2. That as it had been erected anterior to the act 4 Geo. IV., c. 49, founded on, and as that act gave no powers to the Sheriff, except as to toll-bars subsequently erected, he could not exercise any jurisdiction over it; and, 3. That, at all events, as it was imperative by the statute that the complaint should be made within six months after the erection of the bar, and as this had not been done, it must be dismissed.

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The Sheriff-substitute, before closing the record, allowed the trustees a proof "of the preliminary defence, that they had levied toll at the check-bar for a period of more than seven years without challenge." On considering the proof, the Sheriff-substitute "found no proof of the preliminary defence against the competency of the action, that the trustees on the Inchbelly road, or their tacksmen, have levied toll at the check or side-bar in question, for a period of more than seven years, without challenge or legal interruption. In particular, found no attempt on the part of said trustees to prove possession of said check or side-bar during the years 1825-6, and 1826-7; therefore repelled the preliminary defences."

The record being afterwards closed, the Sheriff-substitute found that the trustees were "bound to show their right under the general Turnpike Act and Local Act, No. 11 of Process, to put up the check-bar in question, and to exact toll thereat, and that they have complied with the requisites of the said general act as to intimation to the public of the meeting of trustees for authorizing said erection and otherwise; and appointed the defenders to lodge a minute, stating specially the authority and due exercise thereof, as above mentioned."

The trustees presented a reclaiming petition, founding on and producing a local act (declared to be a public one) relative to the Inchbelly road-trust, dated in 1795, the endurance of which was limited to twenty-one years; but which had been continued by subsequent local statutes, and especially by one, marked No. 11 of Process, which renewed some of its provisions by reference to them, without engrossing them anew. The Sheriff-substitute refused the reclaiming petition, "and in respect of the provision made by § 5, c. 13 of Act of Sederunt, ordained the production (the statute 1795) to be withdrawn."

In the minute lodged by the trustees, in compliance with the above interlocutor, they quoted the statute 1795 (which had been ordered to be withdrawn), and founded upon it in argument. Gourlay and Co., in answering the minute, also argued on the effect of that statute, and stated, that though the copy had been ordered to be withdrawn, they

ere aware that it was open to both parties to found on the tenor of the statute; and they produced a copy of the statute. The Sheriff-substitute found no right conferred by the General Turnpike Act, nor by the Local Act, No. 11 of Process, upon the defenders to put up the check-bar in question, and to levy toll thereat. Found it unnecessary to pronounce upon the due exercise of such right, in respect no such right existed: Thereupon, repelled the whole defences, granted warrant to remove the toll-bar or gate complained of, and interdicted, prohibited, and discharged, as prayed in the original petition; and found the pursuers entitled to expenses." No. 308.
June 12, 1831.
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Gourlay.

In the meanwhile, the toll-bar had been taken down, and, on a reclaiming petition, the Sheriff-depute, "recalled as unnecessary, in these circumstances, that part of the interlocutor which granted warrant to remove the toll-bar or gate complained of, and interdict against the defenders from levying toll at said bar, seeing that, before said interlocutor was pronounced, the bar had been removed, and the levy of toll discontinued; it adhered to, and continued the interdict contained in said interlocutor, so far as it applies to the erecting of toll-bars, or levying toll at the place where the bar in question formerly stood, or at any other part of the road in dispute, excepting in pursuance of statutory authority, and duties thereby required."

The trustees brought an advocacy, which was objected to as incompetent, on the ground, that by the 112th Section of the Act, 4 Geo. IV. 49, it is provided, "that where by this act the adjudging of any penalty, forfeiture, fine, or any other matter is committed to the Sheriff, or to the judgment of such Sheriff, &c., shall be final and conclusive, and shall not be subject to review by advocacy or suspension, or by reduction, or by any process of law whatever, any law or usage to the contrary notwithstanding;" and that as to all actions commenced under this act, it is continued in force by the General Turnpike Act, 1 and 2 Will. IV., 43, § 116.¹

To this it was answered,—

1. That although where an application to the Sheriff is competently made, and regularly disposed of, the Sheriff's judgment is final, yet the plea sustained in this case before the Sheriff was, that the application itself was unwarranted by the statute; and therefore it was open to the Supreme Court to decide whether it was competent, which resolved into an enquiry as to whether the defences were well founded—all of which imported that the Sheriff had no right to sustain the application; and it was only when the Court was satisfied that he was entitled to sustain it, that they could hold their power of review to be excluded. But,
2. The Sheriff had acted ultra vires, in ordering a statute to be with-

¹ Wilson, June 11, 1831 (ante, IX. 725); Merry, Nov. 29, 1828 (ante, VII. 90); Macdonald, June 25, 1830 (ante, VIII. 977).

No. 308. drawn from process, which was founded on in defence, and declared to be a public act. And it appeared from his interlocutors, that he had excluded that statute from his view in deciding the cause; while he had merely looked at the statute, No. 11 of Process, in which many of the provisions were continued, by mere reference, and without repetition.¹

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Gourlay.

Besides, the sole power given to the Sheriff by the General Act, was to order a toll-bar to be removed; and, therefore, he had gone ultra vires, in granting any interdict, and especially an interdict in so extensive terms.²

The Lord Ordinary found "it proved, that, for some years previous to 1827, toll duties were levied occasionally, but not regularly, at the bar in question on the Inchbelly road; that, during the years 1827 and 1828, when Marshall was lessee of the Town-head bar, and after his death, when Aitken, his brother-in-law, took charge of the tolls under the lease, that toll duties were seldom if ever collected at that bar; that no table of rates, in terms of the General Turnpike Acts, was put up there previous to Whitsunday, 1830, when the advocator, Martin, became lessee; that the application of the respondents to the Sheriff was made within six months after Martin erected new posts with a chain, for the first time put up a table of rates, and began again to levy toll duties after they had been discontinued; that, in these circumstances, the application was competent; that it was not ultra vires of the Sheriff, to determine whether the said toll-bar was erected by virtue of an Act of Parliament, and on his finding that it was not so erected, either to order it to be removed, or, being removed while the action depended, to interdict the advocators from replacing it: That, under the statute 4 Geo. IV., cap. 49, the judgment of the Sheriff in this matter is not subject to review; therefore sustains the objection to the competency of this advocacy, dismisses the action, and finds the advocators liable in expenses in this and in the Inferior Court."

The advocators reclaimed, and the Court ordered Cases.

LORD PRESIDENT.—I am of opinion that we ought to adhere to the Lord Ordinary's judgment. As to the argument, under which it is said we must hold, that the Sheriff had excluded the prior local statute of 1795 from his view altogether, and had confined his attention solely to the statute, No. 11 of Process, it appears to me to be quite extravagant on the part of the advocators to maintain it. That same statute, in gremio, continued many of the provisions of the former act of 1795, by referring to them as therein set forth. And I cannot presume that the Sheriff would disregard the enactment continuing the former act, more than any other of the enactments in the statute. But if he paid due regard to that

¹ Young, June 28, 1814, (F. C.); Brown, Feb. 1, 1825 (ante, III. 480, and 3 W. & S. 441); Sim, Feb. 24, 1831 (ante, IX. 507); Scott, July 2, 1832 (ante, X. 700); Grant, Dec. 8, 1833 (ante, XII. 167).

² Sim, Feb. 24, 1831 (ante, IX. 507); Dixon, June 27, 1833 (ante

ment, he must have examined the former act, so far as it was continued in No. 308.
 I must therefore lay aside, as untenable, the position taken up by the ad-
 vocate, that the Sheriff acted otherwise; and as I think his judgment not liable June 12, 1834.
 view, I am satisfied we ought to adhere. Lang v.
 Gourlay.

LORD GILLIES.—I concur with your Lordship. The Sheriff was bound to
 order both the statute, described as No. 11 of Process, and the act of 1795,
 which it continued in force. But the Sheriff was not bound to say in his inter-
 dict that he had done so. He was bound to examine all the Acts of Parlia-
 ment necessary for the decision of the case; but he did not require specially to
 have had done this. Perhaps it was irregular to order the copy of the statute
 to be withdrawn from process; but the Sheriff had access to the statutes not the
 court, and we must presume that he availed himself of this, so far as was just and
 necessary. There is another ground taken up by the advocates, that the question
 whether the trustees had been warranted in erecting the toll-bar, is one which
 is not open to the judgment of this Court, because it is only after finding this
 to be the case that we can be satisfied the Sheriff was acting under the statute at
 law, and consequently, that our own jurisdiction is excluded. I consider there is
 no objection in this. I think it was the intention of the act to give the Sheriff power
 to determine whether the toll-bar was erected without authority; and that his
 determination on this point is one which we have no right to review. My only
 question in the case is, whether the Sheriff did not go too far in granting the inter-

LORD M'KENZIE.—I am for adhering. I think the power to grant the inter-
 dict was implied in the power to order the toll-bar to be removed as an improper
 interdict. Indeed, as the toll-bar had, de facto, been removed during the process,
 it is not likely the Sheriff could scarcely do any thing else than he did in granting inter-
 dict. And, in general, when any trespass whatever has been committed, I con-
 sider that it is competent to a judge, having jurisdiction in that question, to pro-
 hibit and interdict as to the future, at the same time that he gives redress as to the
 past. Even though the trespasser should remove the ground of complaint during
 process, I think it would be competent for the complainer still to crave inter-
 dict. The only matter which occurred to me as attended with any doubt, was the
 point, whether the terms of the interdict do not go rather too far; and whe-
 ther they should not have been strictly limited, so as to strike against the re-erec-
 tion of the bar in question. In all other respects, I have no difficulty.

LORD BALGRAY was also for adhering.

THE COURT adhered, and awarded additional expenses against the advo-
 cates.

CAMPBELL and MACDOWALL, W.S.—M'LEAN and GUTHRIE, W.S.—Agents.

No. 309.

THOMAS LANDALE, S.S.C., Pursuer.—*M^cNeill—J. Anderson.*MRS JOAN ANDERSON, Defender.—*More.*

June 12, 1834.

Landale v.

Anderson.

Agent and Client.—Circumstances in which held that an agent had undertaken to conduct a defence for a married woman, against an action of adherence by her husband, solely on the faith of recovering from the husband, and not on the responsibility of his client.

June 12, 1834.

2^D Division.

Ld. Medwyn.

T.

THE defender, Mrs Joan Anderson, having left the society of Charles Howden, her husband, he raised against her an action of adherence, with the purpose of founding thereon a process of divorce. Before stating a defence to this action, the defender wrote to the pursuer Landale, S.S.C., enquiring whether her husband was bound to pay the expense of her defending against his action, and received from him in answer the following:—"I understand a husband is bound to pay the expenses his wife may be put to in defending an action of adherence brought by him against her. You can let me know if you wish to defend the action brought against you."

On this she authorized a defence to be entered by the following note, of date 18th July, 1831:—"I received yours; and upon the understanding that Mr Howden is bound to pay the expenses, I am anxious that you should adopt all proper steps for defence. I will be ready at any time to give you the information you may require. I suppose you will petition for aliment at the same time."

On the 18th November, Landale wrote this note to the defender:—"I think it would be expedient to employ an advocate to draw the defences for you to the action of adherence, brought by Mr Howden, as the case is important."

"According to the opinion of the commissary-clerk, Mr Howden will be bound to pay the expense incurred on your part, whether he succeeds in the process or not. As the outlay, however, in seeing counsel, and otherwise in course of discussion, will be considerable, I would thank you for a payment to account. The defence, if ready, may be lodged on Friday."

She replied in these terms:—"I received yours, and I understood from the commencement that Mr Howden was bound to advance money to carry on the process, or I should never have contended with him. You had better apply to the Court to make him advance what is necessary, both for the expenses already incurred, and what may be incurred."

On the 28th December, however, the attempt to get payment from Howden having failed, she made an advance to Landale of £5, and defences were given in; but Landale, after some correspondence, refusing to go on unless she made a further advance, or found ~~account~~ payment of his account, which she would not do, the (

and decree pronounced, and thereafter decree of divorce for desertion No. 309. obtained. Landale subsequently raised this action for payment of his account against the defender, and also against Howden.

June 12, 1834.
Cantley v.
Robertson.

The Lord Ordinary pronounced this interlocutor:—"Finds, from the letters which passed between the pursuer and defender, Mrs Howden, before stating a defence, that she distinctly intimated to him that she did not mean to incur any responsibility for the expenses incurred in her defence in the process for adherence brought against her by her husband, but that he must trust to recover said expenses from her said husband, and that the pursuer undertook the agency on that understanding; therefore sustains the defences for Mrs Howden; assoilzies the said defender; finds her entitled to expenses, and decerns: Finds that Charles Howden, the husband of the defender, as the possessor and administrator of the goods in communion till the dissolution of the marriage, and, as such, liable for his wife's debts properly contracted, is liable to the pursuer for the just amount of his account incurred in her defence; therefore decerns against him for the amount, as it shall be taxed, and remits the same to the auditor of Court to tax and to report: Finds the pursuer entitled to his expenses, in so far as they have been incurred against the said defender."

Landale reclaimed, in so far as regarded the absolvitor of the defender Mrs Joan Anderson, and the award of expenses in her favour; but before his note came to be advised, Howden had paid his account, so that the only interest remaining was that as to the expenses of process.

THE COURT refused his reclaiming note.

T. LANDALE, S.S.C.—T. LIVINGSTONE, W.S.—Agents.

ELIZABETH CANTLEY, Advocate.—*Skene—Sutherland.*
JOHN ROBERTSON, Respondent.—*Rutherford—Monteith.*

No. 310.

Parent and Child—Semplena Probatio.—Action originally raised before the Sheriff of Edinburgh by Elizabeth Cantley, a married woman, but not living with her husband, against the respondent Robertson, in whose service she had been, for filiation and support of a child, alleged by her to be illegitimate. A proof was allowed, in which the two principal witnesses adduced were her sisters. The Sheriff found that there was no *semplena probatio*, and the Lord Ordinary, in an advocacy, remitted *simpliciter*.

2^d DIVISION.
Lord Medwyn.
B.

LORD MEADOWBANK observed,—I think that the evidence of the sisters was inadmissible, though, at any rate, I am satisfied that it is false from beginning to end, and that there is not a vestige of proof against Mr Robertson; and, further,

No. 310. I consider, that in the case of a married woman, the presumption being that the child is her husband's, the proof must be more pregnant than in other cases.

June 13, 1834,
Neilson v.
Morison.

THE COURT adhered.

Forrest v.
Thomson.

J. A. ROBERTSON, S.S.C.—A. JOHNSTONE, W.S.—Agents.

No. 311.

JAMES NEILSON, Suspender.—*Shene*—J. Anderson.
JOHN MORISON, Charger.—*Marshall*.

Agent and Client—Settled Account.—Bill of suspension and liberation passed, on juratory caution, of a charge on a decree in absence obtained by an agent on a bill granted by a client, bearing to be for "an account of business rendered," but which was never audited.

June 13, 1834.

1st Division.
Ld. Moncreiff.
B.

NEILSON granted a bill to Morison, a law-agent, for £55, 18s., bearing to be "to account of an account of business rendered," on which he raised an ordinary action, obtained decree in absence, and incarcerated Neilson, who presented a bill of suspension and liberation, resting chiefly on the allegation, that the account was overcharged, and that he was entitled to have the decree opened up, in order that the account might be audited.¹ Morison objected to the bill being passed without caution.²

The Lord Ordinary having refused the bill, Neilson reclaimed, and stated, that he was so poor as to be unable to find any caution but juratory caution.

Their Lordships observed, that the cases referred to were strongly indicative of the opinion of the Court as to the propriety of an agent's getting his account audited before he takes decree for it; and they passed the bill on juratory caution.

J. CULLEN, W.S.—A. FLEMING, W.S.—Agents.

No. 312.

GEORGE FORREST, Suspender.—*Wilson*.
ALEXANDER THOMSON (Cashier of Greenock Banking Company),
Charger.—*Keay*—*Pyper*.

Process—Diligence—Jurisdiction.—The Court refused, *hoc statu*, to turn the charge on a bill (which was under £25) into a libel, it being alleged that *ex facie* of the bill, it could not be the foundation of summary diligence.

¹ Duke of Queensberry's Executors, May 23, 1822 (*ante*, I. 426), and July 4, 1825 (*ante*, IV. 145); Megget, March 2, 1826 (*ante*, IV. 514); Act of Sederunt, Feb. 6, 1806; Brown, Dec. 3, 1830 (*ante*, IX. 136).

² M'Michie, July 7, 1826 (*ante*, IV. 803); M'Donnell, June 28, 1829 (*ante*, VI. 798); M'Ara, June 4, 1831 (*ante*, IX. 684); Mackenzie, June 12, 1831 (*ante*, IX. 730); Elder, May 27, 1829 (*ante*, VII. 656).

A CHARGE being given by Thomson, as indorser and holder, to Forrest, No. 312. he acceptor of a bill for £21, 10s., he presented a bill of suspension, June 13, 1894: respect of an alteration having been made on its date, subsequently 1st Division. his acceptance, and that the vitiation was manifest, ex facie, so as to Ld. Corshouse. ct even an onerous indorsee. Thomson moved that the charge should Forrest v. Thomson. turned into a libel. But the Lord Ordinary, "in respect it is alleged, , ex facie of the bill charged on, it could not be the foundation of Home's Trustees v. Ralston's Trustees. mary diligence, and that the sum for which the charge is given is er £25 sterling, refused, hoc statu, to turn the charge into a libel." Thomson reclaimed.

ORD PRESIDENT.—The Court can never be compelled to turn any charge into a libel, and it is enough to warrant them in refusing to do so, if they are satisfied the competency of the proceeding is doubtful. On that ground I would adhere to the Lord Ordinary's judgment.

ORD GILLIES.—The sum in dispute is of so small amount, that a libel, by way of ordinary action for it, could not competently be raised in this Court. It is a loss, therefore, to see how the Court can turn the charge into a libel.

ORD MACKENZIE.—I see no answer made by the charger to the ratio assigned by the Lord Ordinary for his interlocutor.

ORD BALGRAY concurred.

THE COURT adhered, and awarded expenses since the Lord Ordinary's judgment.

W. MERCE, W.S.—MACMILLAN and GRANT, W.S.—Agents.

HOME'S TRUSTEES, Raisers.

MRS RALSTON'S TRUSTEES, Claimants.—*Jameson—McDougall.*

MISS MARY HOME, Claimant.—*Skene—Miller.*

CLYNE'S TRUSTEES, Claimants.—*D. F. Hope—A. McNeill.*

No. 313.

Process—Multiplepoinding—Expenses.—Circumstances in which the Court held, that the raisers of a multiplepoinding were liable in expenses to a party called claimant; and, 2. That a claim, founded on illiquid accounts by an alleged creditor of a claimant, could not be sustained, reserving to him to insist in his claim in other form.

THE late Mr Home of Linhouse, in 1814, granted a bond for £800, June 13, 1894. payable in liferent to Miss Aitchison, and the fee equally to his daughter, Mrs Ralston and Miss Mary Home; and in 1818, he conveyed his estate to trustees, under burden of payment of the bond, and also of £500 to Mrs Ralston at the first term after the death of his wife. Mr Home died in 1819; and in 1826, his trustees executed a bond and disposition in security of the above sums of £800 and £500. In 1827, Mrs Ralston and her husband conveyed her interest to trustees; and in 1831, the conveyance was duly intimated to Home's Trustees, and to the agent, the late David Clyne. 1st Division. Ld. Corshouse. S.

No. 313.

June 13, 1834.
Home's Trustees
v. Ralston's Trustees.

After the death of Mrs Home, and the above intimation, Home's trustees raised a summons of multiplepoinding, in which they called the parties above mentioned, and, in particular, Mrs Ralston's trustees, Miss Home, and "David Clyne, S.S.C., for himself, and as agent and factor for Home's trustees," &c.

Claims were lodged for Mrs Ralston's trustees, for Miss Home, and for Clyne, the latter of whom stated, that "in the present state of controversy with the defenders, the claimant finds it impossible for him to lodge, at present, a complete and final claim. He may state, however, in the meantime, that the defenders, the children and representatives of the deceased James Home of Linhouse, writer to the signet, are indebted to him and his constituents accounts to a considerable amount;" and he then specified the sums. "Farther, and without prejudice to the above, the defender, Miss Mary Home, for herself, or as one of the representatives of her late father and mother, stands indebted to the claimant and his constituents in the principal sum of £171, 15s. 9½d, conform to accounts produced in a process of count and reckoning, raised and depending at her instance against the claimant, together with the expenses already incurred and to be incurred by the claimant in that process."

None of the sums thus claimed were constituted by decree, and they were not admitted.

Mrs Ralston's trustees, and Miss Home, contended that the process of multiplepoinding was unnecessary, and they objected to the claim of Clyne, as irregular and unfounded.

The Lord Ordinary "preferred the claimant Miss Mary Home, in terms of her claim; and found her entitled to expenses of process from the raisers of the multiplepoinding, and also from the claimant David Clyne; reserving their claims of relief against each other, and also reserving his claim of £171, 15s. 9½d. against her, for an account of business said to have been contracted in the management of her affairs: Preferred Mrs Ralston's trustees in terms of her claim; found them entitled to expenses from the said David Clyne; and decerned in the preference, and against the raisers of the multiplepoinding accordingly; and found the raisers of the multiplepoinding entitled to the expense of bringing the action into Court, in so far as Mrs Ralston's trustees are concerned, to be paid out of the fund in medio, and to no other expenses."

Mr Clyne reclaimed, and, after his death, his trustees sisted themselves.

The Court adhered, and awarded additional expenses against Clyne's trustees.

D. MANSON, S.S.C.—G. MONRO, S.S.C.—A. ROBERTSON, W.S.—Agents.

No. 314.

June 13, 1834.
Home v.
Clyne's Tra.

Forman v.
Campbell.

1st Division.
Ld. Fullerton.
S.

Anderson v.
Anderson.

Miss MARY HOME, Pursuer.—*Skene—Miller*.
CLYNE'S TRUSTEES, Defenders.—*D. F. Hope—A. McNeill*.

Compensation.—Special case in which the Lord Ordinary repelled a certain claim of compensation, and remitted quoad ultra to an accountant. The Court adhered, and awarded expenses against the defenders.

A. ROBERTSON, W.S.—D. MANSON, S.S.C.—Agents.

Mrs MARGARET FORMAN and CHILDREN, Pursuers.—*Robertson—Sandford*.

WILLIAM C. CAMPBELL, Defender.—*D. F. Hope—McNeill*.

No. 315.

QUESTION on evidence, Whether there were facts and circumstances established sufficient to infer that the pursuer and defender were married persons, and their children lawful children. The Lord Ordinary found that there were not, and assolizied, and the Court adhered.

June 13, 1834.
2d Division.
Ld. Medwyn.
R.

HENRY TOD, W.S.—JOHN GIBSON,—Agents.

Mrs A. V. S. TORRY ANDERSON, Pursuer.—*Buchanan*.
JOHN ANDERSON, Defender.—*G. G. Bell*.

No. 316.

Process—Proof—Service.—In a reduction of a service, a further proof being allowed on both sides—held that the proper course was to take it by commission, and not by Jury trial.

THE pursuer, Mrs Anderson, instituted an action of reduction of a service by the late Andrew Anderson, father of the defender, to Michael Anderson of Tushielaw, as his great-great-grandfather, on the grounds, 1st, that the service was inept; and, 2d, that the evidence was insufficient to support the verdict, and that the verdict was contrary to the fact. The first ground of reduction was disposed of by the judgment of the Court, mentioned ante, X. 696, and, on the cause returning to the Lord Ordinary, the pursuer intimated her intention to adduce evidence to disprove the verdict, while the defender thereupon intimated his intention to adduce further evidence in support of it, so that it became necessary to allow a proof on both sides. This proof the pursuer craved should be taken by commission, while the defender insisted for a remit to a jury. The Lord Ordinary ordered minutes of debate “on the question, whether the proof should be taken by commission, or whether the whole matter should be sent to trial by a jury, in the ordinary proceedings in the Court, and how far this last

June 13, 1834.
2d Division.
Ld. Moncreiff.
T.

No. 316. course is competent and expedient, in order that the Lord Ordinary may obtain the directions of the Court on this, as a question of general importance ;” and his Lordship thereafter made avizandum with the minutes to the Court, issuing the subjoined note.*

June 13, 1834.
Anderson v.
Anderson.

The Court concurred in the opinion expressed by his Lordship, and remitted to allow the proof by commission.

W. GARDNER, W. S.—W. MARTIN, S. S. C.—Agents.

* “ The Lord Ordinary, having allowed a proof by commission, in another case of this description, expected that the point might perhaps have been decided in it, but the order was acquiesced in by both parties, and the point being here contested, it seems to be a fit opportunity for having it settled. The Lord Ordinary, though very sensible of the evils of proofs by commission, has great difficulty in thinking that a remit to a Jury is consistent with the principle of the review of a verdict returned under the brieve of inquest, as expressly reserved by the statutes. It appears to him, that, in principle, the Court are not, in the reduction, at all placed in the same situation as when they are called upon in ordinary causes to say whether a new trial should take place. They are bound to decide on the merits of the evidence itself, which, in a case like the present, must consist in a great measure of written evidence. And though, by the established practice, it is competent to impeach the verdict by other evidence, and to support it by other evidence when impeached, the evidence already taken, and constituting part of the written record of the service, cannot be cancelled, but must be considered along with any other proof to be adduced. It is also to be observed, that the verdict under the brieve of inquest is a proceeding of a very special nature, a trial by a jury of fifteen men under the old law. How near the trial by another jury of twelve may come to a simple review of the first verdict, cannot be known beforehand, and the result may be something inconsistent with all principle. Farther, the trial (now by the junior Judge of the Court of Session) of competitions of brieves, is appointed to be proceeded in, as formerly, before the macers or the Sheriff, and the review by reduction is reserved absolutely entire as it was. But that process of reduction supposed a judgment of the Court itself, on the merits of a proof already taken or competent to be taken, and a right of appeal to the House of Lords on the merits of the judgment of the Court on that proof. That right of appeal may or may not be thought to be an evil in such a case. But the Lord Ordinary cannot discover that it has yet been taken away by statutes.

“ There are other considerations which are alluded to in the minutes, and will occur to the Court. But the Lord Ordinary is the more anxious that the point should be settled by the Court, because there is at present under preparation before him, a reduction of a verdict given in a competition of brieves before himself, in a case of importance; and he should think it very extraordinary if the Court were required, instead of considering the merits of the proof themselves, immediately to remit it for trial by another jury of twelve jurors, required to give a unanimous verdict.”

JOHN MACMASTER and Others, Pursuers.—*D. F. Hope—Whigham.*
 MRS STEWART or DICKSON, and HUSBAND, Defenders.—*Shene—*
Marshall.

No. 317.

June 17, 1834.
Macmaster v.
Stewart.

Jurisdiction—Foreign.—An action having been brought in the Court of Session by residuary legatees, under an English will, against parties domiciled in Scotland, who administered to the will, which specially directed the English Court of Chancery to be the forum in the event of legal discussion; and the administrators, in obedience to an order of the Lord Ordinary, filed a bill in that Court, and being ascertained by the opinion of counsel, that they might be there compelled to account, the Court sisted farther procedure, *hoc statu.*

In 1810, the late John Macmaster died in England, possessed of real personal property, situated in that country, and leaving a will, or deed of settlement, executed in the English form, by which he appointed three Englishmen executors, and provided legacies to several parties, directing the residue to be divided among upwards of twenty persons; but declaring, that if any of the legatees harassed the executors, the latter should file a bill in the High Court of Chancery, so that his will might be carried into execution under the direction of that Court. The executors having refused to act, one of the residuary legatees, Mrs Stewart or Dickson, wife of the Rev. Dr Stewart, minister of the parish of Kirkowan in Wigtonshire, took out letters of administration, whereby she and her husband, after granting bond to account in England, and finding cautioners, (Scotsmen,) intromitted with the personal estate, and the rents of the real estate. All the special legacies were paid, and various payments were made to the residuary legatees; but a considerable delay occurred both in exhibiting full accounts of intromissions, and in bringing the real estates to sale for the purpose of distribution in terms of the will. It was said that the latter delay was occasioned by the inability of Dr Stewart and his wife to give a valid title to a purchaser: and that this arose from circumstances over which they had no control.

In 1832, two of the residuary legatees raised an action in this Court against Mrs Stewart and her husband, to account, and to carry the purposes of the settlement into full execution. The defenders pleaded, that, the settlement was an English deed, relative to English property, and for which they had granted bond to account in England; and, as the testator had expressly directed that an accounting under the settlement should take place in the English Court of Chancery, where they were ready to proceed with an accounting, the pursuers should not be permitted to insist on their action, especially as they were only two, out of a large number of residuary legatees. They also alleged, that, in consequence of certain proceedings adopted by them in Chancery, the pursuers could compel them to make a satisfactory accounting there. This was denied by the

June 17, 1834.
 1st Division.
 Ld. Corehouse.
 S.

No. 317. pursuers, who alleged, that they had no means of forcing the defenders to account, except in the Courts of Scotland, as they lived beyond the jurisdiction of the Court of Chancery, and had removed great part of the proceeds of the estate to Scotland.

June 17, 1834.
Macmaster v.
Stewart.

The Lord Ordinary "sisted process for fourteen days, that the defenders may have an opportunity of filing a bill in the Court of Chancery in England, or adopting other proceedings by which they may be made accountable in that Court, to those interested in the will of the late John Macmaster, for the whole moveable as well as heritable property of the testator, in so far as it fell under their administration, with certification that, if satisfactory evidence is not then produced, that the accounting may competently go on in the said Court to that effect, at the instance of the pursuers against the defenders, the Lord Ordinary will proceed in this cause."

The defenders filed a bill in Chancery, and stated their willingness to go on with an accounting in that Court, but the pursuers declined to appear there under that bill, alleging that the defenders could abandon it when they chose, and that the pursuers had no means of enforcing a complete accounting there.

The Lord Ordinary directed a case and queries to be laid before English counsel, as to the effect of the proceedings which had been held in the Court of Chancery, and the right of the pursuers to enforce a full accounting there. On considering the opinion of counsel, his Lordship "sisted farther procedure, in hoc statu, reserving all questions of expenses."*

The pursuers reclaimed.

LORD PRESIDENT.—The Lord Ordinary has only sisted procedure hoc statu, and it appears to me that, under all the circumstances, his Lordship has adopted

* "NOTE.—It is plain that the testator had it in view that his executors, in case of any dispute with the legatees, should account for his whole estate, personal as well as real, in the Court of Chancery in England, and he has expressly directed in his will that this should be done. It is now established by the opinion of English counsel, that the direction given to the executors on this subject, applies equally to the defenders who are administrators. The accounting with regard to the real estate has long been going on in that Court, in consequence of a bill filed by the pursuer Macmaster. The first plea maintained by the pursuers, that they could not compel the defenders to account in Chancery for the personal estate, because they are not within the jurisdiction, is removed by the defenders having now filed a bill for that purpose. Their second plea, that the defenders might at any time defeat the proceeding, by withdrawing or abandoning the bill, is also removed, because it is proved by the opinion of counsel that the pursuers, by filing a bill, or by some other known process, may fix them in Chancery, until a decree is obtained there. On the grounds, therefore, both of expediency and the will of the testator, formerly referred to, it seems imperative that this process should be sisted, until the accounting in Chancery is brought to a close. It is possible that the aid of this Court towards required to enforce the execution of the decree."

the most expedient course. If any improper delay is allowed by the defenders to occur in their accounting in England, it is open to the pursuers to go to the Lord Ordinary, and crave his Lordship to proceed here.

No. 317.

June 17, 1834.

Sligo v. Hal-

dane.

LORD MACKENZIE.—Perhaps it should be noticed, that, in the last sentence of his Lordship's note, he contemplates it as imperative, that the sist should endure until the close of the accounting in England. It may happen that circumstances occur, before that period, which will make it necessary to go on with the accounting here. It is, therefore, strictly a sist hoc statu, and in general terms, as expressed in the Lord Ordinary's interlocutor, which occurs to me to be proper.

LORDS BALGRAY and GILLIES concurred in thinking that the interlocutor should be adhered to.

T. RANKEN, S.S.C.—TOD and ROMANES, W.S.—Agents.

GEORGE SLIGO, Suspender.—*Skene—Outram.*

DR HALDANE and Others, (of St Mary's College of St Andrew's,)
Chargers.

No. 318.

Teinds—Valuation.—A decree of valuation of teinds in 1732, contained, inter alia, an item of 14 bolls of bear; question, whether, in respect that no bear was now grown in the parish, and no fiars prices of bear struck in the county, the titular could compel payment in barley, or its value, in place of bear or its value.

IN 1732, a decret was obtained of valuation of the teinds of the lands of Scougal, lying in the parish of Whitekirk and county of Haddington, and now belonging to Mr Sligo. They were valued, inter alia, at 14 bolls, 1 firlo, 2 pecks, 1½ lippies bear. There are no fiars prices of bear struck in Haddingtonshire, and it was said that no bear is now grown in that county; and none is grown on Mr Sligo's lands. Mr Sligo presented a bill of suspension, as of a threatened charge, at the instance of St Mary's College of St Andrew's, the titulars of the teinds of the parish of Whitekirk, for payment, inter alia, of 14 bolls, 1 firlo, 2 pecks, and 1½ lippies of barley, in place of bear. He objected, that barley was a grain perfectly distinct from bear, both in the eyes of botanists and farmers; that it was of a very different commercial value; and that the titular might as well demand wheat or oats in lieu of bear, as he might demand barley. He offered to pay the ipsa corpora of bear of the most unexceptionable quality, or the value of such bear in money, to be ascertained as provided by 48th Geo. III. c. 138, § 12, in questions with the minister, by referring to the fiars prices of bear in adjoining counties, or to be fixed in any other equitable way.¹ He alleged, that no similar question to this had ever been decided. The chargers contended that barley, being now the crop, which was truly the growth of the lands, and

June 17, 1834.

1st Division.

Bill-Chamber.

Ld. Moncreiff.

D.

¹ 1 Connell, 437.

No. 318. being just a better species of bear, they were entitled to insist on payment in barley, and that this had been so decided in an unreported case¹ in the Bill-Chamber.
 June 17, 1834. Howden v. Porterfield.

The Lord Ordinary having reported the bill and answers, *

THE COURT passed the bill.

DAVIDSON and SYME, W.S.—W. COOK, W.S.—Agents.

No. 319. ALEXANDER HOWDEN and ALEXANDER PEARSON (Paterson's Trustees),
 Pursuers.—D. F. Hope—H. J. Robertson.
 JAMES CORBETT PORTERFIELD, Defender.—Jameson—G. G. Bell.

Entail—Provisions to Children.—Clause.—1. Terms of a clause in an entail, allowing an heir to grant a bond of provision to younger children, under which it was held competent for him to grant a bond, burdening the heirs, in case only of failure of his own issue male; and which bond became exigible, on the death of the granter's son, above twenty years after the granter's decease. 2. Where a bond is granted under permissive powers in an entail, it is like an entailor's debt, and the entailed estate is liable to be attached both for principal and interest, so that any heir of entail, taking up the estate, incurs a liability to that extent—the estate being of greater value.

¹ Bell v. Heritors of Crail, March 8, 1805.—2 Connell, 163.

* "NOTE.—The Lord Ordinary reports the case, as the easiest way for the parties to obtain a satisfactory judgment. At first sight, it seems a little startling to say, that an heiritor shall pay his valued teind to the titular, by the value of what is certainly a different grain, at least in modern and common acceptation, from that expressed in the valuation. For there can be no doubt, in fact, that bear and barley are practically different grains, in kind, quality, and value. But still it is very doubtful whether this solves the point. The principle of the valuations in grain is, that the teinds shall be paid, or may be so, by delivery of the specified grains, the growth of the lands. In the present case, it seems to be admitted, that there is no bear grown on the lands; and the decision in the case of Bell, seems to go at least thus far, that the heiritor is not entitled to sow bear, on purpose to pay the minister with grain of an inferior quality to that of the ordinary produce of the land. But in the case of Bell, the valuation was in 1631; and it was ably argued by Lord Robertson, that, at that period, there was no other denomination of the species of grain generally comprehended under the Latin name of *Hordeum*, and so that it might comprehend barley as an improved species, when that came to be substituted for the coarser bear. But in the present case, the date of the valuation is 1733, a century later—and it may be doubtful whether the same thing could then be said. The rule provided for the case of there being no bear raised on the lands, or no sown of bear, in the case of a minister's stipend, under the act of Parliament passed after the case of Bell, does also furnish an analogy, and an implication, favourable to the complainant's plea. But on the whole, the authority of the case of Bell, (the papers in which the Lord Ordinary has read), and the principle on which it was decided, incline him to think, that the plea of the chargers may be supported."

In 1721, Mr Porterfield of Porterfield executed a strict entail of that estate. The prohibition to contract debt, &c., contained a clause, "excepting as is after excepted:" and the following provision afterwards occurred—"excepting and reserving furth and from the said clause irri- tant full power and liberty to the said heirs of tailzie to contract and take on debts for the provision of their younger children, not exceeding three years' free rent of the lands and others foresaids, after deduction of liferents and real debts, and the annualrent of personal debts; and also, to contract and take on, for just and necessary causes, the sum of 6000 merks therewith, at least with as much of the said 6000 merks as shall be uncontracted, and the estate not affected with, for the time, so that the debt to be contracted by them, and wherewith they may burden and affect the saids lands, shall never exceed 6000 merks at one time, and three years' free rent of the lands and others foresaids, after deduction of liferents and real debts, and the annualrent of personal debts," &c. It was provided, that if an adjudication should be led against the lands for the above provision, "the heir of tailzie who shall happen to possess the lands for the time, shall be bound to purge the said diligence three years before the expiry of the legal thereof," under pain of committing an irritancy.

No. 319.

June 17, 1834.

Howden v.

Porterfield.

June 17, 1834.

1st Division.

Ld. Fullerton.

B.

In 1791, Mr Boyd Porterfield, heir of entail in possession, had one son and several daughters. He executed the following bond of provision:—"Considering that by the settlements of my estate, &c., and by the entail thereof, &c., full power and liberty is reserved to the heirs of tailzie to contract and take on debts for the provision of their younger children, not exceeding three years' free rent of the lands and others thereby entailed, after deduction of liferents and real debts, and the annualrents of personal debts which may affect the same for the time; and that I am resolved, in terms of the said power and liberty, to burdan the heirs succeeding to me in my said entailed estates of Porterfield and Duchall with the payment of the provision hereinafter mentioned to my younger children hereinafter named, in case allenarly of the failure of heirs-male of my body, whereby the said lands and estate will devolve upon an heir of entail not descended of me: And that, by a rental of the said entailed estate, and scheme of the debts affecting the same, signed by me of the date hereof, and as relative hereto, it appears that I have full power and liberty, in terms of the said entail, to grant a bond of provision to my younger children, to the extent after specified, do therefore hereby bind and oblige myself, and my heirs of tailzie succeeding to me in my entailed lands and estate of Porterfield and Duchall, but with and under the provision, declarations, and reservations hereinafter written, to pay to Mrs Alexander and Mrs Fotheringham, my third and fourth daughters, equally between them, and their heirs, executors, and assignees, the principal sum of £2400 sterling, and that at the first term of Whitsunday or Martinmas

No. 319. next after my death, in case I shall happen to die without heirs-male of my body; or if I shall leave heirs-male of my body, who shall succeed to me in my said taillied lands and estate, but shall thereafter fail, then at the first term of Whitsunday or Martinmas next after the death or failure of the last of the heirs-male of my body."

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After the death of Mr Boyd Porterfield in 1793, his son, Alexander Porterfield, made up titles, and possessed the estate under the entail till his death in 1815. He left no issue. A competition ensued between Sir Michael Shaw Stewart and Mr Corbett Porterfield for the estate, which was finally decided by the House of Lords in 1831. In 1818, the present Mr Corbett Porterfield succeeded to his father; and in 1832, Mrs Alexander and Mrs Fotheringham conveyed to Paterson's trustees their right under the bond of provision executed by Boyd Porterfield; and Paterson's trustees raised action against Corbett Porterfield for payment of the bond and interest since the bond became exigible by the death of Alexander Porterfield in 1815. The defender pleaded, 1st, That the bond was not granted in the fair or valid exercise of the permissive clause of the entail; 2d, That it was granted for a sum exceeding three years' rent, and so was ultra vires; 3d, That no interest was due upon the bond prior to the defender's own succession; and 4th, That, prior to the action, the rents of the estate were bona fide consumed, and interest was not due for the corresponding period.

The Lord Ordinary "repelled the defences, in so far as they rest on the first, third, and fourth pleas in law for the defender, and decerned;" and ordered the case to the roll quoad ultra.

The defender reclaimed, and the Court, considering the first plea to deserve mature consideration, ordered Cases.

Pleaded by the pursuers—

1. In so far as an heir of entail is unfettered, he possesses all the power of a fee-simple proprietor. By the permissive clause in the entail, Mr Boyd Porterfield was entitled to grant a bond of provision, as effectual in all respects as a fee-simple proprietor could. It was clear that he could have granted the bond had he burdened his son, the first heir of entail succeeding, with the payment of it in the first instance. But the postponement of the debt, until the death of that son, was truly *jus tertii* to the defender; because, if the son had been compelled to pay it, he could have kept it up by assignation against the defender. The only effect, of suspending the term of payment of the bond, was favourable to the defender, as it prevented the possibility of interest accumulating before the death of Alexander Porterfield.¹

The pursuers did not admit that only one such bond of provision could

¹ Sandford, 245, 246, 247; Note appended to Wemyss, Nov. 23, 1810 (F. C.); Macgill, June 13, 1798 (15451); 4 St. 18. 6. 7; 3 Ersk. 8. 29.

exist at a time; but even if it were so, the bond in question was valid, if granted without violating the powers of the entail.¹ No. 319.

2. If the bond was effectually granted, the estate was liable to be attached, both for the principal, and for all interest arising since the bond became payable. In taking up that estate, the defender was liable to the same extent, under pain of having the estate evicted.² June 17, 1834.
Howden v.
Porterfield.

Pleaded by the defender—

1. The power to contract the debt in question, was a special and limited exception from the general prohibition against contraction. The prohibition operated in behalf of each successive heir as he took up the estate, and saved him from his predecessor's debts; the co-relative exception must have a commensurate operation against each heir as he took up the estate. The burden of the provision must be made to attach to each heir successively, as the co-relative of the possession of the entailed estate. The entailer never contemplated granting any other power of burdening than this, and he had not granted any other.

Farther, the sole object of granting the power was to make a provision for younger children. But it was not a legitimate exercise of that power, to grant a bond which was suspended for above twenty years after the granter's death. And the right of every substitute-heir was infringed by the granter's having exempted any one heir, who ought to have been liable first in the series, and who might have paid the debt without keeping it up against the estate.³

Besides, only one such bond of provision could exist at a time; and it was unjust to a substitute-heir, coming to the estate, if he was to be prevented from providing for his own family in consequence of a bond by a comparatively remote ancestor, which had lain for a long term of years latent.

2. The defender could not be subjected in payment of any interest prior to his accession to the estate, as he only represented his father as heir of entail.

LORD PRESIDENT.—I think the Lord Ordinary's interlocutor is right. Suppose that Mr Boyd Porterfield had granted a bond that was payable immediately on his death; the defender's objections, so far as disposed of by the Lord Ordinary, would not reach such a bond. But the sisters of Mr Alexander Porterfield, on his succeeding to the estate, might have told him that they would exact no interest on the bond during his lifetime. They could not thereby have increased the burden on the next heir, but they could have refrained from taking payment from their brother. If, then, they had chosen to allow the bond thus to lie over

¹ Halket Craigie, Dec. 4, 1817 (F. C.).

² Campbell, Nov. 29, 1815 (F. C.); Erskine, July 7, 1829 (ante, VII. 844); Jardine, June 14, 1833 (ante, XI. 720).

³ Thomson, Dec. 8, 1875 (5980); E. of Rothes, Jan. 29, 1829 (ante, VII. 389); Kennedy, Feb. 11, 1829 (ante, VII. 397).

No. 319. till his death in 1815, the very same claim would have arisen against the defender which is now made. I do not see that he has sustained any prejudice from the form that was adopted, and which appears to me not to be in violation of the entail. However, I feel some hesitation as to the period at which the liability for interest should commence. I doubt if it can be carried farther back than the defender's accession to the estate.

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LORD MACKENZIE.—I concur with the Lord Ordinary, and would adhere to his interlocutor. In regard to the question of interest, I apprehend that this bond, being granted in virtue of a permissive power in the entail, is in the same situation with an entailor's death. The entailed estate is attachable not only for the principal sum, but also for the interest of the debt. The defender, in taking up the estate, could only take it, subject to that liability. From the term when the bond became exigible, I apprehend that it must bear interest.

LORDS BALGRAY and GILLIES intimated that they were for adhering to the Lord Ordinary's interlocutor.

THE COURT accordingly adhered.

PEARSON, WILKIE, and ROBERTSON, W.S.—J. GIMON and G. H. DONALDSON, W.S.—Agents

No. 820.

JOHN BELL, Pursuer.—*Moir—Monteith.*

J. MORTON and C. JOHNSTONE, Defenders.—*Keay—Deas.*

Trust.—Circumstances in which trustees, under a deed for behoof of creditors, having paid certain debts in full, were held not entitled to credit therefor in an accounting at the instance of other creditors.

June 17, 1834.

2D DIVISION.
Ld. Medwyn.
R.

THE late John Moir, manufacturer in Dundee, of date 4th March, 1826, executed a trust-deed in favour of the defenders, Morton and Johnstone, merchants there, who were his creditors to a considerable amount. The material clauses were in these terms—"Considering that I am due to sundry persons certain sums of money, which I am unable immediately to pay, therefore, and for the further security and more ready payment of the debts due by me to my whole just and lawful creditors, and for preventing the charges and expenses which my said creditors might otherwise be put to in doing legal diligence for their debts," he conveyed all his estate and effects, heritable and moveable, to these parties, for the purposes, and under the provisions following:—"Primo, My said trustees, or survivor of them, shall have power, and they are hereby expressly authorized, to sell and dispose of the whole subjects, means, and estate, heritable and moveable, before conveyed, either by private sale, or public voluntary roup, and either in whole or in parcels, and at such times and prices as they shall think proper; with power to receive payment of the prices, and to take bills or bonds in security of the same from the purchasers; and, for rendering effectual such sale, and to grant power to the said trustees, or survivor of them, to grant."

dispositions and other writings necessary, with all clauses needful, and that simply, so as that the purchasers may be nowise concerned with the application of the prices thereof, nor be burdened nor affected with any of the provisions herein contained: But declaring always, that it shall not be incumbent on my said trustees to sell or dispose of my said estate, heritable or moveable, until they shall think it proper to do so, and except in such manner as they shall think fit: And declaring farther, that it shall be lawful for my said trustees, or survivor of them, to carry on the manufacturing business hitherto carried on by me, in such manner, and for such time, as may be deemed most advantageous for the general behoof of all concerned, and to use the materials and articles on hand, or purchase others with the trust-funds, as they may find it necessary; and for these purposes, as well as for the disposal of my stock in trade, the said trustees, or survivor of them, shall have power to appoint factors or managers from time to time, at such salaries, with such powers, and liable in such diligence, as my said trustees, or survivor of them, may think proper to fix: Declaring always, that if the said trustees, or the survivor of them, shall see fit, it shall be lawful for them or him to appoint me, either singly or along with any other person or persons, as their factor or manager, and that under such conditions and control as they may consider necessary, it being in their power to recall such factories, and remove such factors, when they think it proper. Secundo, With power to the said trustees, or survivor of them, either to compound, transact, and agree, or to submit and refer any questions, disputes, or differences, that may arise betwixt them and any other person or persons touching the execution of this trust-right, or any thing of and concerning the premises in any manner of way; which transactions or submissions, with the decreets-arbitral, one or more, to follow thereon, are hereby declared valid and sufficient to all intents and purposes: As also, with power to sue and insist in all actions, and to do every other thing that shall be found necessary for effectually securing my said creditors, and effecting the payment of their debts. Tertio, It is farther provided and declared, that this disposition shall not be construed, so as to prefer any one creditor to another; but the said creditors, or any of them, shall noways, by their acceding to, or accepting of this trust-right, be hindered or prejudged of or from any action or diligence, competent to be used at their instance against any persons or person bound with or for me in payment of any debt; and that notwithstanding of these presents, and their acceptance thereof, it shall be in their power, at any time they think fit, to use all manner of diligence, real or personal, for payment of the debts owing against such co-obligants, as accords of law. Quarto, It is farther provided and declared, that these presents are granted for, and to the special end and effect, that the said trustees, or survivor of them, shall apply the proceeds of the estate and effects hereby conveyed, after deduction of all necessary charges and expenses to be disbursed by them in

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No. 320. executing this trust-right, as well as after payment of all preferable debts, towards payment of my whole just and lawful creditors at the date hereof, and that by one or more dividends, as they may think proper, and according to the several rights and preferences of my said creditors; and after deduction and payment of my debts as said is, that the said trustees, or survivor of them, shall make payment to me, my heirs and assignees, of the residue of my said funds, if any shall remain, and shall convey and redispone to me and my forebears, the remainder of my said estate and effects, in case any part thereof shall remain undisposed of. Quinto, It is hereby provided and declared, that the said trustees, or the survivor of them, shall be noways obliged to complete their rights by possession or otherwise, except in so far as they think right, or to use any other diligence than they think fit, and they shall not be liable for me, or any other factor they appoint, or agent they employ, nor in solidum, nor for each other, but only each for his own personal and actual intromissions."

The defenders accepted of this trust, allowing Moir to continue the management, and carry on the business under them, though without any written appointment as factor or manager. A state of his affairs appeared to have been given up by Moir to the defenders, at the date of the trust, which brought out a surplus balance in his favour of £1674; but it ultimately appeared that he had greatly understated his debts and obligations, which (including £1700 disputed) exceeded the amount stated by him by £5752, so that, at the date of the trust, he was in reality insolvent. Prior to this period, in the course of 1824, he had consigned various quantities of goods to the pursuer, Bell, merchant in Glasgow, who had, on the faith of the proceeds, accepted bills to Moir to a considerable amount. A large proportion of these goods not finding a ready sale in Glasgow, had been shipped by Bell for Charleston, to be disposed of by a branch there of the house of John Fyffe and Company, of Glasgow, who guaranteed the sales and returns. At the date of the trust-deed, it was supposed that the returns would be so favourable, as to exceed the obligations come under by Bell on account of them; and accordingly, in the state of affairs given by Moir to the defenders, Bell was inserted as his debtor, to the extent of £934, 7s. 6d. Certain bills, however, which had been remitted from Charleston to account of sales in 1825, were dishonoured, and, though assumed by Fyffe and Company under their obligation of guarantee, these parties became bankrupt; and ultimately, the result of the whole transactions was, that a balance of £1218, 15s. remained due by Moir to Bell. The defenders did not make any public notification of the trust; but in the July after its execution, they applied to Bell for a state of the account between him and Moir, and Bell accordingly transmitted them an account of the transactions between them, bringing out a large balance in his own favour. In the course of their management, the defenders renewed in their own names various bills granted prior to the trust, and retired these and others, held by th

dividual creditors, thereby paying in full debts contracted prior to the No. 320. trust, to the extent in all of £2624, 11s. 5d., whereof £1225, 14s. 3d. was ^{June 17, 1834.} their own private debt. In October, 1827, the Dundee Union Bank, ^{Bell v. Morton.} creditors of Moir to the extent of £600, having threatened to apply for a sequestration against him, the defenders published an advertisement in a Dundee newspaper, intimating the execution of the trust in their favour, and that a dividend would be paid on the 1st of November, and calling on the creditors to lodge their claims prior thereto. In consequence of this, Bell transmitted a formal claim, with an account and affidavit, bringing out a balance in his favour of £2761, 2s. 1d., but subject to deduction in the event of further remittances from America. No dividend, however, was paid, except to the Dundee Bank, who received 5s. in the pound, and in consequence took no steps towards a sequestration. In 1829, Moir died; and in 1830, the balance due Bell on the consignments, being reduced by subsequent remittances to £1218, 15s., he raised the present action against the defenders, concluding for payment of the amount, as having made themselves personally liable by paying other creditors in full, and otherways violating their duty as trustees, or for a count and reckoning as trustees.

In support of this claim, Bell contended—

1. That the defenders were bound to have made an equal distribution of the trust-estate among all the creditors; that they must have ascertained the true state of Moir's affairs, or at least ought to have done so, and to have retained a dividend to answer his claim as it might ultimately turn out; but that having paid certain debts in full, including a large amount of their own, they must now be personally liable for such a dividend as would have effeired to his claim had these payments not been made, and had the trust-estate been wound up at once and equally distributed.

2. That, at all events, after the advertisement in October, 1827, they could no longer be in bona fide to make payments preferably to particular creditors, and that they must at least be liable personally for such dividend as the estate, if then equally distributed, would have yielded to all the creditors.

On the other hand, the defenders contended that the trust was not for distribution, but for management, and was not intended to be published; that they had no reason to believe that Moir was insolvent; that, on the contrary, he had acted as a solvent party down to his death, while, by themselves renewing his bills in their own names, so as to be now in advance for the estate, they showed their perfect bona fides; and having thus acted in bona fide, they could not be personally liable in consequence of payments made, while it was supposed there would be a sufficiency of funds for all, the more especially as Bell had been considered a debtor to, and not a creditor on the estate, till the supervening bankruptcy of Fyffe and Company turned the balance in his favour.

The Lord Ordinary remitted to an accountant to examine the accounts

No. 320. and report; and a report was accordingly returned, from which, inter alia, it appeared, that on the view of the defenders being entitled to credit for all the payments made by them, the estate was entirely exhausted, leaving claims outstanding (including £1700 disputed) to the extent of £6244, 7s. 8d., and a balance due them of £359, 12s. 3d.; while, on the view of their not being entitled to credit for payments to account of debts contracted prior to the trust, the estate, as it stood originally, would have yielded a dividend of 8s. 3d. per pound to all the creditors. On considering this report, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note: *—" Finds the pursuer entitled to such

* " The pursuer having acceded to the trust, the question at his instance must depend on the nature of the trust, the duties imposed upon the trustees, and the manner in which they have discharged these duties. The object of the trust was to enable the trustees, with safety to themselves, to interpose their credit for Moir, to enable him to go on, under the impression that he was solvent, but unable to discharge all his engagements immediately. The trustees were themselves principal creditors. The truster gave in a state of his affairs to them, which has turned out grossly defective and erroneous. He states his funds at £4481, 18s. 6d., and his debts £2807, 16s. 10d., thus leaving a surplus of £1674, 1s. 8d., besides the heritable property, probably worth £2000, after payment of debts heritably secured. But it has turned out, that the claims against the estate, independent of the pursuer's debt, exceed the sum in the state, by at least £2700, and there are, of disputed claims, about £1700 more. Much will depend on what shall be held to have been the duty of the trustees as to ascertaining the true state of the claims against the estate. If they were bound to verify the statement of the truster before proceeding to pay off any of the claims, they have completely failed in this respect. But this could only have been done by calling a meeting of the creditors, or publicly notifying the trust-deed, and desiring claims to be given in. This would have declared Moir's embarrassments at once, ruined his credit, and done what it was just the object of the trust to avoid. In like manner, they seem to have been satisfied with the account of the goods on hand, and debts due to him, given up by Moir; and there is now no means of checking the accuracy of the amount of funds accounted for. They also allowed Moir to act as their manager in working up the unmanufactured goods, and in working a quarry. This, by the trust-deed, they were entitled to do. The accounts of their own intromissions are accurately kept and regularly vouched. It is said that they have not been very accurate in calling upon Moir to account to them, so that he has died indebted to the trust-estate.

" It appears that, believing the state of debts given up to be accurate, the trustees proceeded to grant their own acceptances for every one of the debts specified in the list, which were constituted by bills, and in the order in which they fell due. By examining the accounts appended to the report, it appears to the Lord Ordinary that this was done in regular course, without preferring one to another, or their own claims to those of the other creditors, exhibiting their confidence in the solvency of Moir, and the ultimate sufficiency of the estate. Moir, it would appear, was reputed solvent all this time; for the bills by the trustees are in his favour. Some of these bills have been paid, but some are still outstanding; and it is true that the whole debts due to the trustees themselves have been paid, some of them after various renewals, and one payment at least subsequent to the raising of this process. Other creditors have also been paid up, but a large amount remains charged.

a share of the trust-funds, along with the other creditors who had claims against Moir, as would effier to his debt of £1218, 15s., if these funds had been ranked on by the creditors at 1st November, 1827, and remits to Mr H. G. Watson, to ascertain for what sum decree will fall to be pronounced in this case, in favour of the pursuer, in terms of the above finding." No. 820.
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Both parties reclaimed;—Bell in so far as it limited the liability of the defenders to what the estate would have yielded at the 1st of November, 1827, allowing the defenders credit for the prior payments; and the defenders in so far as they were found liable to any extent.

The Court, on hearing parties, recalled the Lord Ordinary's interlocutor in hoc statu, and again remitted to the accountant "to examine and report what dividend the estate of John Moir would have paid at the date

" With regard to the pursuer, it appears that no blame is imputable to the trustees for not intimating the trust to him. He is given up as a debtor in Moir's state for no less than £934, 7s. 6d.; and it was not till long after, that it was ascertained that the balance would be on the other side, which, in this process, is now fixed at £1218, 15s. The loss has arisen from the failure of shipments to America realising the expected returns, and the bankruptcy of a house which had granted bills for £3000. The pursuer, however, knew of the trust in July, 1826; but he continued to correspond with, and transact with Moir himself, and renewed his current bills with him alone, down to the period of his death, another proof of Moir's reputed solvency. The pursuer never asked for the security of the trustees, nor, so far as appears, pressed them for payment, nor even made any claim upon them prior to the advertisement in October, 1827, when he stated his claim at something above £3000. By this time, it was clear there would be a shortcoming of the funds, and it is difficult to understand that the trustees should be entitled, after this, to continue to carry on the trust, propping up Moir's credit, and making payments as if he were solvent. It would rather seem to have been their duty to allow the bank to sequestrate the truster; and the device of advertising a dividend to avert that step, but, as they state, without any intention to pay it to other creditors, or being in a condition to do so, seems to be a very questionable measure. The dividend paid to the bank was 5s. in the pound. Without the consent of the other creditors, were the trustees entitled to make this payment, unless they could afford the same to other creditors in the same situation? It rather appears to the Lord Ordinary that they were not; so that, while the bona fides of the trustees, acting in the spirit of the trust-deed, and under the peculiar clauses applicable to them as trustees, protects them from the claim of the pursuer for full payment of his debt, and even for the dividend which would have been payable if the estate had been equally divided among the creditors at the date of the trust, it does not appear that they can have the benefit of this legal plea of bona fides subsequent to October, 1827. The effect of this seems to be, that the pursuer is entitled to such a dividend as he would have received if a rateable division had been made at this time; so that the defenders must be liable for the sum paid to the bank, and for all sums paid subsequently to creditors, (beyond the proportion due to them along with the other creditors,) and the pursuer's claim under this action will be ascertained according to the proportion which his debt bears to the other outstanding debts. If this view be well founded, the Lord Ordinary thinks that the defenders must also be liable in the expenses of process."

No. 320. of the advertisement inserted by the trustees in the Dundee, Perth, and Cupar Advertiser in the month of October, 1827, and that in both of the June 17, 1834. *Ball v. Morton.* two views stated in his general report." The accountant accordingly returned an additional report, which bore that, on the first view, viz. that the defenders were entitled to credit for all the payments made by them, the estate would, at the period in question, have yielded a dividend of 1s. 3½d. in the pound; and, on the second view, viz. that they were not entitled to credit for payments to account of debts contracted prior to the trust, a dividend of 6s. 0½d. per pound.

LORD GLENLEE.—This is a hard case; but, on the whole, I think the second view in the accountant's report is that to be adopted. It is clear that, under this trust, no one creditor was to have a preference over another; and it follows from this, that the trustees were not, in paying, to give one creditor a larger share of his debt than another. I am not satisfied that the trust was intended to be concealed from the creditors, and an appearance of solvency kept up. This appears from the clause as to the case of creditors refusing to accede, which implies that they were to know. I am persuaded of the bona fides of the trustees, and that they acted on the belief that the funds would turn out sufficient, and I have no idea of making them liable for more than they actually recovered; but still, as to that, with whatever bona fides they applied the funds to pay particular creditors, yet, when there comes to be a shortcoming, they cannot rest on their bona fide belief that the funds would be sufficient for all; and, therefore, I would proceed as if the funds were still in medio, and make a rateable division. Then, as to their own debts, though there may be no *dolus dans causam*, there would be a great deal of *dolus incidens* if they turned the trust into a means of retaining payment in full of their own debts. But I think the same rule is to be applied to all the other debts paid, and that the funds are to be taken as if the sums so applied were in medio.

LORD CRINGLETIE.—There are two conclusions in the summons—1. For payment of the full debt; and 2. Alternatively, to account for their intrusions, and for a share of the whole funds effecting to the debts. I concur with the views expressed by Lord Glenlee, and think the trustees were in bona fide to a certain extent, believing the estate equal to the debts. But, then, in 1827, they find out the real state of matters, and advertise a dividend; and surely it was not fair to advertise what they admit they never intended to make. The pursuer at that time put in a claim, and yet, after that, they made a payment to the Dundee bank, and to extinction of their own debts. I cannot hold that was done in bona fide, and must therefore approve of the second view.

LORDS JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly pronounced this interlocutor:—"Find that the claims of the pursuer must be taken and settled agreeably to the second view taken by the accountant in his report, and additional report in process; remit to the Lord Ordinary to proceed accordingly, and to do as to his Lordship may seem just, reserving all claims *hinc inde* as to expenses, with this explanation, that the parties are to be put on the same footing as to stamps and discounts on bills renewed and interest."

THISTLE FRIENDLY SOCIETY OF ABERDEEN, Pursuers.—*Cunninghame*— No. 321.

Mylnæ.

ALEXANDER GARDEN and WILLIAM KNOX, Defenders.—*Rutherford*—

Moir.

June 17, 1834.
Thistle Friend-
ly Society of
Aberdeen v.
Garden.

Cautioner—Friendly Society.—Circumstances of negligence on the part of a Friendly society in regard to the control exercised by them over their treasurer, which held sufficient to liberate his cautioners.

By the regulations of the Thistle Deposit Friendly Relief Society of June 17, 1834. Aberdeen, it is inter alia provided as follows :—“ That the treasurer shall be bound, within eight days after his election, to grant bond, with security, to the satisfaction of the committee, for his intromissions and faithful management. The treasurer shall also be bound to deposit the money of the Society in such a manner, and as often, as directed by the committee ; and he shall not be allowed to retain in his hands a sum exceeding five pounds at one time. All bills, and other securities for money, shall be drawn in name of the treasurer ; but these vouchers, when taken, shall be lodged in a box, to be kept for the purpose, having three locks, one of the keys being kept by the treasurer, and one by each of the key-bearers, and shall not be opened without a special order from the committee.”

2d Division.
Ld Mackenzie.
T.

At a meeting held of date 26th December, 1823, it was resolved, “ That the money then in the treasurer’s hand, and what farther sums may be collected by him at any future period, if not a time when it can be lent to members, shall be either lodged in the bank, or in some other place of safety, wherever the committee may direct, but there shall no more be allowed to remain in the treasurer’s hands than what the rules direct, unless in a case where any disappointment might take place. Also, that the treasurer’s account shall be brought up each meeting, to ascertain what may be in his hands.”

In December, 1824, David Forbes, weaver in Aberdeen, was elected treasurer of the Society, and his appointment was renewed yearly down to 1831, the defenders Garden and Knox granting bond as his cautioners for the years 1829, 1830, and 1831, whereby they bound themselves that he should “ faithfully execute the office of treasurer of said Society, and hold just count and reckoning to the said Society of his intromissions with the funds thereof as treasurer foresaid, and make payment of whatever sum may be due by him as treasurer foresaid.” In the execution of his office Forbes was allowed to deposit in his own name whatever money he placed in bank, so as to be always under his individual control, and although the Society had it in their power, by examination of the pass-book kept with the bank, or obtaining an account from the bank, to check his transactions, and ascertain the amount actually deposited compared with the sums collected by him, they did not do so, but contented themselves

No. 321. with an occasional examination of his own books and states, which, as it afterwards appeared, did not give a correct view of his operations. It also afterwards appeared, that during the whole of the year 1831, the balance in Forbes's hands on the weekly states was seldom less than £20 or £30. Towards the end of October it was £79, and at the end of October it had increased to £251, in addition to which, on the 7th December, being on the eve of absconding, he drew out the whole funds of the Society deposited in bank, amounting to £511. Instead, however, of carrying this off with him, he placed it to the extent of £501 in a drawer in his house, and then absconded, writing to the Master of the Society that he had left this sum, which was immediately taken possession of for the Society.

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ly Society of
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Thereafter, the Society raised the present action for payment of the balance due by Forbes, against Garden and Knox, his cautioners, who defended on this ground, *inter alia*, that the Society had not taken ordinary or reasonable care to overlook and check the proceedings of Forbes, nor enforced their own regulations, on which the cautioners were entitled to rely for their protection.

The Lord Ordinary assoilzied the cautioners, adding the subjoined note.*

The Society reclaimed, but the Court adhered.

GARD and MORTON, W.S.—A. G. SUTHERLAND, W.S.—Agents.

* "Great part of the grounds of defence appear to the Lord Ordinary ill-founded; and though these were not insisted on at the debate, they are fully stated in the defences and answers to the condescendence. The ground on which the interlocutor rests is the want of reasonable attention by the Society and their Committees to the execution of the treasurer's duty, by which want of attention the danger of his cautioners was greatly increased, and his embezzlement probably caused. It seems to the Lord Ordinary that there is no sufficient warrant in the statute of George IV., or in the law for exempting such Societies, if they have a treasurer, with cautioners, from the ordinary condition of such cautioners, that the party secured by it shall do his part, or its part, if it be a corporation of any kind, in looking after the treasurer's execution of his duty. And in this case, it is obvious that there was no idea of throwing over this duty on the cautioners, since there was no provision made to aid them in it, and very decided rules laid down for its performance by the Society itself. The rule, especially, that not more than five pounds should remain in the treasurer's hands, but all the funds be lent out on securities, or lodged in bank, though qualified to a certain degree, (the regularity of which qualification is not quite free from doubt,) never could, in any reasonable or tolerable construction, admit of allowing sums, running up to above £250, to remain immediately in his hands, and all the rest of the Society's funds, amounting to above £500, to be left subject to be drawn out of the bank at his uncontrolled pleasure. Yet this was allowed by the mode of dealing with him adopted by the Society, when it might easily have been checked; and the consequence was, that it appears he embezzled, and probably wasted, or lost on some speculation, the money that was immediately in his hands, and drew out all the rest, with the intention of carrying it off, though conscience, or the fear of the criminal law, made his last intention almost entirely. The Lord Ordinary does not think

Rev. WILLIAM THOMSON, Objector.—*Rutherford*.
 COMMON AGENT in Locality of Moneidie, Respondent.—*Keay*—
J. Murray, jun.
 LORD LYNEDOCHE, Compearer.—*A. Murray.*

No. 322.

June 18, 1834.
 Thomson v.
 Lynedoch.

Teinds—Subvaluation—Dereliction.—In the subvaluation of the teinds of a parish, formerly a parsonage, a report in 1629, (the phraseology of which varied in reference to different lands,) contained these words, "Findis that the landis of Pittendinne and Milnehoill, according to the probatioun usit and deducit yairament, hes payit, pntlie payes, and may pay in constant rent of stok and teind, baith personage and wicarage in time cōm^s, by the comoditie of the mylne yrof of silver dewtie zerlie, iij^s iij^s merkis mo^v. And Findis that the teindis of the foirsaid landis wer rentallit of auld to xx bolls wic^h, twa p^{ts} meall, and third p^t bear, q^h was payit to the minister and persone of Monydie, at the leist to thair takemen;"—held, 1. That these words imported a separate valuation of the teinds of these lands at 20 rental bolls; and, 2. as there was no dereliction, according to this mode of interpreting the report, decree of approbation of the subvaluation, pronounced in terms thereof.

THE report of the subvaluation of the parish of Moneidie, which was June 18, 1834.
 formerly a parsonage, bears, that on 17th December, 1629, the sub-commissioners of the Presbytery of Dunkeld met, and there were present, 1st Division.
 besides the heritors mentioned, Mr Patrick Omev, the minister and parson. The report bears, that they "all in ane voice, at the leist, as mony present for the tyme, condescendit to the probatioun and depositions of the witness^{is} law^{is} sūmond and āpeirand for proving of the stock and teind bygaine, present, and to cum, q^{by} the Sub-commissioneris findis that the landis after specit and teinds yaireoff, is and may be heirefter rentallit as followis, viz." An enumeration of the several estates followed, and there was frequently a variation in the phraseology employed to state the result of the proof respecting each. Thus it was stated, regarding Nairn of Strathurd, that "his landis, efter spec^t, hes payit, pntlie payes, and may pay, in constant rent of stok and teind, baith personage and wicarage, in time com^s, the particular quantities underwritten, viz. His landis of Pitlandie, of silver dewtie, to the heretor zerlie, iiij^s merks mo^v; And payis by and attour of Rentallit bolls to the persone and minister of Teind, xxviiij bolls of victuall. Ld. Moncreiff.
 Teind Court.

"His landis of Balbrogo, of silver dewtie zerlie, ijcxⁱ Libs. and payis of rentallit teind bollis to the minister zerlie xxx bolls victuall q^h landis (thought is deir worth,) comunibus annus, jo m^v.

"His landis of Lethaime, includan the Cuthilshead, may pay zeirle of

make the cautioners answerable for a loss following upon such neglect. He feels for the hardship that may thus fall on such a Society, but there would be a hardship also the other way; and the rules of law cannot bend to such considerations without legislative sanction provided beforehand."

No. 322. silver dewtie to the heretor, (by the comoditie of hedder cadging,) viijxx
 merkis moy, and payes by and attour of teind
 June 18, 1834. bollis to Margaret and hir spous, for his entres zeirlie, xvj
 Thomson v. bolls wictuall.
 Lynedoch.

“ His lands of the hoill of Strathurd, (by the said Cuthilshead, and by the comoditie of hedder and turvis cadging,) may pay zeirlie to the heretor of silver dewtie xxj libs. ij s. viij d. and payis by and attour to the minister of Rentallit teind ij bolls wic^l. ” Afterwards it was stated, that the “ landis of Pittendinne and Milnehoill, according to the probatioun usit and deducit yairanent, hes payit, pntlie payes, and may pay in constant rent of stok and teind, baith personage and wiccarage in time cōm^t, by the comoditie of the mylne yrof of silver dewtie zeirlie, ij^c ijxx merkis moy. And Findis that the teindis of the foirsaid landis were rentallit of auld to xx bolls wic^l, twa p^u meall, and thrid p^t bear, q^{ik} was payit to the minister and persone of Monydie, at the leist to thair taksmen.”

In 1668, a contract was entered into between the parson and the heritors of Moneidie, by which 17 bolls were allocated out of the lands of Pittendynie and Millhole, one half of which was to be paid in victual, and one half by a conversion in money, at the rate of L.6, 5s. Scots per boll. In 1721, this contract was acted upon in the decree of locality of Moneidie which was then pronounced. There has been no final locality since then; and there has been no approbation of the subvaluation as to the lands of Pittendynie, &c., now belonging to Lord Lynedoch. In the pending process of locality of that parish, the common agent, founding on the case of Chalmers,¹ considered that the report of the subvaluation imported a separate valuation of the teind of the lands of Pittendynie, &c., at 20 rental bolls. He accordingly held, that there had been no dereliction of this subvaluation, and gave effect to it in the locality. The minister objected, that the mention of the teinds having been “ rentallit of auld to 20 bolls victuall,” was merely introduced narrative into the report, and referred to a prior condition of the lands, and not to their condition as at the date of the subvaluation, or at the date of the submission to King Charles I.; that the teinds were fixed, by the subvaluation, at L.48 Scots, being the fifth part of the cumulo valuation of 360 merkis, or L.240 Scots, which was stated as the constant rent of stock and teind. He, therefore, pleaded, that the allocation of 8½ bolls of victual, and L.53, 2s. 6d. Scots, of conversion-money, upon the lands of Pittendynie, &c., under the contract of 1668, was a large excess beyond the teinds in the subvaluation; and that, as stipend had been paid at that rate under the locality of 1721, and subsequently till a new interim scheme of locality in 1793, and as no attempt had ever been made to revive the subva-

¹ 22d Nov. 1820, (R.C.)

uation, it must now be held as derelinqushed, and the lands must be localled on, as unvalued. No. 322.

During the discussion of the question, Lord Lynedoch raised a sum-
mons of approbation of the report of the sub-commissioners, concluding
for declarator, " that the stock, and teind, parsonage and vicarage, of the
pursuer's said lands, shall be now and in all time coming, the particular
sums of money, and quantities of victual, contained in the said report;
and that the teinds of the foresaid lands were rentallit of auld to 20 bolls,
two part meal, and third part bear, which were paid to the minister and
parson of Moneidie, and it ought and should be found, declared, decern-
ed, and ordained, by decree of the said Lords as Commissioners foresaid,
that the foresaid valuation by the sub-commissioners of the teinds of the
said lands and others above described, has ever been since the said report,
is now, and shall continue and endure in all time coming, as the just
worth and constant yearly value of the teinds, parsonage and vicarage, of
the said lands and others." June 18, 1834.
Thomson v.
Lynedoch.

The minister consented that the summons should be held as repeated,
incidentally, in the process of locality, and his objections as defences.

The Lord Ordinary found, " that the question whether Lord Lynedoch has lost the benefit of the subvaluation 1629, in relation to his lands of Pittendynie and Millhole, mainly depends on the construction of that clause of the report which applies to these lands, it being admitted that if the 20 bolls of grain mentioned therein are to be taken as the valued teind, the valuation has not been lost by dereliction, and this point being raised in a process of approbation, in which the Lord Ordinary has no power to give judgment, makes avizandum therewith to the Court, and appoints that part of the record to be printed, together with a copy of the report of the sub-commissioners, and this part of the present interlocutor, and the subjoined note, and copies to be put into the boxes of all the Judges, in order to be reported: Finds no expenses due to any party."*

* " NOTE.—With regard to the question concerning Lord Lynedoch's lands of Pittendynie, &c., the Lord Ordinary, after carefully considering the report of the subvaluation, and the case of the Duke of Athole against Chalmers, November 22, 1820, (Fac. Coll.) is of opinion, that the 20 bolls mentioned in the report are to be taken as 'rental bolls,' and as constituting a separate valuation of the teind, while the three hundred and three score merks must be considered as the valuation of the stock as drawn by the heritor. This was a parsonage in which the minister incumbent had been in use to draw the teinds, and in such cases it was specially provided in the submissions, that 'the benefice should not be hurt by any valuation;' now it appears clearly by the report, that the teinds of the lands in question, and of various other parcels mentioned, had been rentalled, or fixed to a certain number of bolls of grain, and the Lord Ordinary has no doubt that the meaning is precisely the same as if the term 'rental bolls' had been employed, as was indeed held in the case of Chalmers. But these rental bolls, according to all the authorities, were to be taken as the valuation, if not opposed; and in the case of a parsonage, the Lord Ordinary rather apprehends that this could not be opposed. In a number of other instances in this report,

- No. 922.** A majority of the Court adopted the conclusion at which the Lord Ordinary had arrived, as explained in his note, and their Lordships therefore repelled the objections of the minister, and pronounced decree in terms of the libel in the process of approbation.

June 19, 1834.
Fullarton v.
Dixon.

J. LAWSON, W.S.—W. FRASER, W.S.—Agents.

- No. 923.** ALLAN FULLARTON (Judicial Factor on the estate of the Dumbarton Glasswork Company), Petitioner.—*Jameson—Christison.*
ANTHONY and JOSEPH DIXON (Jacob Dixon, senior's, Trustees),
Respondents.—*Rutherford—H. J. Robertson.*

Judicial Factor—Partnership.—The estates of an extensive and solvent mercantile concern were sequestrated by the Court after the death of the last partner, and a judicial factor was appointed "with power to take the funds and estate under his charge, and to manage and wind up the whole affairs of the company," and all parties concurring in the expediency of selling the heritable property of the company, but some of them opposing the sale by the factor,—held, that as the heritable

the valuation is so expressed as to make it clear that the silver money mentioned as payable to the heritor, is distinct from the rental bolls paid to the minister; in other cases where there were no rental bolls, the stock and teind are valued together, and in these cases, of course, the fifth part of the whole would be the teind. It happens that in the entry relative to the lands of Pittendynie and others, the expression is ambiguous, bearing that the lands 'has paid, presently pays, and may pay in constant rent of stock and teind, both parsonage and vicarage, in time coming, by the commodity of the mill thereof, of silver duty merely three hundred and three score merks money.' If it had stopped here, this would have been plainly a valuation of the stock and teind together, as in some of the first instances in the report. But it goes on, 'and finds that the teinds of the foresaid lands were rentalled of old to 20 bolls victual, two parts meal, and third part bear, whilk was paid to the minister and parson of Monedie, at the least to their tacksman.' These last words are disputed, the words being said to be illegible, and it being supposed that they should be 'at the Feast of .'. Now, on the one hand, no reason can be imagined why these rental bolls should be mentioned at all, if they were not mentioned as being the valuation in the same manner as in the other cases, while, as they were the rental bolls of the parsonage, the valuation could hardly be made otherwise; and on the other hand, whatever might be the reason for valuing the stock in silver money, even where the valued teind has to stand by the rental bolls, it is quite clear that this was done in all the other cases in this report, and also in the report in the case of Chalmers; and though in this instance this valuation is awkwardly introduced, so as to make the silver money appear as the value of the stock and teind together, the Lord Ordinary is on the whole of opinion, that this cannot be the true meaning, and that substantially the meaning is the same as in the other cases, to state the stock and teind as consisting first of the three hundred and three score merks of silver money, as the stock payable to the heritor; and, secondly, of the 20 rental bolls as the teind paid and payable to the parson. He thinks that the clause cannot be ~~valued~~ construed otherwise, and, on the whole, that the case cannot be principle from that of the Duke of Athole v. Chalmers.

property must be viewed as part of the funds of the company, the factor was No. 323.
entitled to make up titles and sell it, and authority granted accordingly.

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Fullarton v.
Dixon.

1st DIVISION.
D.

ON the death of the late Jacob Dixon, sen., his sons Anthony and Joseph were left his trustees under a trust settlement of his estates. Mr Dixon was the last surviving partner of the Dumbarton Glasswork Company, and that firm was the last of a series of companies, which had succeeded to each other, and were possessed, inter alia, of considerable heritable property, acquired at different periods. By Mr Dixon's settlement the personal interest of the two trustees in his estate was limited to a special legacy of £4000 each, and they had received considerable payments to account of this. There were claims against the company to an amount exceeding £70,000; but the property of the company, including a large amount of outstanding debts, was of much greater value. There were parties beneficially interested in Mr Dixon's settlement to a much larger extent than the trustees, Anthony and Joseph Dixon; and these gentlemen having assumed the management of the extensive glassworks and property of the company, a petition was presented by the representatives of a former partner, who stated themselves to be creditors for a debt of above £35,000, craving the sequestration of the company's estates, and the appointment of a judicial factor to wind them up. The petition was supported by other parties interested, and, after opposition by Anthony and Joseph Dixon, the Court appointed Mr Watson,¹ and afterwards Mr Caw,² "judicial factor on the funds and estates sequestrated, with power to take the same under his charge, and to manage and wind up the whole affairs of the companies, with the other usual powers." Afterwards Mr Allan Fullarton was named in place of Caw, as "factor on the funds and estate of the Dumbarton Glasswork Company, and the other companies composing the said partnership, as craved, with the usual powers."

Several negotiations ensued between the judicial factor and Mr Dixon's trustees, as to the propriety of bringing the heritable estate to sale. The judicial factor was desirous of selling, and at length, all parties having stated their conviction of the expediency and necessity of such a sale being speedily effected, both because the works were deteriorating in value, and because a great amount of debt existed which was bearing a high rate of interest, Messrs Anthony and Joseph Dixon presented a petition, praying for authority to complete their titles to the heritage, and to sell in terms of articles of roup, and to convey to purchasers, on consignment of the price, subject to the orders of the Court. Their Lordships refused the petition, observing that, if granted, it would just be, "pro tanto, a substitution of the petitioners in the room of the judicial factor."³ Afterwards the factor presented a petition, craving authority, "as judicial factor upon the foresaid

¹ Dec. 22, 1831 (ante, X. 178).

² Jan. 30, 1832 (ante, X. 208).

³ Dec. 20, 1833 (ante, p. 248).

No. 323. sequestrated estate, to complete feudal titles to the heritable subjects of which it is partly composed in his person, so as to vest the same in him as judicial factor, for behoof of all parties interested, and subject to the future orders and directions of the Court; to grant warrant to, and authorize the petitioner to expose and sell the said properties by public roup, upon due intimation, at prices, and under articles of roup to be fixed by your Lordships, or as you may direct, the free proceeds of such sales being thereafter disposed of as your Lordships may appoint." The factor stated that he was unable to condescend on the precise condition of all the heritage, to which he, as representing the company, had right, because the titles were in the hands of Anthony and Joseph Dixon, and their agent; but that, according to his information, the company was in possession, inter alia, of the following heritable property:—

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" 1. Of an acre of ground, in which James King was infeft for himself and the other partners of the Dumbarton Bottle-work Company. 2. Of two and a half roods, conveyed in the same terms to John Robertson. 3. Of sundry pieces of ground, &c., in which James Dunlop and Thomas Donald were infeft in 1784, for the Dumbarton Glasswork Company. 4. Of sundry subjects conveyed to the Dumbarton Glasswork Company in 1785 and 1789, in which they were infeft. 5. Of a house and yard conveyed by Joseph Henning, shipmaster in Dumbarton, to John Dixon of Levensgrove, on which no infeftment was passed. 6. Of sundry subjects in Dumbarton, Glasgow, and Greenock, conveyed in 1805 and 1813, to Alexander Houston of Clerkington, John Dixon, and Anthony Dixon, coal-masters at Knightswood, John Dixon, senior, Jacob Dixon, senior, and Adam Seton, at Glasgow Bottle-work, composing the Dumbarton Glasswork Company, on which infeftment was taken in favour of these parties. And, 7. Of six cut roods of land in Dumbarton, conveyed in 1816 to Alexander Houston, John Dixon, senior, and Jacob Dixon, senior, partners of the Glasswork Company who were infeft."

He contended that this heritage being the property of the company, was in reality part of their stock in trade, and that he, as judicial factor, appointed to wind up the company estate, must be entitled to make up titles to the heritage and sell it, which he proposed to do by processes of constitution and adjudication. But although such power was implied in the nature of his appointment, yet as it was of an unusual nature, he craved the Court expressly to interpose their authority to it. He founded on the refusal of the petition of Messrs A. and J. Dixon, both as creating a necessity for granting to the judicial-factor the powers now craved, and as evincing the opinion of the Court that such power ought to be granted.

The prayer of the petition was supported by the concurrence of some of the parties having a large interest in the sequestrated estate. It was opposed by A. and J. Dixon, who pleaded that it was ~~inconsistent~~ accordingly, was wholly without precedent, to grant such

judicial factor; that, if granted, the heritable property would not sell advantageously, because purchasers would be distrustful of any titles which could be made up by the unwarrantable interjection of a judicial-factor into the feudal chain; and that though the petition should be granted, there were no termini habiles for the factor's making up titles, as he was not like a trustee under the bankrupt act, in whose favour a statutory adjudication is provided. They did not specify, in reference to any particular portion of the heritage, the mode in which they would propose to complete a feudal title; but they stated generally that it was through one of themselves alone that the title to some of the subjects could be made up; that the factor should therefore proceed to sell, and that they were willing to give their concurrence, after the sale, in making up a title to the purchaser, who might retain the price until such title was made up.

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Walker.

LORD GILLIES.—This is not the ordinary case of a judicial-factor appointed on a sequestrated land-estate. It is the case of a factor appointed to wind up the concerns of a trading company; and I consider the heritable property in question to be nothing else than so much of the assets of the company. In the circumstances of the case, I am for granting the prayer of the petition; which does not in the least imply that the factor is to proceed per saltum in making up a feudal title.

LORD BALGRAY.—I concur. I am satisfied that it is for the interest of all parties, and indeed they all admit the propriety of a sale. It appears to me to be the duty of the respondents to afford every facility in their power to the judicial-factor in effecting such sale.

LORD PRESIDENT.—I concur; and I may observe, that it appears to me these respondents, on a former occasion, gave a consent in the course of their negotiations, which I should have understood to mean a sanction to the prayer of this petition.

LORD MACKENZIE thought the prayer of the petition should be granted.

THE COURT accordingly granted the prayer, and awarded expenses against the respondents.

W. Renny, W.S.—T. GRAHAME, W.S.—Agents.

EDWARD HASSETT, Suspender.—*Robertson*.
ROBERT WALKER, Charger.—*Jameson*.

No. 324.

Process—Reclaiming Note.—An objection to the competency of a reclaiming note on the merits, repelled, although a copy of the letters of suspension was not appended, it appearing that the omission was occasioned partly by the fault of the objector.

ROBERT WALKER, charger, presented a reclaiming note against an interlocutor of the Lord Ordinary, suspending the letters simpliciter, in a process of suspension and liberation. Hassett, suspender, objected to

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D.

No. 324. the competency of the note, because, although a copy of the record was appended to it, yet no copy of the letters of suspension was so; which
 June 19, 1834. last was imperative by § 77 of A. S. 11th July, 1828. He referred to
 Tulloch v. the cases of Cook, Feb. 12, 1831,¹ and Gilmour and others, Nov. 16,
 De Eresby. 1832.²

The Court allowed the printed letters to be now put in, and ordered the case, as usual, to the roll. It was the opinion of the Court, as expressed by the Lord President, that some misunderstanding on the subject had occurred between the parties, and that the suspender should not, in the circumstances, be allowed to take advantage of it. It was understood that, in future, the rule of the A. S. would be enforced.

R. ANDERSON—D. KIRKHAM—Agents.

No. 325.

GEORGE TULLOCH, Pursuer.—*Deas.*

LADY WILLOUGHBY DE ERESBY AND HUSBAND, Defenders.—*Rutherford*
 —*Dundas.*

Jurisdiction—Lease—Poinding.—1. A baron bailie has jurisdiction to grant warrant to sequestrate and sell the crop for rents falling under hypothec, although a warrant to poind and sell had been previously granted by the Sheriff, under a decree at the instance of a creditor of the tenants; but, 2. A poinding for arrears under his warrant, inept to the effect of securing a preference for these arrears over the creditor poinding under the warrant of the Sheriff.

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 Ld. Moncreiff.
 F.

THE pursuer, Tulloch, having, of date 7th July, 1830, obtained decree before the Sheriff of Perthshire for the sum of £17, 14s. 3d., and expenses, against Tainsh, tenant in a small piece of ground, part of the barony of Milnab, belonging to the defender, Lady Willoughby De Eresby; and having charged him on the Sheriff's precept containing warrant to poind, executed a poinding of the growing crop and a cow on the premises above mentioned, and, on the 24th September, obtained from the Sheriff warrant to sell. The day of sale was fixed for the 5th October, but on the same day on which Tulloch obtained his warrant to sell from the Sheriff (24th September), an application was presented to the baron bailie of the barony of Milnab, in name of Lord and Lady Willoughby De Eresby, setting forth, that Tainsh was owing arrears of rent for the piece of ground held by him, at the rate of £6, 10s., besides that for the current year, and praying the baron bailie to sequestrate the crop and stocking, and to interdict the messenger employed by Tulloch, and all others, from selling or disposing of the same. On the same day on which the application was presented, the baron bailie pronounced an interlocutor, appointing it to be served, and to be answered in six days.

¹ Ante, IX. 429.

Ante, I

and in the meantime sequestrating the crop and stocking, and interdicting all and sundry from selling or disposing of the crop, except upon finding caution to pay the rents for which Lady Willoughby De Eresby might have a right of hypothec. The petition was served upon Tainsh, and also upon the messenger who had executed Tulloch's poinding, and no answers having been lodged for Tainsh, the baron bailie, on the 2d October, pronounced decree in absence against him for the arrears due, the decree containing warrant to poind. Under this decree, the factor for Lady Willoughby De Eresby caused a poinding to be immediately executed of the crop and stocking already attached by the poinding at the instance of Tulloch under the Sheriff's warrant, and a warrant of sale having been farther obtained from the baron bailie, the effects poinded were sold by roup on the 4th of October, (being the day before that fixed for the sale under Tulloch's poinding,) and the proceeds applied pro tanto to extinguish the arrears of rent, leaving, however, a balance of £10, 16s. 11½d. still due.

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In the meantime, answers had been given in for Tulloch and his messenger to the petition of Lord and Lady Willoughby to the baron bailie, in which they objected to his jurisdiction, and defended on the merits, that he was not entitled to interfere with a poinding under a warrant from the Sheriff, at all events, to the effect of giving the landlord a preference for arrears which his hypothec could not cover. The bailie sustained his jurisdiction; and, in respect Lord and Lady Willoughby had a preferable right of hypothec on the property sequestrated, he continued the sequestration and interdict. Thereafter, however, Tulloch proceeded to sell a quantity of potatoes, part of the poinded crop, which had not been sold at the roup on the 4th October under the baron bailie's warrant, whereupon another petition was presented to the baron bailie in name of Lord and Lady Willoughby, craving decree against Tulloch and the messenger for £6, 10s., as the rent of the current year, for which the crop had been sequestrated, together with expenses, and damages for breach of interdict. No answers were given in to this petition, and, in respect thereof, the baron bailie, in July, 1831, pronounced decree against Tulloch and the messenger for £6, 10s., and £2 of expenses.

Of all these proceedings, Tulloch brought an action of reduction on these grounds, inter alia—

1. The sequestration and poinding by the baron bailie, were an undue and incompetent interference with the proceedings under authority of the Sheriff.

2. The poinding was further inept, as not executed according to the forms prescribed by the bankrupt statute, which extended to all poindings.

3. The sequestration was incompetent, in so far as regarded the arrears of rent, which could not be recovered by the right of hypothec; and,

No. 325. 4. The decree of July, 1831, was altogether incompetent, the baron bailie having no jurisdiction over Tulloch or the messenger.
 June 19, 1834. *Tulloch v. De Eresby.* Lord and Lady Willoughby did not dispute the irregularity of the decree of July, 1831, but as to the other proceedings, contended—

1. The jurisdiction of baron bailies as to recovering rents due to the baron by tenants of the barony, is reserved by the jurisdiction act, and subsists in full force, and the baron bailie therefore was entitled to sequestrate and grant warrant for poinding, which will be effectual even for arrears not covered by the hypothec, in competition with that under the Sheriff's warrant, unless the latter were first completed, which it was not, there being no transference to the creditor in an ordinary poinding till the sale is reported.¹

2. The forms prescribed by the bankrupt statute as to ordinary poindings, have no application to poindings under a baron's decree, for payment of rents due by tenants of the barony, which still proceed in the summary manner competent in his court for this purpose; and,

3. The sequestration was only continued for the current year's rent, and the sale for arrears proceeded on the poinding, under the decree for payment against Tainsh, and being duly completed before that proceeding from the Sheriff, it must be preferable in a competition therewith.

The Lord Ordinary reduced the decree of July, 1831, but quoad ultra sustained the defences, and assoilzied, adding the subjoined note: *—

Tulloch reclaimed.

LORD GLENLEE.—I agree with the Lord Ordinary's interlocutor, in so far as it repels all objections to the formality of the procedure; but I confess I have some scruples as to the other part. There are no objections certainly to the proceedings before the baron bailie, in so far as they merely enforce the landlord's

¹ *Tullie v. White*, June 15, 1817 (F.C.).

* "The Lord Ordinary has no doubt that the jurisdiction of the baron bailie still subsists in such questions. There may be a question whether the case of a poinding by warrant of the bailie's decree falls under the rules of the bankrupt act, or still continues a peculiar case under the exception of the statute 1669, c. 4, as explained by the authorities. But the Lord Ordinary finding it laid down broadly by Mr Erskine (3, 6, 21), that 'in consequence of this reservation, barons may, by the present law, poind their tenants for the arrears of rent fixed by decree, not only without an antecedent charge, but even instant after pronouncing the decree, without waiting the expiration of the days which are ordinarily indulged to debtors when a charge is given them on a decree;' and seeing no statutory provision on the subject which can be considered as a repeal of the law, and no authority which holds it to be repealed, conceives that the rule must be the same, and sees no cause for reducing the proceedings in this case, which appear to have been in other respects right and just. But the decree of 31st July, 1831, was plainly irregular and must be reduced. That decree, however, not having been acted on, the reduction of it leads to no other consequence."

hypothec; but here it seems to be for arrears. The landlord is entitled, no doubt, to sue in his own baron court for arrears, but how was he or any other landlord entitled to a preference for arrears over other common creditors. The utmost would have been to compete with them, *pari passu*, but in so far as he got a preference for arrears, it is clear the decree was unjust, and must be set aside, and this at common law, and without going on the sequestration act, or any thing else.

LORD CRINGLETIE.—I see from the original proceedings, which I have looked into, that the baron bailie has not gone wrong—but the person who executed his warrant. The petition applies to the whole arrears, but the baron bailie only sequestrated till caution was found for the current rents for which the crop was hypothecated. There were no answers for Tainsh, and decree for payment was given, and warrant for arresting and poinding. This was all right, but the fault was in putting it in execution in the face of a previous warrant from the Sheriff, obtained by Tulloch. Thereafter the baron bailie finds the landlord's claim preferable for the current year's rent only. But what do Lord Willoughby de Eresby's people do on this? They execute a poinding, and sell the goods. That is the objectionable proceeding, and not the baron bailie's judgment. That poinding, therefore, is null and void, and should be reduced and set aside, and to that extent the interlocutor must be altered.

LORD JUSTICE-CLERK and MEADOWBANK concurred.

THE COURT accordingly pronounced this interlocutor:—"Adhere to the interlocutor submitted to review, in so far as it reduces the decree of July, 1831; quoad ultra alter that interlocutor: Reduce the decree and poinding thereon libelled, in so far as it infers a preference as to arrears, reserving all questions relative to the competition between the parties and expenses of process: Remit to Lord Moncrieff, Ordinary, to proceed therein, and to decide as to his Lordship may seem just, and to this effect *hoc statu decern*."

BROWN and MILLER, W.S.—DUNDAS and WILSON, W.S.—Agents.

EDWARD RAILTON, Advocate.—*Rutherford—Cheape.*

ROBERT MUIRHEAD, Respondent.—*Jameson—Patton.*

No. 326.

Right in Security—Lease—Title to Pursue.—1. Held that an heritable creditor, infest, is not entitled to apply for sequestration of effects, as being liable to hypothec for rent. 2. Question, 1st, Whether, if an heritable creditor, infest, and holding a decree for mails and duties against former tenants, give possession to a new tenant, or to the proprietor at a rent, he can obtain sequestration; and, 2d, Whether an heritable creditor, infest, who has not used poinding of the ground, can attach, by sequestration, moveables on the property belonging to the proprietor who is in the natural possession.

WILLIAM RUSSELL, merchant in Falkirk, granted, in favour of Robert Muirhead, merchant there, an heritable bond and disposition in security for £450. Muirhead was infest on 26th March, 1822. There were

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No. 326. houses upon the ground conveyed; and, after some arrear of interest was incurred, Muirhead raised an action of mails and duties against the tenants of the premises, in which he obtained decree on 25th November, 1829, and 19th May, 1830. The rent of the premises amounted to £55. At the term of Whitsunday, 1831, the proprietor, Russell, under the firm of W. J. Russell and Company, entered into the occupation of the premises. On 25th June, 1832, Muirhead presented a petition for sequestration against W. J. Russell and Company, in which he narrated the bond and disposition and sasine, the decree of mails and duties, and the amount of arrears of interest now due on the bond. He alleged that W. J. Russell and Company were liable for a rent of £55 for the past, and as much more for the current year: "That the petitioner had by law a right of hypothec over the shop goods, household furniture, and other effects of the said W. J. Russell and Company, within the foresaid premises, in security and for payment of the rents due and to become due to the petitioner as aforesaid; and in order to make his said right effectual the said application was made." He therefore craved warrant to sequester and sell, and he obtained warrant accordingly. On 5th July following, he presented a new petition to the Sheriff, stating these circumstances, and that he was about to carry the warrant into execution, but that Edward Railton, agent in Glasgow, had used a poinding of the shop goods, household furniture, and other effects, of W. J. Russell and Company, "in the possession aforesaid, occupied by them, over which the petitioner has a right of hypothec in security and for payment of the said rents." He therefore craved an interdict against Railton from selling or intermeddling with the poinded effects of W. J. Russell and Company, "or any of the shop goods, household furniture, and other effects, in the premises aforesaid occupied by them," and "to declare the interdict perpetual, aye and until the rent and expenses due are paid to the petitioner, and security found for the rent to become due."

Railton, in place of denying that Muirhead had any right of hypothec at all, contended that it was not of so extensive a nature as alleged, and could not exceed the current annual rent of the bond. The Sheriff found "that the poinded effects in question are hypothecated to the pursuer, to the extent of the rent payable by the tenants of the premises, and found, accordingly, that the pursuer was entitled to sequester for more than the current annual rent of his bond: Therefore continued the interdict in terms of the conclusions of the complaint." Railton brought an advocacy, and pleaded, 1. That an heritable creditor had no right, in virtue of his infestment, to petition for sequestration of any of the moveables found upon the ground, whether the proprietor's or a tenant's, as being under hypothec to him. And, 2. That Muirhead was not even in a condition to raise this question, as his application was expressly laid on the footing of a landlord suing for rents; ~~that the relationship of landlord and tenant did not subsist bett~~

Russell. And, 3. That he, at the date of his petition, possessed no other right than that of any heritable creditor infeft, and his decree of maills and duties was directed against a prior set of tenants; and that although he had subsequently allowed the proprietor, Russell, (who was the same person with W. J. Russell and Company,) to enter into possession, yet this was without any agreement between them, such as could constitute the relationship of landlord and tenant. Muirhead answered, 1. That an heritable creditor, who was infeft, and held a decree of maills and duties, was entitled to sequester for the rents due by the tenants, and had a hypothec over the effects in the premises to that extent:¹ but, as he had made an agreement with Russell, after the former tenants left the premises, by which he allowed Russell to enter and occupy, at a rent of £55, this alone was enough to support a petition for sequestration. 2. That he had entered into possession by his decree of maills and duties; and that, as he had been made to believe W. J. Russell and Company to be a separate firm, he must, in this question, possess the same right against them, as if there had really been a tenant in the premises different from the proprietor.

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The Lord Ordinary "advocated the cause, and before farther answer, allowed the respondent a proof of his averment, that after the expiry of the leases of the tenants, against whom the decree of maills and duties was obtained, the proprietor, Russell, who, it is now admitted, is the sole partner of the firm of W. J. Russell and Company, and therefore identical with that company, entered into possession of the subjects over which the respondent's heritable bond extends, not as proprietor of the subjects, but by a special agreement with the respondent, by which he became bound to pay to the respondent a yearly rent of £55 sterling, and allowed the advocator a conjunct probation."*

Muirhead now stated that Russell was dead, and he was unable to prove

¹ Parkers, Feb. 5, 1783; L. Kelhead, Nov. 2, 1748 (2735); Webster, July 13, 1780 (2902); Erskine, Nov. 2, 1748 (2901); Tullis, June 18, 1817 (F.C.); 2 Ross's Lectures, 438, 439; 4 Ersk. 1. 49; 2 Bankt. 5. 8.

* "NOTE.—Whether an heritable creditor ever had a lien, ipso jure, over the moveables on the land covered by his security, is now become matter only of antiquarian research. It is settled law, that, practically, he has no such lien now, but must proceed to affect them by diligence. By a decree of maills and duties, he will obtain the benefit of the landlord's hypothec over the crop, stock, and moveables, of the tenants, to be made effectual by a sequestration;—by a poinding of the ground, he may attach the effects of the landlord, and those of the tenants to the extent of the rents due by them. In the present case, the respondent did not poind the ground; he has sequestered the property of Russell, and the effect of that sequestration must depend on the fact, whether Russell entered into possession in the character of landlord, or by virtue of an agreement, by which, as tenant, he was to pay a rent to the respondent. The Lord Ordinary cannot hold the decree in absence in the sequestration as a proof of the existence of such agreement, in a question with the advocator, who was no party to the process."

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any special agreement with him for the rent of £55. The Lord Ordinary, "in respect it is now admitted by the respondent that he is unable to instruct his averment that Russell entered into possession of the subject in question in virtue of a special agreement, by which he became bound to pay a yearly rent to the respondent, and in respect that the petition for sequestration was presented by the respondent, not in the character of a creditor having a lien over the moveables on the property by virtue of his heritable bond, but solely for the purpose of attaching the goods covered by his hypothec as landlord; altered the interlocutor of the Sheriff; recalled the interdict, and decerned; found no expenses due."* Muirhead reclaimed.

LORD BALGRAY.—There was no proper tenant in the premises at all.

LORD MACKENZIE.—I am for adhering, but I do not consider the point so clear as to call for an award of any expenses against the respondent. His Lordship was understood to add, that a right of hypothec might exist, although there was no lease.

LORDS PRESIDENT and GILLIES were for adhering.

THE COURT accordingly adhered.

T. LEBURN, S.S.C.—J. BURN, W.S.—Agents.

No. 327.

JAMES BENNETT, Petitioner.—*D. F. Hope—Penney—Dunbar.*
JAMES JOHN FRASER, Respondent.—*Shene—Robertson—Buchanan—Maidment.*

Inhibition—Arrestment.—Where one of four cautioners in a bond, the term of payment of which was postponed till 1836, and the amount due depended on an accounting, was bankrupt, and a second was apparently involved to a considerable extent with him, and the third had burdened part of his heritage—held that the holder of the bond was entitled to use inhibition and arrestment in security against the fourth cautioner, without alleging that either of the principal obligants was vergens, and without using any diligence against them, except inhibiting one; and that the Court could not recal the diligence without caution.

* "NOTE.—The question alluded to in the former note, viz. Whether an heritable creditor, who has not used a poinding of the ground, can attach, by a summary sequestration, moveables on the property not hypothecated for rent, but belonging to a proprietor in natural possession, is not raised in this case. The petition for sequestration does not proceed on the allegation of such a right. It sets forth that the respondent has a right of hypothec over the effects for payment of the rents due and to become due to him, and, in order to make this right effectual, that the application is made. No expenses are found due, because the advocator in the Inferior Court admitted, erroneously in point of law, that there was a hypothec to some extent, and argued his case on that supposition."

IN 1826, the estates of George Pentland were sequestrated under the bankrupt act, and in 1827 James John Fraser, W.S., and Charles Campbell Stewart, W.S., conceiving that the estates were sufficient to meet Pentland's debts, undertook a bond of caution for payment of the debts, by two equal instalments, at six and twelve months. In a relative statement of the trustee, submitted to the creditors, he estimated that £15,100 was the sum "for which it is reckoned cash down and caution will fall to be provided, besides allowances to the interim factor and trustee, and the expenses of carrying through the arrangement."

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The estates of Pentland were conveyed to Fraser in trust, for securing him against his advances and obligations, and there was a substitution in favour of Stewart as trustee, failing Fraser. Pentland afterwards executed a deed, which narrated the obligations undertaken by Fraser, and advances made by him, and stated a sum of £8760 as due by Pentland to Fraser, on 22d December, 1827, after auditing and examining the accounts. Pentland became dissatisfied with the management of Fraser, alleging, inter alia, that at the date of the above settlement, he had received £5500 from the estate, which was not credited in the above account, and it was arranged that the estates of Pentland should be conveyed by Fraser, on certain conditions, to Messrs Paton and Sandeman. Articles of agreement were drawn out, referring to an extensive and complicated set of claims, to be insisted in between Pentland on the one hand, and Fraser and Stewart on the other; and it was agreed, that when Fraser and Stewart devolved the estates on Sandeman and Paton, the latter should pay £2000 to Fraser, and £1000 to Stewart; while Fraser and Stewart became bound to instruct, on the final accounting, that these sums were due to them by Pentland, and to give credit for the amount. It was also agreed that Sandeman and Paton should grant their joint bond as trustees and individuals for satisfying the claims of Fraser and Stewart, to the extent of £6000, but under reservation of various claims of compensation and retention, and of the effect of certain diligence used against Fraser, so long as it stood undischarged; "and, farther, under this express declaration, that the granting of said bond shall not be held to infer that the said sum, or any part thereof, is due to the said James John Fraser, and Charles C. Stewart, or either of them, and shall form no claim against the said Edward Sandeman and Thomas Paton," beyond the sum to be fixed by arbiters or a court of law, under an accounting. Sandeman and Paton were bound to pay any additional sum beyond the £6000 which might finally appear to be due—"declaring, that the £6000 conditionally provided for by the said bond, and what, if any, farther sum that shall be found due to the saids James John Fraser and Charles Campbell Stewart, or either of them, under said submission, shall not be exigible for five years from the date hereof, provided the security of the said Edward Sandeman and Thomas Paton, in favour of the saids James John Fraser and Charles Campbell Stewart, remains unimpaired." A state of the

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Sandeman and Paton granted a bond, dated the 11th of July, 1831, in implement of, and referring to the articles, as conditions of the bond, and binding them to pay £6000, or any larger sum which might prove the result of an accounting, but declaring that no part of the sum was admitted to be due, except so much as should appear due, after adjusting all claims under the accounting; "that the said sum of £6000, conditionally provided for by the bond, and such further sum, if any, as shall be found due, &c., shall not be exigible for five years from the date hereof;" and consenting to registration for execution, in common form. It also bore the following attestation and cautionary obligation: "We, Alexander Robertson and James Bennett, writers to the Signet, do hereby not only attest the sufficiency of the within named and designated Edward Sandeman and Thomas Paton, but also bind and oblige ourselves jointly and severally, our heirs, executors, and successors, as cautioners and sureties subsidarie along with them in terms of the bond within written, and we consent that the attestation be recorded along with the within bond, in terms of the clause of registration therein contained, and to the effect within mentioned, and for that purpose, we constitute the procurators therein named." Another attestation and cautionary obligation, as to the sufficiency of the two obligants in the bond and their cautioners, Robertson and Bennett, was signed by Sir Patrick Walker and Dr J. A. Robertson, in November following. After this, Fraser delivered over the estates of Pentland to Sandeman and Paton.

Little progress was made in the accounting, owing to causes of delay, which were mutually attributed by the opposite parties to each other. After a submission proved abortive, an action of count and reckoning was raised by Fraser against Sandeman and Paton, to which Bennett was called for his interest. Much irritable feeling arose between Fraser and Bennett, as appeared from their correspondence; and in December, 1832, Fraser, having put the bond upon record, obtained letters of arrestment, and used arrestments to a large extent against Bennett, who alleged that funds, to the amount of £4000, were thereby locked up. Fraser also used inhibition against Bennett, and Sandeman, and Sir Patrick Walker. About this time Sir Patrick Walker had granted a trust-conveyance of a part of his heritable property, for the purpose of its being sold, to extinguish certain debts. Mr Alexander Robertson, the co-attestor with Bennett, was in circumstances of embarrassment, which led to his estates being sequestered, in February, 1834; and Fraser alleged, that Dr J. A. Robertson was much involved with Mr Alexander Robertson.

Bennett presented a petition for recal of the arrestments and inhibition, without caution or consignment. He pleaded, 1. That as the bond was of a conditional nature, and nothing was yet shown to be due under it, and Fraser might turn out to be debtor in place of creditor, ~~the bond should be recalled~~

competent to use diligence of any sort upon it. And, 2. That as the term of payment under the bond was suspended till July, 1836, it could only be under very urgent circumstances that diligence in security should be permitted, so long before the term of payment; that as Fraser made no specific averment that either Sandeman or Paton was vergens ad inopiam, it was nimious and oppressive to use diligence against any of their cautioners, especially without using similar diligence against the principals; that as the security of Fraser was ample, from the solvency of the principal obligants, and of all the cautioners but Mr Robertson, the use of diligence inflicted a severe injury on Bennett, without any adequate cause; and that as much vindictive feeling existed on the part of Fraser towards him, the Court must look with jealousy at any measures of diligence, of a harassing sort, adopted by Fraser against him.

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Fraser pleaded, 1. That the bond was an obligation for £6000, or whatever sum should be found due under the accounting, and, being registered, formed a good warrant for the use of diligence in security. And, 2. That though the term of payment had not come, there was such a change of circumstances as justified him in using the diligence. He would not have parted with the trust-estates, had he not got the security of the bond; that security consisted, not merely of the principal obligants, but of their four cautioners. One of the cautioners was now sequestrated—another, Dr J. A. Robertson, was much involved in that failure—and a third, Sir Patrick Walker, had recently burdened part of his heritable estate. These things made a great change on the security, and he was entitled to use diligence in security against the remaining cautioner; and it was not for the Court to go nicely into the question whether the respondent could be safe without using diligence, as it was enough for him to say that he now no longer possessed that measure of security, without which he would not have given up possession of the trust-estates, and he did not consider himself safe with any thing less; that the diligence was not dictated by vindictive feeling, but by a prudent regard to his own security, and that unless a clear case of abuse of diligence was made out, the Court were not warranted to tie up the hands of any creditor in using legal remedies for his own protection.

The Court refused to recal the arrestments and inhibition, except on caution; and as the petitioner declined to find caution, his petition was refused, but no expenses were awarded against him.

Their Lordships were understood to hold, that the specification of the sum of £6000 in the bond afforded prima facie evidence of a probable debt to that amount; that there appeared to have been very considerable advances made by Fraser; and though it was impossible to foresee the result of an accounting, hinc inde, yet, as he had given up possession of the trust-estates, upon getting a bond signed by two principal obligants, and four cautioners, a sufficient change in the circumstances had since

No. 327. occurred to prevent the Court from exercising so high and delicate a branch of its jurisdiction as that of depriving a party of the use of diligence in security, when no caution was offered.

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Merry v.
Masson.

SMITH and KINNEAR, W.S.—J. J. FRASER, W.S.—Agents.

No. 328.

JAMES MERRY, Pursuer.—*Moir*.

MRS MARY DUN or MASSON, Defender.—*Whigham—Chapman*.

Proving of the Tenor—Writ.—Circumstances in which the Court sustained the adminicles, and allowed a proof in an action of proving of the tenor.

June 21, 1834.

1st Division.
S.

THE late James Dun died infest in certain subjects in Glasgow, conform to sasine, recorded on 12th February, 1771. He left an only child, Mary Dun, who was served heir to him on 19th March, 1779, and was infest on 1st April following. On the 20th of March, 1787, a contract was executed, which was still extant, between Mary Dun and her husband, James Masson, on the one part, and Marion Brown and her husband, James Merry, on the other part, whereby Mary Dun, inter alia, disposed to Mrs Merry or Brown the pro indiviso half of the subjects inherited from her father. On 19th May, 1790, the subjects were brought to sale, according to articles of roup, which remain extant, and which set forth that they "are to be exposed to sale by Mary Dun, daughter of the deceased James Dun, &c., now wife of James Masson, &c., with consent of the said James Masson," &c., and with consent and concurrence of Mr and Mrs Merry—"the said Mary Dun standing vest and seised with the said subjects, but being accountable to the said Marion Brown or Merry for one half of the same." One of the articles of roup was—"4. The said exposers shall be bound, against the said term of payment, and at one and the same time with receiving payment of the price of the said subjects, to grant and deliver to the purchaser, or his heirs or assignees, a valid and formal disposition of the premises by the said Mary Dun and her said husband, with consent of the said Marion Brown and her said husband." The testing clause bore the articles of roup to be signed by the husbands, James Masson and James Merry, "for themselves, and as having power from, and taking burden on them for, their said wives." Mrs Masson could not write, and there was no signature except by the husbands. By the minutes of roup, which were still extant, it appeared that there had been several offerers, and that James Merry, the last and highest bidder, was preferred. The law-agents who drew out the articles of roup, and were employed by Masson and Merry, were T. and R. Grahame, writers, Glasgow. Their books contained entries on account of drawing the articles of roup, advertising, attending

&c. ; and, under date November 12, 1790, there was an entry for “ draw- No. 328.
ing disposition by Mary Dun, &c. to James Merry.”

No disposition by Mary Dun to James Merry, or instrument of sasine ^{June 21, 1834.} *Merry v. Masson.*
thereon, could be found ; but the minute-book of the burgh register of
sasines at Glasgow, contained the following entry :—

“ 8th June, 1791.

“ *Dun* { Sea: James Merry, on resignation of Mary Dun, with con-
to { sent of James Masson and Marion Brown, &c. in a piece of
Merry. { yard,” &c.

Of the same date, the sasine stands recorded in the burgh register of
sasines, and sets forth that James Merry’s procurator produced “ a dispo-
sition, bearing date the 31st of May last, made and granted by Mary
Dun, daughter of the deceased James Dun, &c. now wife of James
Masson, with consent of the said James Masson, and with consent and
concurrence of Marion Brown, spouse of James Merry, &c., with advice
and consent of James Merry, &c., whereby, for the reasons therein speci-
fied, the said Mary Dun and Marion Brown, with the special advice and
consent of their respective husbands, and they for themselves for their
interest, and they all of one consent, sold, disposed, conveyed, and made
over from them, to and in favour of the said James Merry, and his heirs
and assignees whomsoever, heritably and irredeemably, all and whole
that piece of yard,” &c. It set forth that the disposition had been duly
ratified by Mary Dun and Marion Merry, and that infetment was de-
livered to Merry under the procuratory of resignation in the said dispo-
sition.

James Merry possessed the subjects without challenge, till his death
in 1815. By his settlement, the liferent of the subjects was left to his
widow, and the fee to his son James Merry. The widow possessed
them till her death in 1818 ; and afterwards the son enjoyed them until
1828, when Mary Dun or Masson, now a widow, raised a reduction of
his titles. She alleged, inter alia, that the contract of 20th March, 1787,
had been impetrated by fraud, and was not her deed. This allegation
was negatived by the verdict of a Jury. She farther alleged that she had
never executed any disposition in favour of Merry, and, as the defender
could not produce the disposition and sasine in question, he raised a sum-
mons of proving of their tenor. He set forth the adminicles already
mentioned, and inserted the tenor of the alleged disposition, leaving it
blank in the testing clause as to the name of the writer, and the number
of pages, and the names of the witnesses to the subscriptions of James
Merry, his wife Marion, and James Masson. It bore to be signed by
two notaries for Mary Dun, who could not write, but the names of the
notaries and witnesses were not condescended on. There also purported
to be a ratification by Mary Dun and Marion Brown, of the same date
with the deed, but the name of the Justice of Peace, or of the shire to
which he belonged, was not given ; neither were the names of the notary
and witnesses stated.

No. 328.

June 21, 1834.
Hamilton v.
Queensberry's
Executors.

The defender pleaded, that the adminicles founded on, were not sufficient to warrant an interlocutor, sustaining them, and allowing a proof; the articles of roup in 1790, though bearing to be signed by Mary Dun, with consent of her husband, had been signed by the husband only; and even if the excerpts, from the burgh register of sasines, were held to instruct that a disposition ever existed, it must have been signed in the same defective way, and was a fraud on the defender, who never knew any thing of it, and, accordingly, it had been allowed to disappear, so that a more perfect deed might be reared in its place by means of a proving of the tenor.

The pursuer answered, that the sasine recorded so long ago as 1791, and followed by peaceable possession till 1828, especially when coupled with the minutes of roup, formed as strong adminicles as could exist in any case. The entries in the law-agent's books, charged for the execution of a disposition; and as the sasine purported to follow under a disposition granted by Mary Dun, with consent of her husband, and ratified by her, it was impossible to listen to the conjecture that it might perhaps have been signed only by her husband. In regard to a writ like a disposition, no special casus amissionis required to be proved.

The Court sustained the adminicles, and allowed a proof.

G. and T. DARLING, W.S.—J. TAYLOR, S.S.C.—Agents.

No. 329.

JAMES HAMILTON, W.S., Suspender.—*Jameson—Whigham.*
DUKE OF QUEENSBERRY'S EXECUTORS, Chargers.—*Rutherford—*
Tait.

Trust.—Circumstances as to claiming payment of a debt from a trustee under a trust for behoof of creditors, not sufficient to import an accession thereto *rebus ipis et factis*.

June 21, 1834.

2^D DIVISION.
Bill Chamber.
Ld. Moncreiff.
F.

IN July, 1815, the executors of the late Duke of Queensberry obtained decree against the complainer, James Hamilton, of Kames, W.S., for the sum of £147; and in October thereafter, Hamilton executed a trust-deed for behoof of his creditors, but stipulating for an allowance of £600 a-year to himself, in favour of John Campbell, quartus, W.S., and failing him, such person as the creditors might elect, it being stipulated, that by acceding thereto, creditors should be bound not to do diligence, nor to take separate measures against the estate. A relative deed of accession, containing a provision to this effect, was at the same time prepared and signed by nearly all the creditors, but not by the Queensberry executors. In January, 1816, however, the executors transmitted to Mr Campbell, the trustee, a claim, unsubscribed, but setting forth the amount ~~of the debt~~ and accompanied by the following note from their agents ~~Jameson and Whigham~~ Tait, Young, and Laurie present compliments to Mr Campbell

informed that he is appointed trustee for Mr James Hamilton, W.S., No. 329.¹ and that the creditors have been required to lodge with him their claims and grounds of debt, have therefore sent herewith claim for the Duke of Queensberry's executors against Mr Hamilton, with state of debt and vouchers, per inventory." No payment was received, and, in 1819, the agents of the executors wrote to Mr Campbell in these terms:—"On 12th January, 1816, we sent to you a claim at the instance of the Duke of Queensberry's executors against Mr James Hamilton, W.S., with the decree and other documents there referred to, for which we hold your receipt. We expected that this debt would have been long ago paid, as we had understood that Mr Hamilton's estates were conveyed to you in trust, in order to a sale for the payment of the creditors. We shall be glad to be informed, whether there is now a prospect of an early settlement; and you will have the goodness to return to us the grounds of debt to the Duke's executors. In case there is no certainty of a speedy payment under Mr Hamilton's trust, we shall consider it necessary to resort to separate measures on the part of our clients. We are, &c." Still no payment was received by the executors, and Mr Campbell having resigned, and a new trustee appointed by the creditors, after whose death, in 1824, no successor was elected, the executors proceeded with diligence, directed against Hamilton personally, who thereupon presented a bill of suspension, without caution, on the ground that the executors had claimed under the trust, and so had virtually acceded thereto, and were barred from doing diligence. To this, in addition to a plea of *res judicata*, it was answered—

1. That in fact the trust no longer subsisted, and had already been disregarded by the Court.¹

2. That the mere act of demanding payment from the trustee of a debtor, did not import an accession of the trust-deed, so as to be bound by its conditions.*

Lord Cringletie having refused the bill, Hamilton presented a second, still without caution, which was passed by Lord Moncreiff, who, at the same time, issued the subjoined note.*

The executors reclaimed, and Hamilton offered juratory caution at the

¹ Hamilton v. Littlejohn, June 11, 1833 (ante, XI. 701).

* Campbell, July 3, 1829 (ante, VII. 826).

* "The Lord Ordinary has no doubt now that there is no *res judicata*. The ground of objection now insisted in could not be instantly verified, when the order of intimation in the process of adjudication was pronounced; and, therefore, the judgment was merely that, not being verified, it could be no bar to that order.

"On the merits, he only means, by passing the bill, that he thinks the letters, with the claim now produced, make at least a probable case to entitle the complainer to a sist of personal diligence, till the matter is discussed. He has no doubt that the trust is subsisting, and that the chargers could call a meeting of the creditors to-morrow, for appointing a trustee. He thinks that there is a probable case for showing that the trustees must be held as having acceded, and a probable case

No. 329. bar, which the executors refused to accept, though they expressed their willingness to allow the bill to be passed upon caution, notwithstanding its having been presented without caution.

June 21, 1834.
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Executors.

LORD CRINGLETIE.—If there were *prima facie* evidence which would warrant us to pass on caution, I would pass on juratory caution; but the correspondence puts the matter beyond dispute in my opinion. The executors sent a claim, which is no accession at all; then, when they find they are not to get payment from the trustee, they write to get back their grounds of debt, as lent "on receipt." The purpose of that was just to go on with the diligence; and it is now clear that there is no ground whatever to suppose there was accession on their part; and therefore I am for refusing the bill.

LORD GLENLEE.—It appears to me, that although accession may possibly be made out, yet, in the Bill-Chamber, if there be an allegation of accession merely *rebus ipsis et factis*, unless very pregnant evidence be adduced, we ought not to pass without caution. Now, I cannot think that the asking of the trustees to pay, and then, when the executors find they do not, withdrawing their ground of debt, is sufficient accession *rebus ipsis et factis* to this trust-deed, with stipulations in favour of the truster, to warrant our passing without caution. If Mr Hamilton were entitled, *de jure*, to have the bill passed on caution, then it would follow, of course, that he should have it passed on juratory caution, when unable to find caution. But when he is getting it passed on caution, only by consent of the chargers, it is not at all the same thing.

LORD MEADOWBANK.—The question is, if this party has shewn a right to have this bill passed, and I do not think he has. He is in a worse position than if it were a mere averment, without documents at all, in which case, it would not have been passed without caution. But here, the documents shew the understanding on both sides, that there was no accession by these executors, but only a willingness to take payment from any party who would pay; and we cannot pass the bill without full caution.

LORD JUSTICE-CLERK.—If the party be entitled to have the bill passed on caution, he is also entitled to juratory caution. I am satisfied, however, that accession is not proved by the documents produced. There is not a word of accession, but the reverse.

THE COURT accordingly altered the Lord Ordinary's interlocutor, and remitted to his Lordship to refuse the bill, unless full caution, as agreed to be accepted by the executors, were found. Their Lordships, at the same time, refused to allow it to be minuted by Hamilton that he had offered juratory caution.

J. HAMILTON, W.S.—TAIT and YOUNG, W.S.—Agents.

also for holding (though it may be doubtful), that if they did, they are not entitled to use personal diligence.

"If there were caution, the Lord Ordinary would have no doubt in passing the bill; but as it is, the complainer being divested of his estate, he thinks it very hard to say that caution is indispensable. Every other creditor raises a similar question, and demand caution."

No. 329.

JAMES L. PITCAIRN, Pursuer.—*Skene—Macallan.*
 J. J. FRASER, W.S., Compearer.—*Robertson—Maidment.*
 PITCAIRN'S TRUSTEES, Defenders.—*G. G. Bell.*

June 21, 1834.
 Pitcairn v.
 Pitcairn's
 Trustees.

Husband and Wife—Trust—Mandate.—A husband having, in his marriage-contract, conveyed his property to a trustee, with power to sue all actions relative to the reduction of settlements of his uncle and father, deceased—held bound to allow his name to be used for this purpose by the trustee, and not entitled to disclaim an action raised in his name, the trustee relieving him of the expenses and consequences of the action.

By contract of marriage between the pursuer, Pitcairn, and Mrs June 21, 1834.
 Marjory Reid, they conveyed to Fraser, W.S., as trustee, all their 2^d DIVISION.
 property, real and personal, for payment, in the first place, of their debts, Ld. Moncreiff.
 secondly, “for payment of the expense of carrying on the law-suits F.
 regarding the setting aside of the deeds of settlement of the said James Laidlaw Pitcairn’s father and uncle,” and, thirdly, for the other purposes therein mentioned, with power to Fraser to sell and dispose of the subjects conveyed, and “to sue and defend all actions, and enter into references, compound and transact relative to the premises,” &c. Under this trust, Fraser raised, in Pitcairn’s name, an action for setting aside the deeds of his father and uncle; but shortly after it was instituted, Pitcairn gave in a minute, disclaiming the action. This was allowed to be seen by Fraser, who put in answers, contending that Pitcairn was bound by the provisions of the marriage-contract to allow the use of his name as pursuer of the action for setting aside the settlement of his father and uncle.

The Lord Ordinary, “in respect of the terms of the marriage-contract, disposition, and assignation”—and “that the same is an onerous deed, and stands unreduced;” found that Pitcairn was not entitled to disclaim, and refused to sustain his disclamation lodged.

Pitcairn having reclaimed,

LORD GLENLEE.—Pitcairn is certainly bound to allow the use of his name.

LORD CRINGLETIE.—I think so too; but Fraser, on the other hand, should be bound to relieve him of all consequences of the action.

The other Judges agreeing,

THE COURT adhered, with the explanation, that Fraser should relieve Pitcairn of all the consequences of the action, and the expenses subsequent to the disclaimer, reserving to the Lord Ordinary to decide as to the expenses of this discussion.

AINSLIE and MACALLAN, W.S.—J. J. FRASER, W.S.—J. L. MITCHELL, W.S.—Agents.

No. 330.

JOHN JOHNSON, Raiser.—*Keay—A. Wood.*NORMAN M'QUEEN, Objector.—*Jameson—A. M'Neill.*

June 21, 1834.

Johnson v.

M'Queen.

Attorney's Certificate—Agent and Client—Trust.—A law-agent being trustee under a trust-deed, in which he had a personal interest, having, as agent, conducted processes on behalf of the trust-estate—held not entitled to credit for his charges and disbursements as agent, while he had no attorney's certificate. 2. Question whether a party having an attorney's certificate, but not being an admitted practitioner before the Court, having carried on processes under the name of an admitted practitioner, can insist against his client for remuneration and reimbursements.

June 21, 1834.

2d Division.

Ed. Mackenzie.

JOHNSON, writer in Edinburgh, when a clerk in an agent's office, was employed by the late Angus Murray, pursuer of the action, reported ante, IV. No. 257, to conduct the reduction of his father's settlement there mentioned. After considerable litigation had taken place, Murray executed a trust-deed, whereby he conveyed all his property to Johnson, as trustee, for the purposes, 1st, of repayment to him of the disbursements and expenses already advanced and incurred; 2d, of payment in remuneration of Johnson's future trouble and responsibility, of £1000 "over and above all law charges and commission;" 3d, of paying Murray's debts; and, 4th, of reconveying to him the residue, if any. A considerable extent of litigation and agency followed, in the course of which Murray died, and some time thereafter the objector, M'Queen, a creditor, raised a summons of multiplepoinding in name of Johnson, as to the trust-funds in his hands. In his condescendence of funds, Johnson, while he abandoned all claim to the £1000, took credit for all his disbursements and charges as agent in conducting the litigations; but as to a considerable portion of these, M'Queen objected to his being allowed credit, on the grounds that he had no certificate, or was not an admitted practitioner before the Courts when the business was performed. It appeared that, for part of the time during which he conducted the litigations, he neither had an attorney's certificate, nor was he an admitted practitioner before the Court, the business being done in the name of a qualified agent, who allowed him the use of his name for that purpose—that during another portion of the time he had an attorney's certificate, but was not an admitted practitioner—that during a third portion he was a practitioner, but had no certificate, and that for a certain period he both had a certificate and was a practitioner. In this state of matters M'Queen contended, that except for the charges and disbursements during the period when Johnson both had an attorney's certificate, and was an admitted practitioner, he could not maintain any demand in a court of law; 1. Because, while he had no certificate, he was barred by the statutes 25 Geo. III. c. 80, and 37 Geo. III. c. 90, and 9 Geo. IV. c. 41. 2. Because the conducting of Court business by a party

practitioner, in name of a qualified agent, was illegal, and consequently
not be sanctioned by a court of law, sustaining any demand on
of business so performed.¹

No. 890.

June 21, 1834,
Johnson v.
M'Queen.

was answered—

being himself trustee, falls to be considered as truly
in cause, the more especially as the first two purposes of
the trust. for his individual behoof; and it having been decided in the
cases of *M'Gown and Ewing*,² as to disbursements, that the statutes did
not apply to a party agenting his own cause, he is entitled to recover
both disbursements and remuneration, these being placed by the acts on
the very same footing, and there being no room whatever to distinguish
between them. And, 2. Although the very common practice of an agent
not admitted conducting a process under the name of a practitioner, be
reprobated by the Court, and expose the party to censure,—and even
although the Court might refuse action, as between the two agents acting
under such an arrangement, there are no grounds in law on which,
upon this account, to refuse action by the agent against the client, for
whose behoof and benefit he has made disbursements, and obtained the
business to be performed.

The Lord Ordinary, on advising minutes of debate, pronounced this
interlocutor:—"Finds, that the defender, John Johnson, has not right to
claim or take credit in this action, on account of either trouble or dis-
bursement incurred by him as agent before the Court, either under his
own name or that of any other person, while he, the said defender, was
either not legally qualified to act in his own name as such agent, by being
either writer to the signet, solicitor, or advocate's clerk, or had not a
license as such agent."

Johnson reclaimed.

LORD JUSTICE-CLERK.—I see no reason to alter.

LORD CRINGLETIE.—Neither do I.

LORD MEADOWBANK.—I am also for adhering, but on the express ground that,
as I interpret the interlocutor, it does not exclude Johnson's claim during the
period when he had a license, although he might not be an admitted practitioner.

LORD GLENLEE.—I construe the interlocutor as Lord Meadowbank does, and
held it open to Johnson to maintain, that he is to be allowed his charges during
the period when he had a license, though he was not a practitioner.

LOrds JUSTICE-CLERK and CRINGLETIE put a different construction on the
interlocutor, which they held to exclude all claim except for charges while he both
had a license and was an admitted practitioner; but as on that construction Lords
Glenlee and Meadowbank would not have been for adhering:—

¹ *Brash v. M'Kinnon*, March 9, 1820 (F.C.); *Henderson v. Gilfillan*, July 12,
1820, in H. of L. (1 S. D. B. Sup.); *Lord Advocate v. Blair Hunter*, March 5, 1833
(ante, XL p. 514).

² *M'Gown*, March 6, 1828 (ante, VI. 696); *Ewing*, Feb. 3, 1831 (ante, IX. 385).

No. 330.

June 21, 1834.
Menzies v.
Caldwell.

THE COURT adhered to the interlocutor, only in so far as it found that Johnson was not entitled to credit for disbursements and charges while he had no certificate, and, quoad ultra, remitted to the Lord Ordinary.

CAMPBELL and STEWART, W.S.—M'INTOSH and GEMMEL, S.S.C.—Agents.

No. 331.

ALLAN MENZIES, W.S., Suspender.—*D. F. Hope—Neaves.*
RALSTON CALDWELL, Charger.—*Paterson.*

Agent and Client—Mandate—Diligence.—Circumstances in which a party was found entitled to plead, that he had given no authority for raising an action in the Sheriff-court to recover the expenses of diligence which had been raised in his name, and with his sanction, but at the desire of another party; and a charge for expenses under a decree absolvitor suspended.

June 21, 1834.

1st Division.
Ld. Corehouse.
B.

MESSRS GILKISON and CAMPBELL were cautioners for the composition, and for the expenses of J. Reid's sequestration, in the course of which an account was incurred to Allan Menzies, W.S., in 1831. A partial payment of the account was made, and, in security of the balance, a bill, accepted by Ralston Caldwell, residing near Airdrie, was put into the hands of Menzies. The bill was dishonoured, and Menzies, having applied to the cautioners, received from Gilkison a letter on 10th March, 1831, requesting him to do diligence against Caldwell. Menzies took out letters of horning in his own name, and, on the 12th, wrote Gilkison,—“I now send to you a horning against Mr Caldwell, which I have made at my instance for your accommodation, and upon which you can take any steps you think expedient. I shall be happy to hear that you are enabled to recover and remit me the money.” Menzies, on the 22d, received a letter from Begg, writer, Airdrie, stating that Gilkison had sent him the horning to be executed against Caldwell; that it had been executed; that Gilkison wished letters of caption; and desiring the bill to be sent along with them. On the following day, Menzies wrote to Begg,—“Agreeably to the request of Mr Gilkison, for whose accommodation I act in this matter, I send you herewith a caption, which you will use as Mr Gilkison may instruct. I also send the horning, registered protest, and bill.” On the 26th, Caldwell wrote Menzies, asking an indulgence of three weeks, and alleging that he had granted the bill merely to accommodate Reid, Gilkison, and Campbell. Menzies replied, that “in regard to the indulgence craved by you, I beg to refer you to Mr Gilkison, at whose request the diligence has been used.” Of the same date, Menzies wrote to Gilkison, “as these diligences have been raised in my name entirely in consequence of your request, and for the benefit of you and Mr Campbell, I have written to Mr Caldwell to apply to you,” &c. On the 5th May, Gilkison paid to Menzies the greater part of the bill and expenses, which amounted to £49; the balance in October following.

It afterwards appeared, that in March, 1832, an action had been raised **No. 331.** against Caldwell in the name of Menzies, by Begg, in the Sheriff-court of Lanarkshire, for payment of an alleged balance of the bill accepted by Caldwell, and of the expense of the diligence following on the bill. Begg produced no mandate from Menzies, nor did he put into process the diligence which had been raised in the name of Menzies. Defences were lodged by Caldwell, and, no replies being put in for Menzies, Caldwell was assoilzied with expenses. Thereafter, on 10th July, Menzies received a letter from Steele, the trustee on the estate of Begg, now sequestrated, intimating that he found, in the books of Begg, "an account as due by Mr Gilkison for diligence at your instance against Mr Caldwell; amount, £6, 15s. 7d. The amount has some time ago been rendered to Mr Gilkison, and you may have a copy if wished. I shall be glad to hear from you as to this at your first conveniency." Menzies replied, "The diligence was raised in my name, at the special request, and for the accommodation of Mr Gilkison, by whom alone Mr Begg was employed in the matter;" and he referred to Gilkison as the party liable for payment of any account which might be due to Begg. The trustee, on 28th September, wrote to Menzies, referring to his former letter for payment of the expenses of diligence, and added, "having learned within these two or three days, that an action had been raised by you (Menzies) in the Sheriff-court, subsequently to the bankruptcy of Begg, for payment of these expenses, I caused enquiry to be made in regard to the case, and find, that, in respect of a failure to reply, decree of absolvitor, and for expenses, has, almost six weeks ago, been pronounced against you. I take the liberty of giving you this notice, in order that you may have your interest attended to." Menzies replied that he never authorized any action to be raised against Caldwell, or sanctioned it in any shape.

On 15th March, 1833, without any other communication having been made to Menzies, Caldwell gave him a charge of horning for £2, 8s. 7d. of expenses of process, and 6s. 6d. of expense of extract of the Sheriff-court decree. Menzies offered a bill of suspension, which was passed, and pleaded, that, as the action had been raised in an inferior Court, without any mandate or authority from him, he could not be affected by the decree charged on, especially as his only letter to Caldwell, in March, 1831, had intimated that the diligence was used at the request of Mr Gilkison, to whom he was referred, in regard to his request then made for indulgence. Caldwell answered, that Menzies had consented to let his name be used in raising diligence against him for payment of the bill in 1831; that Begg was the agent then employed; and that as the ordinary action, raised in 1832, was for recovering an alleged balance of the bill, and the expenses of that diligence, and as the same agent still acted, Caldwell was led, in consequence of the proceedings of

June 21, 1831.
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Caldwell.

No. 331. Menzies himself, to rely that the action was raised by his authority;¹ and if his name was unwarrantably used, it lay with Menzies to seek relief against the parties who had done so.

June 21, 1834.
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Caldwell.

The Lord Ordinary "sustained the reasons of suspension, suspended the letters and charge simpliciter, and decerned, and found the charger liable in expenses." *

Caldwell reclaimed, and, at the same time, raised an action of relief and payment against Gilkison, Campbell, and Begg, and his trustee. In defence, Begg stated, that he had the express authority of Gilkison for raising the ordinary action in name of Menzies in the Sheriff-court; and he also contended that, in the circumstances, he had the implied authority of Menzies. Gilkison denied that he ever gave authority.

LORD BALGRAY.—I think the interlocutor of the Lord Ordinary is well founded. Menzies, on sending the caption to Begg, wrote to him that he did so "agreeably to the request of Mr Gilkison, for whose accommodation I act in this matter;" and he desires Begg to use the caption "as Mr Gilkison may instruct." If Mr Gilkison afterwards gave instructions to raise the ordinary action in the name of Menzies, that cannot make him responsible for a proceeding which he never authorized or sanctioned.

The other Judges concurred; and it was observed that the case of Sanderson, referred to by the charger, was a different case from this.

THE COURT adhered.

G. GILLANDERS, W.S.—J. CULLEN, W.S.—Agents.

¹ Sanderson, May 17, 1833 (ante, XI. 628).

* NOTE.—"The suspender authorized diligence to be done on the bill mentioned in the record, not for his own behoof, but at the request of Gilkison, and for the benefit of him and Campbell, and he sent the protest, horning, and caption, to Begg, for that purpose. The diligence was done accordingly; but Begg, the agent for these parties, without the suspender's knowledge or authority, thought fit to raise an ordinary action in the suspender's name against the charger, and afterwards to suffer decree of absolvitor, with expenses, to go out, for failing to lodge replies. The suspender cannot be bound by the decree, in a process which he neither expressly, nor by implication, gave authority to raise. If Begg had lodged the steps of diligence in process, the charger might have been entitled to hold them as an implied mandate, and the breach of trust on the part of Gilkison and Campbell, or their agent, might have subjected the suspender; but no such production was made. It is said that the suspender should have disclaimed the action; but it does not appear from the record that he ever heard of it till he received Mr Steele's letter of 28th September, 1832, six weeks after decree of absolvitor had been pronounced, and when it must have been final."

Mrs LAMBE or RITCHIE and OTHERS, Objectors.—

Mrs CHAPMAN or RITCHIE and OTHERS, Respondents.—

No. 332.

June 24, 1834.
Lambe v.
Chapman.

Marriage-Contract—Fee and Liferent—Judicial Factor.—1. Terms of a marriage-contract, under which it was held, that, a conveyance of heritable subjects being made, not in implement, but in security of a husband's obligation to provide a liferent of a sum of £1500 to his wife, she was not liferentrix of the subjects, but was bound to account for their rents, under deduction of the interest of £1500. 2. A factor loco tutoris having expended the minor's money in purchasing heritable subjects—held, that this was an act of extraordinary administration, and that the subjects must be held by the factor on his own account and risk, and the price accounted for to the minors.

On the marriage of Miss Mary Chapman, with the late William Ritchie, in 1808, an antenuptial contract was executed, “in contemplation of which marriage, the said Mary Chapman hereby assigns, disposes, conveys and makes over to the said William Ritchie, her husband, and to his heirs or assignees, all and sundry lands, heritages, goods, gear, debts and sums of money, as well heritable as moveable, belonging to, or resting and owing to her, and particularly all share or interest which she may have in the property and subjects vested in the persons before named, as trustees nominated and appointed for behoof of her, the said Mary Chapman, and of her said mother, and sister, Catharine Chapman, by a trust-deed and settlement executed by her said deceased father and her said mother, bearing date the 8th November, 1796, and which share or interest, it is believed, may produce or be of the value of £500 sterling: And she, with consent foresaid, binds and obliges herself to grant, subscribe, and deliver all deeds necessary for vesting the property hereby conveyed in the person of the said William Ritchie, or his foresaids: For which causes, and on the other part, the said William Ritchie hereby binds and obliges himself to join £1000 of his own proper money with the said sum of £500, and to lay out the said whole £1500 upon the purchase of heritable property, or upon sufficient bonds, either heritable or moveable, and to take the rights and securities thereof to the said William Ritchie himself, and to the said Mary Chapman, his spouse, in conjunct fee and liferent, for her liferent use alienably, after his death, in the event she shall happen to survive him, and to the children, one or more, to be procreated betwixt them, in fee; whom failing, the said sum of £1000 sterling to the said William Ritchie, his own heirs and assignees whomsoever, in fee, and the remaining £500 to the said Mary Chapman, her own heirs and assignees whomsoever, in fee; and as often as the foresaid sum of £1500, or any part thereof, shall be uplifted, the said William Ritchie binds and obliges himself, and his foresaids, to settle and secure the same again, in the terms above expressed; and which provision above written, conceived in favours of the said Mary

June 24, 1834.
1st Division.
Ld. Moncreiff.

No. 332. Chapman, she, with consent foresaid, hereby accepts of in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she, jure relictæ, or otherwise, could ask, claim, or crave of the said William Ritchie, her husband, or his heirs, executors, or representatives, in and through his death, in case she shall survive him, or that her nearest of kin could ask or demand of him through her death, in case he shall happen to survive her." Power was given to Ritchie, whom failing, to his wife, to divide, as he chose, among the children to be procreated, "the above-written provisions in their favour, which are and shall be in full satisfaction to them of all bairns' part of gear, portion natural, legitim," &c. The deed contained this clause,—“And in security pro tanto of the provisions before written, conceived in favours of the said Mary Chapman, and of the issue of the said marriage, the said William Ritchie hereby disposes, conveys, and makes over to and in favour of himself and the said Mary Chapman in conjunct fee and liferent, for her liferent use allenary, after his death, in the event she shall happen to survive him, and to the children, one or more, to be procreated betwixt them, equally in fee, heritably and irredeemably, all and whole that shop in St James's Square, Edinburgh; as also, all and whole the westmost half of the second flat from the street, or third from the foundation of the foresaid corner or southmost tenement, situated immediately above the foresaid shop,” &c. He also granted procuratory to resign “for new infestment of the said subjects to be given to him and Mary Chapman, and to the children to be procreated, &c. for their respective rights of liferent and fee,” &c. In the precept of sasine he required the bailie to give to him and Mary Chapman and the children, &c. “for their respective rights of liferent and fee, foresaid heritable state and sasine, &c. of all and whole the foresaid shop,” &c. One of the subjects disposed by Ritchie had been bought, in 1803, at a price of £390; the other, in 1807, at a price of £430; being £820 in all.

In 1813, Ritchie purchased a flat in St James's Square, at the price of £356, and took the disposition to himself in fee-simple. The property which Mrs Ritchie had disposed to her husband in the marriage contract, was burdened with the liferent of her mother, Mrs Chapman, under the trust-settlement of 1796; and as Mrs Chapman survived Ritchie, the trust in her favour did not come to an end during his marriage. The property consisted in part of some heritage at Libberton, to the pro indiviso half of which Mrs Ritchie had a right, along with her sister, Mrs Simpson. The pro indiviso half, of which Mrs Simpson was far, was bought by Ritchie, in 1819, at a price of £300, and titles were made up to the whole subject, so as to vest Mrs Ritchie's pro indiviso half in herself, in fee-simple.

Ritchie died intestate in February, 1821, leaving several children, all in pupillarity. He had about £1000 in bank, and he had ~~about~~ £1300, of which £1000 was on an heritable security, of

avour alone. In March following, Mrs Ritchie being appointed *Nq. 332.*
 : loco tutoris to her children, entered on the management of the
 ; and in 1823 she invested two sums of £800 and £500 of their *June 24, 1834.*
 r in the purchase of two houses in Edinburgh; each convey- *Lambe v.*
 being taken, in fee-simple, to herself. She made a second mar- *Chapman.*
 with John Ritchie, teacher in Edinburgh. In 1830, she and her
 nd petitioned the Court to audit her factorial accounts, and give up
 ond of caution, as the children were now choosing curators for
 elves. Before this petition was disposed of, another was presented
 : children, complaining of the management of their mother as fac-
 nd objecting to the accounts lodged by her. The Court, of consent,
 ed the factory; and a remit was made to hear parties.

e chief points of discussion were, 1st, Whether Mrs Ritchie was
 ed, under the marriage-contract, to act as liferentrix of certain por-
 of the heritage left by her husband, and therefore to give no ac-
 of the rents; or whether she was bound merely to take credit for
 per annum, as the interest of the sum of £1500 specified in the
 age-contract, and at the same time to debit herself with the rents of
 hole heritage left by her husband. 2d, Whether she was justifiable
 ring expended the chief part of the minor's money in the purchase of
 ge. And, 3d, How far her accounts could be sustained, notwith-
 ing her having failed to lodge a rental of the heritage, and curato-
 rventories, in terms of the Act of Sederunt 1730, and notwithstand-
 he want of vouchers to many of the details of disbursement.

added by the Objectors—

The true intention of the contract was to secure the liferent of a
 of £1500 to Mrs Ritchie; and, accordingly, after providing that
 should be done, either by buying heritage, or effecting loans, it
 declared that as often as Ritchie should uplift the said sum, he
 d reinvest it. At the marriage, Ritchie possessed two heritable
 :cts, which he disposed to his wife and himself in liferent, "in secu-
 pro tanto of the provisions" of the contract. Part of these subjects
 een bought some years before, and the price paid could form no
 measure of their value at the time of the marriage, if viewed as an
 tment of part of the £1500 in implement of the contract. They
 fore were expressly disposed, not in implement pro tanto of the
 isions, but in security of them; that is, in security of the liferent of
 n of £1500, for in any other way the disposition must have been in
 sment, and not in security. 2. The factrix was not entitled to in-
 the money of the minors in buying house property, and she must
 ant to them for all the sums so expended, and keep the houses to
 elf. 3. The factorial accounts were insufficiently vouched; and by her
 ligence the factrix had incurred the penalties of the Act of Sederunt

No. 332. *Pleaded by the Respondents—*

June 24, 1834.
Lambe v.
Chapman.

1. The onerous obligation undertaken by William Ritchie, was to invest £1500 in buying heritage, or in loans, in terms of the contract. At his death there were two heritable subjects which had been disposed in the precise terms of the contract, to her and her husband in conjunct fee and liferent. Though this was said to be in security of her rights, that word was merely used because the conveyance fell short of her full rights; but, so far as it went, it was specific implement, which was the best of all security, pro tanto, of the obligation. She was willing to take the price paid for the subjects, being £820, as the best criterion how far the £1500 had been invested in terms of the contract. Of the balance, the Libberton heritage, which cost £300, and had been disposed to her in fee, must be held to have been in farther implement of her provision; and also the heritage, bought by her husband, during the marriage, at £366, should be so imputed. There still remained £24 of the £1500 uninvested; and on that she was entitled to interest at five per cent. 2. It was necessary to invest the minor's money in the purchase of house property, as it would not otherwise have yielded an annual return sufficient for their maintenance and education. 3. In the circumstances, there was no room for the penalties of the Act of Sederunt 1730; and the accounts were sufficiently vouched.

The Lord Ordinary pronounced this interlocutor:—"Finds, primo, That the obligation of the late Mr William Ritchie, by the marriage-contract between him and the petitioner, Mrs Ritchie, was to add £1000 to £500, the estimated value of Mrs Ritchie's property, 'and to lay out the said whole £1500 upon the purchase of heritable property, or upon sufficient bonds, either heritable or moveable, and to take the rights and securities thereof to the said William Ritchie himself, and to the said Mary Stuart Chapman, his spouse, in conjunct fee and liferent, for her liferent use allenary after his death, in the event she shall happen to survive him,' and to the children of the marriage in fee; with an eventual substitution of his heirs and assignees in £1000, and her heirs and assignees in £500; and finds, That, under this provision, Mrs Ritchie was entitled to have a specific liferent vested in her, either in heritable property, or special bonds taken in these terms: Finds, secundo, That Mr Ritchie himself having previously purchased the property in James's Square, at the prices specified in the report, and having, by the said contract, disposed the same, with procuratory and precept, in the precise terms above recited, the title thus created must be considered as having been made as specific implement pro tanto of his said obligation; and that, on the one hand, Mrs Ritchie was bound to accept of it as implement accordingly, and, on the other, she had a vested right of liferent in that property, which, on its emergence by the death of Mr Ritchie, entitled her to draw the rents thereof, whatever they might be."

tertio, That the title to Mrs Ritchie's share of the property at Libberton having been made up in Mr Ritchie's lifetime in favour of the petitioner herself simply, and no reduction of that title having been brought, it must be presumed to have been so made with the knowledge and consent of Mr Ritchie; but finds, That, as the petitioner was under an obligation by the marriage-contract to convey that property to Mr Ritchie, under the condition of the full £1500 being laid out in terms of the said contract, she could only hold it subject to the said obligation: Finds, quarto, That no other investment having been made in terms of the contract, either in heritable property or upon sufficient bonds, beyond the sum of £820 laid out on the property in James's Square above mentioned, Mrs Ritchie was entitled to hold the property at Libberton vested in her as in lieu or place of such further investment pro tanto, at the price of £300, fixed by Mr Ritchie as the value of Mrs Simpson's half share of the same property, she being always bound to hold and convey the same to herself in liferent, and the children of the marriage in fee, and quoad ultra in terms of the contract: Finds, quinto, That, with regard to all other rents or funds, the petitioner, as factrix for her children, is bound to account generally, subject to a deduction, on the principle that she was entitled to have an additional sum of £380 laid out either on heritable property, or on sufficient bonds, and to enjoy a liferent under such investment: Finds, sexto, That no investment on bonds having been made, and the separate property purchased by Mr Ritchie, at the price of £356, having been taken to himself and his heirs and assignees, the rents of that property uplifted by the petitioner ought, in equity, to be considered as received in further implement of the liferent right to which she was entitled by the marriage-contract; and that, on the small balance of the £1500 still remaining unprovided for, she must be entitled to interest at 5 per cent: Septimo, finds it admitted, That the petitioner, as factrix, has not complied with the provisions of the Act of Sederunt 1780, in so far as she did not lodge a rental of the heritage, or any curatorial inventories, and the accounts of her intromissions were not regularly given in; but finds, That the effect of this neglect of the Act of Sederunt cannot be satisfactorily determined, until the accountant shall report on the actual state of accounts rendered, in order that it may be seen how far these accounts are full and sufficient, and how far the estate of the minors may have sustained loss by the want of exact or sufficient diligence: Finds, octavo, That the act of purchasing house property, with the funds of the minors, was an act of extraordinary administration, not warranted by the ordinary powers of the petitioner as factrix; and finds, That, though the reason assigned for it, of enlarging the income of the family, and enabling the petitioner to give her daughters a superior education, if correct, may be fair and reasonable in itself, the petitioner must still be answerable for any positive loss which can be shown to have arisen from that

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*Lambe v.
Chapman.*

act of administration ; but reserves farther consideration of the whole of this matter, until the accountant shall have reported upon the amount of the rents drawn from such property, compared with the interest which would have arisen to the estate on the prices paid, and the present value of the subjects, to be ascertained in such way as he shall direct, and, in general, on the loss alleged to have arisen upon these transactions: Finds, nono, That the petitioner is entitled to fair allowances for the maintenance and education of her children, and that, in the relative situation of the parties, it was not essentially necessary that she should specify every particular sum employed for the behoof of each ; but finds, That the extent or amount of such allowances must be judged of upon the special facts of the case, and may materially depend on the specification which she may be able to give of money extraneously expended for enlarging the education of her daughters, or the absence of any such specification : And with these findings, remits of new to the accountant to enquire into the several matters requiring investigation above set forth, with power to him to call for explanations from the parties, and to take the assistance of valuers, in so far as that may be necessary, and thereafter to make up and report a full state of the accounting on the principles of this interlocutor ; and in the meantime reserves all questions of expenses." *

* "NOTE.—The Lord Ordinary sees no room for doubt on the first and second findings of the above interlocutor. For though the contract does bear, that the property in James's Square is conveyed 'in security pro tanto of the provisions before written,' this is in security pro tanto of the obligation to lay out £1500 in the terms quoted in the interlocutor, viz. on heritable property, the rights to be taken to the wife in liferent, &c. as the leading alternative ; and the conveyance itself, with procuratory and precept, is expressly in those terms. The fourth and sixth findings, at least the latter, are more doubtful ; as it may perhaps be thought that the children, as coming in place of their father, were entitled to have satisfied the obligation of the marriage-contract in the easiest way of which its terms admitted, by simply giving the petitioner the liferent of a personal bond. But, as it was clearly the duty of Mr Ritchie to have made the full investment in the one form or the other during his life, the Lord Ordinary is strongly inclined to think, that, when it was found on his death that this had not been done, Mrs Ritchie was entitled to the most liberal construction, in regard to the full execution of the engagement, in a contract which is by law uberrimæ fidei ; and this the more especially as, in the contract itself, Mr Ritchie, by the conveyance of the St James's Square property, had evinced his own sense of the fair and fit mode of implement which he contemplated. It therefore appears to the Lord Ordinary, that, in the equitable adjustment of the rights of the parties, in so far as a full investment was not made through the omission of the husband, Mrs Ritchie, in now accounting for the rents of heritable property drawn by her, should be held to stand in the same situation as if the investment had been actually made in terms of the contract of the two subjects referred to in the findings. "The other points in the interlocutor appear to be sufficiently explained in the body of it. The eighth may be somewhat doubtful."

The objectors having reclaimed, the Court pronounced this interlocutor:—"Find, That the subjects conveyed in the contract of marriage, by the late William Ritchie to his wife, were so conveyed, not in implement of the obligations undertaken by him in the said contract, but only in security pro tanto of the provision made in favour of his wife and children: Find, That Mrs Chapman or Ritchie is entitled in her factory accounts to take credit for no more than the interest of the principal sum of £1500 thereby provided: Find, That the whole of the property conveyed as above to the said Mrs Chapman or Ritchie, or which devolved upon or belongs to her, falling under her counter obligation in the said contract of marriage, must be conveyed to and vested in her, in liferent, for her liferent use allenary, in security of her foresaid annual provision of the interest of £1500, and to the children of the marriage in fee, and that all concerned must concur in having the subjects so conveyed and vested: Find, That the purchase of heritable subjects by her with her children's money, was an act of extraordinary administration, as found by the Lord Ordinary, and must therefore be held by her on her own account and risk, and that she must give her children credit in her factory accounts for the sums so expended: Recal the Lord Ordinary's interlocutor, in so far as inconsistent with the above findings, and quoad ultra remit to the Lord Ordinary to proceed farther in the accounting, and to do therein as he shall see just."

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Reid v. Kedder.

J. SOMMERVILLE, S.S.C.—P. PEARSON, S.S.C.—Agents.

MRS REID OF ARNOTT and Others, Pursuers.—*D. F. Hope—Forsyth.*

No. 333.

JOHN KEDDER OF CALDER, Defender.—*Jameson—Whigham.*

Writ—Proof.—1. The granter of a disposition mortis causa, had three natural sons, James, Thomas, and John, and no other child; the dispositive clause was in favour of "John Kedder, residing at Kirkhall, my son, for the services rendered by him to me ever since he was able to do any work;" the Christian name, except the first letter, was written throughout the deed on an erasure; the testing clause which appeared to have been written after the deed was signed, bore that the deed was subscribed "in favour of the said John Kedder, my son," and these words were free of erasure; sasine followed in favour of John, and was recorded four years before the death of the granter, whose liferent was reserved; the deed contained evidence that Thomas was not the grantee, and John offered to prove that it could not be James, because James had never resided at Kirkhall, or rendered the services to his father, specified in the dispositive clause, whereas he (John) had done both:—held incompetent to allow John to prove by the writer and instrumentary witnesses, that the Christian name John was written upon the erasures, as it now appeared, in the presence of the deceased testator, and before or at the time when he

No. 333. subscribed the deed, and that the testing clause was then also filled up as it now stood, in his presence. 2. Question, whether such disposition was valid, against a reduction raised by the heir-at-law, though parole proof was disallowed of the erasures in the Christian name having been made in presence of the grantor, and before signing the deed. 3. Question, how far a deed loses any of the usual privileges of a probative writ, if it be instructed that the testing clause has been filled up after the deed was signed.

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1st Division.
Ld. Corehouse.
B.

THE late James Kedder of Daviesdykes had three sons, all illegitimate, and born of different mothers, James, Thomas, and John, who was the youngest. In virtue of a disposition of Daviesdykes, alleged to have been granted by the father, dated 6th October, 1810, reserving his life-rent and power to revoke, John was infeft; and the instrument of sasine was recorded on 21st August, 1811. The father died on 1st December, 1814, upon which event John entered into possession of the estate.

The disposition commenced in these terms, the letters in italics being written on erasures:—"I, James Kedder or Calder, &c., in consideration of the regard I have and bear to *John* Kedder, residing at Kirkhall, my son, and for the services rendered by him to me ever since he was able to do any work; and for certain onerous causes," &c., "have sold and disposed," &c., "to and in favour of the said *John* Kedder," &c.; and the same erasures occurred in every clause prior to the testing clause; but on two occasions the word "junior" formed part of the designation. The testing clause was in these terms:—"In witness whereof, these presents, written upon this and the two preceding pages of stamped paper, by James Naismith, apprentice to William Hamilton, writer in Hamilton, are subscribed by me in favour of the said John Kedder, my son, at Daviesdykes, this sixth day of October, eighteen hundred and ten years, before these witnesses, the said William Hamilton, David Marshall, Esq., of Neilsland, and the said James Naismith, writer hereof." The deed imposed an obligation on the father to pay an annuity of £10, to Thomas, one of the three sons; reserved power to revoke; and appointed the grantee to be executor and universal intromitter.

The father left a sister, who was his heir-at-law, and who lived six years after him, but without challenging the right of John Kedder. In 1830, after the sister's death, Mrs Reid or Arnott, and others, who alleged they were heirs-at-law, raised a reduction of the disposition, as being an invalid instrument. The reason of reduction was thus libelled: "This disposition is not a deed valid by the law of Scotland in favour of the said John Kedder, so as to convey heritage, or in any way to prove the will, purpose, or disposition of the grantor, and is, in particular, vitiated and erased in all the parts thereof wherein the name of the pretended grantee, John Kedder, or Calder, the natural son of the said James Kedder, is written, that is, the said word '*John*,' standing

in the dispositive clause, procuratory of resignation, and precept of sasine, No. 333. and generally throughout the body of the deed or instrument, and also on the back or description of the same, is written upon an erasure, whereby as the said words so written upon erasures must in law be held and considered as pro non scripto, and as the deed does not prove that it was executed in favour of the pretended grantee, whose name is thus written on an erasure, all the essential and indispensable parts of the deed or instrument are rendered void and ineffectual in law.”

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The pursuers farther alleged that it appeared, ex facie of the instrument, that the testing clause must have been added after the deed was signed by the granter and witnesses, as a part of it was written over a portion of the granter's signature. The defender denied this, and maintained that the deed was unimpeachable as it stood, but he offered to prove by the writer and instrumentary witnesses, that the alterations in the Christian name were made in presence of the granter, and before he subscribed the deed, and that the testing clause, as it now stood, was filled up in his presence.

The pursuers objected that such proof was incompetent, and pleaded, 1. That as the erasures appeared ex facie of the deed, and occurred in substantialibus, the erasures were fatal, unless the alterations were made before the granter signed the deed; and the only competent proof of their being so made, was to be sought in the testing clause. But that clause took no notice of any erasures, and they must therefore be presumed to be ex post facto. If parole proof were allowed, especially ex intervallo, to instruct whether an erasure was made before or after a deed had been signed, it would only be necessary, in future, to make ex post facto erasures upon any deed, and then a party would claim a parole proof to support them. This was opposed to law and practice.¹ 2. If parole proof were admitted, it ought not to be that of the writer and instrumentary witnesses, who had an interest to support the deed. And, 3. though the summons had specially libelled that the erasures should be held pro non scripto, yet it also contained the usual reason of reduction which generally alleged vitiation in substantialibus; and it was still competent therefore to plead that the erasures were a greater vitium than mere blanks would have been, because there must have been some other name than John, originally written, and consequently some other grantee, or else there could have been no erasure. And indeed the grantee had evidently been at first James Kedder, junior, before the ineffectual

¹ Bell on Testing Deeds, p. 104, 109, 110, 116, 121; Master, 4 T. R. 320, 2 H. Bl. 141; Murchie, July 1, 1797 (1458); Hamilton, Dec. 1, 1824 (ante, III. 345); Thomson on Bills, 206; Innes, March 10, 1827 (ante, V. 559), and June 20, 1827 (2 W. & S. 637).

No. 333. attempt was made by some party to turn the deed into a grant to a different person.

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Bald v. Ked-
der.

The defender pleaded,—

1. The grantee, in the dispositive clause, was specially designed, without erasure, as “the son” of the granter; and this part of the designation was repeated in the testing clause. This made it certain that James, Thomas, or John, the defender, was the grantee, because there were no other sons. It could not, however, be Thomas, because the grantee was taken bound to pay Thomas an annuity of £10; and it could not be James, because the grantee was designed as residing “at Kirkhall,” and as having “rendered services to the granter, ever since he was able to do any work,” whereas James had never resided at Kirkhall, and for twenty years before the deed, was living at a distance, and unconnected with his father. The defender was ready to prove this, and farther, that he resided at Kirkhall, and had always rendered services on his father’s lands. These extrinsic circumstances it was competent to prove, because there could be no ambiguity under the deed, except as to which of the granter’s three sons was the grantee; and to the effect of determining that question, (which it was *jus tertii* to the pursuers to raise,) such proof was competent, and had been allowed in similar cases. But the testing clause was sufficient, without any other proof of this, as it stated that the deed was conceived in favour of the said John Kedder, the whole name, and the word “said” being there free of erasure. This was equivalent to a statement, that John had been previously stated, and was therefore the word which ought to stand on every erasure. And as the whole clauses formed but one deed, and the testing clause had been filled in according to usual practice, it must be dealt with, in the absence of opposite proof, as if filled in before signing the deed. Besides, as infeftment was given to the defender, and the sasine recorded four years before his father’s death, this was real evidence in corroboration of the statement in the testing clause, that the deed was executed in favour of the defender. But, to remove any ground for alleging that the erasures were made *ex post facto*, the defender was entitled to give the testimony of the writer and the instrumentary witnesses,¹ and where undisturbed possession had followed so long, the defender was entitled to be favourably dealt with by the Court. This was especially the case in a question regarding a *mortis causa* settlement. 2. The instrumentary witnesses had no interest whatever in the question whether the erasures were made before they

¹ 4 St. 42. 19; Adam, June 12, 1810, F. C.; 3 Ersk. 2. 20. and 9. 8.; Kellier, June 16, 1826 (ante, IV. 724); Morton, Dec. 10, 1828 (ante, VII. 172), and 4 W. & S. 379; Arrot, Feb. 1730 (12285); Frank, July 9, 1793 (16822); Bell on Feudal Deeds, 236 and 239.

and the granter signed, or afterwards; and they were the best witnesses. It was according to precedent to examine the writer of the deed also. And, 3d. As the summons had libelled that the erasures should be held pro non scripto, they should be read as if "J—— Kedder, residing at Kirkhall, my son," &c., had been written, and this followed up by the declaration in the testing clause, that the deed was in favour of "John Kedder, my son," which made a good deed to the defender.

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der.

The defender also averred that the late James Kedder had expressed his intention repeatedly to make him his heir. Counter averments were made by the pursuers, and a proof was claimed, embracing them, if any proof at all was allowed.

The Lord Ordinary found "it competent for the defender to prove by the writer and instrumentary witnesses subscribing the said deed, or any of them, that the Christian name John, prefixed to the word Kedder in the various parts of the deed, was written upon the erasures, as it now appears in the presence of the deceased testator, and before, or at the time when, he subscribed the said deed; and that the testing clause was then also filled up as it now stands in his presence. Before answer, allows him a proof accordingly, and to the pursuer a conjunct-probation, in reference to the said special facts." *

* "NOTE.—If there were a necessity for the Lord Ordinary deciding on the deed as it stands, without any proof, though he should think the case doubtful, the inclination of his opinion is in favour of the validity of the deed; because when the erasures and appearance of the testing clause are carefully attended to, he thinks that it removes all the substance of the objection founded on the erasures. It has evidently been written all at one time, and with the same ink with which the word John has been inserted, and the words employed in it 'in favour of the said John Kedder,' are evidence on the face of the deed, legally presumptive at least, that that name had been inserted in the other parts of the deed before the granter subscribed. But still it will be much more satisfactory, if the fact be proved by the writer or instrumentary witnesses, as distinctly averred in the 7th article of the defender's statement. And though the Lord Ordinary holds any proof of more general facts, as to the intentions or instructions of the testator, to be incompetent, he is of opinion, that it is competent to prove by the official witnesses what actually took place at the time of execution, in order to remove any doubt arising from the appearance of the deed, or of the granter's subscription in particular.

: "The pursuers spoke of demanding a more general proof, if any proof were allowed. It is not necessary for them to prove that the name had been originally written James Kedder, junior, or that it so stood in the scroll, for this is distinctly admitted in the same 7th article of the defender's statement; and as to other proof of intention, &c., the Lord Ordinary must think it altogether incompetent; but also sees, that if the proof offered by the defender be effectually brought, every such enquiry must, from the nature of the thing, be excluded. The interlocutor, however, only allows this limited proof before answer, and leaves every thing else open."

No. 333. The pursuers reclaimed, and craved the Court to find the proof incompetent.

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The Court ordered Cases, and on considering these, and inspecting the deed itself, their Lordships unanimously altered the interlocutor of the Lord Ordinary, and refused to allow the proof.

LORD MACKENZIE.—If the testing clause had contained words, which, in reasonable construction, could be held to be a notice of the erasures, and a correction of them, the only question which could then have been left, would be whether the testing clause was not itself an ex post facto operation. For, if it was made clearly to appear, even by extrinsic testimony, or from an inspection of the deed itself, that the testing clause was written after the deed was signed, I should doubt whether it could be so implicitly relied on. Where a deed has been signed, with an empty testing clause, and it afterwards appears that erasures, in important parts of the deed, are noticed in that testing clause which has been filled in, ex intervallo, I should conceive it dangerous to hold that such an instrument possessed all the privileges of an ordinary probative writ. Upon an inspection of the principal deed itself, now under reduction, I do not think the testing clause contains a sufficient correction of the previous erasures. It says the deed is signed in favour of the said John Kedder; but does it follow from this that the original name of James was already erased, and the name of John superinduced when the deed was signed, or even when this testing clause was written? It may imply an absurdity, if the testing clause was so expressed, while the original name, James, remained un-erased in the previous parts of the deed; but it also implies an absurdity to conceive that the alterations and erasures had been previously made, without being noticed in the testing clause. If the testing clause does not contain enough to be a correction of the erasures, without the aid of speculative inferences and conjectures, I cannot adopt such a mode of interpretation, especially in reference to a deed which has been left in such a condition as this one. But still less would I allow a parole proof to supply what may be wanting in the testing clause. I conceive such a course would be highly dangerous. I do not conceive the case before the Court to belong to that class in which a parole proof has been allowed. It is said that the Christian name, now erased, was originally written James. But I apprehend that a disposer, after a deed is written in favour of James, cannot effectually turn it into a deed in favour of John, by erasing the one name and substituting the other, unless these erasures are duly noticed and corrected in the testing clause.

The other Judges concurred, in considering the proposed proof incompetent, and LORD GILLIES observed, that, upon inspecting the deed, it appeared to him that the testing clause was filled in after the deed had been signed.

LORD GLENLYON, Petitioner.—*Keay—Jameson.*
 THOMAS HOWE and MANDATORY, Respondents.—*G. G. Bell.*

No. 834.

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 Lord Glenlyon
 v. Howe.

Diligence—Inhibition.—Circumstances in which the Court refused a petition to recall inhibition without caution or consignment.

ON 21st June, 1832, Lord Glenlyon granted bond, in the English form, for £4100, payable on 21st June, 1834. The obligation was to become void on payment of the true debt, which was £2056, 8s. 9d. On 2d November following, Howe and his mandatory raised an action of constitution and payment of the debt of £2056, 8s. 9d., as on 21st June, 1834, against Lord Glenlyon, and immediately executed inhibition on the dependence. Decree in absence was obtained in January 1833. In March 1834, Lord Glenlyon petitioned for recall of the inhibition, without caution or consignment, alleging, that it had been nimiously used, as the term of payment of the bond was then distant; and, farther, that the bond was granted for a debt which was not justly due; that it had been signed by him in ignorance of the real facts of the case; and that he had executed a summons of reduction-improbation of it. Howe answered, that the petitioner had not challenged the use of inhibition for a year and a half, and, in the meantime, the term of payment of the bond had arrived: that the petitioner had also been taking steps for largely burdening his heritage, so as to justify the use of inhibition even if the term of payment were still at a distance; that the bond was granted for full value, and that this must be presumed until it was reduced.

LORD BALGORY.—The Court must look at the bond, so long as it is unreduced. It is a regular and *ex facie* valid document of debt, and the term of payment is now past. I think, in all the circumstances, the Court are not warranted in recalling the inhibition, where no caution is offered. The petition should be refused.

Jameson, for petitioner, moved the Court to supersede the petition until the action of reduction was disposed of.

LORD MACKENZIE.—I see no ground for superseding. I think the petition ought to be refused now.

LORDS PRESIDENT and GILLIES concurred, and the petition was refused, with expenses.

H. GALVAN, W.S.—T. B. FARRER, Agents.

No. 335.

GEORGE MONRO, S.S.C., Complainer.—*D. F. Hope—A. Wood.*

June 24, 1834. MRS ROBERTSON'S TRUSTEES and OTHERS, Respondents.—*Sol.-Gen. Cockburn—Cunninghame—Anderson.*
 Monroe v.
 Robertson's
 Trustees.

Jurisdiction—Contempt of Court.—Complaint for alleged breach of sequestration granted by a Sheriff—held incompetent before the Court of Session, the Sheriff's own Court being the proper forum.

June 24, 1834.

2d Division.
 T.

THIS was a petition and complaint by Monroe, S.S.C., against Mrs Robertson's trustees and others, for certain proceedings in a poinding and sale of the crop and stocking of the tenant of a farm in Ross-shire, as being in breach, 1. Of a sequestration granted by the Sheriff in security of the landlord's hypothec, to which Monroe had acquired right by assignation; and, 2d. Of an interdict granted in the Bill-Chamber. The allegations as to the breach of interdict were disputed, and as to the breach of sequestration, it was contended that the complaint was incompetent before this Court, and ought to have been made to the Sheriff who had granted the sequestration, and whose authority was alleged to have been contemned.

LORD JUSTICE-CLERK.—Every Court has power to maintain its own dignity, and any complaint for contempt ought to be made to the Court itself, whose authority is alleged to have been violated. In the case of *Gray v. M'Nair*,¹ which has been referred to in support of the competency of this complaint, the whole case was before this Court, and the decision there establishes the opposite doctrine to that maintained by the complainer.

The other Judges concurring,

THE COURT refused the complaint as incompetent quoad the alleged breach of sequestration, and as to the breach of interdict charged, remitted to the Lord Ordinary to have a record made up.

GEO. MONRO, S.S.C.—A. M'BRYAN, W.S.—Agents.

No. 336.

ARCHIBALD BRUCE, Complainer.—*Sol.-Gen. Cockburn—G. G. Bell.*

THOMAS MANSFIELD (Rennie's Trustee), Respondent.—*Skene—M'Neill—Dunbar.*

Bankruptcy—Sequestration—Trustee.—In a complaint by a trustee on a sequestrated estate against the resolutions of the commissioners and creditors fixing his allowance for commission, the Court, before answer, remitted to an accountant to report as to what would be a suitable allowance.

¹ July 4, 1826 (ante IV. 765).

THE complainer, Bruce, was elected trustee on the estates of Rennie No. 336. of Phantassie, in 1829. In 1831, the commissioners fixed his allowance as at that period at 500 guineas in name of commission, and 200 guineas for clerks. He continued to hold the office till 1833, when, after some opposition, (as to which, see ante,) he was found entitled to resign, and the respondent Mansfield was elected trustee in his place. Thereafter the commissioners having fixed Bruce's allowance for the period since 1831, at a sum which he considered very inadequate to his trouble, and the determination of the commissioners having been confirmed by a resolution of the creditors, he presented a petition and complaint, in which he claimed a larger amount of commission, and also a sum of £150, for work stated by him as extra work, performed in his character of accountant. In answer, Mansfield, the present trustee, besides maintaining that the resolutions of creditors in matters of this kind, ought not to be interfered with unless in very gross cases, and that in truth the allowance made was sufficient, contended, that no extra charge for work performed by a trustee in his separate capacity as an accountant could be recognised; and besides, that the work in question had been taken into view in fixing the commission allowed in 1831.

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T.
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Grahame.

The Lord Ordinary, "before answer, and reserving all questions as to the effect of the resolutions of the commissioners and creditors, 'remitted to an accountant' to report what sum will be a fair and suitable allowance to the complainer, as commission, for the period of his management posterior to the 4th of January, 1831, having in view the statements of the parties relative to the sum of £150, claimed as for extra work, not included in, or covered by, the allowance of 700 guineas then awarded to him, and reporting his opinion on this matter, according to the practice and understanding of accountants in such cases."

Mansfield reclaimed, but the Court adhered.

SCOTT and BALDERSTON, W.S.—THOMAS JOHNSTONE, S.S.C.—Agents.

STEWART JOLLY, Advocate.—*Skene—Moir.*
FRANCIS GRAHAM, Respondent.—*Robertson—Maidment.*

No. 337.

Lease.—Description of new buildings on a farm, which held to have been "built in lieu of" others previously on the farm, and for which the tenant was entitled to remuneration, as being so built.

SEQUEL of the case mentioned ante, VI. 236, which see. The inter-locutor there reported having been appealed from by Graham, the House of Lords pronounced the following judgment:—"Find that the advocate, Stewart Jolly, is entitled to melioration for houses and biggings, in so far as the houses and biggings on the farm, at the dates of the tacks,

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2D DIVISION.
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T.

No. 337. are improved, or others, suitable to the farm, built in lieu of the same, and better than the same, at the expiration of the tack; and find, that he is not entitled to meliorations for houses and biggings built of new, except as aforesaid: And it is ordered and adjudged, that the several interlocutors, complained of in the said appeal, so far as the same are inconsistent with the above finding, be, and the same are hereby reversed: And it is farther ordered, that the cause be remitted back to the Court of Session, to do therein as shall be consistent with the said findings, and as shall be just."

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The cause accordingly returned to this Court, when a record was made up, and a proof allowed, with reference to the particular buildings for which Jolly was entitled to be remunerated under the lease, in terms of the finding of the House of Lords.

The Lord Ordinary, on advising cases, pronounced the following special interlocutor, which sets forth sufficiently the particulars of each disputed article:—"I mo, In relation to the principal dwelling-house on the farm of Morphie, libelled, Finds that the tenant, under the lease which was assigned to the pursuer, was bound to erect a dwelling-house on that farm, of dimensions not less than certain dimensions specified, and that at his own expense, with certain furnishings of wood and money by the landlord, in order to assist him in said erection, but without any claim at the end of the lease, on account of that erection; but finds that the tenant was, by the said lease, entitled to claim against the landlord at the end of the lease, for any meliorations made on the said house, after the erection and valuation of the same, not being unsuitable to the farm: Finds that it was agreed that there should be a valuation of the same after it was erected, but that this valuation does not appear ever to have been made: Finds that the value of the wood furnished by the landlord towards the erection of the said house, appears to have been £27, and the money to have been £10; but that the said sums cannot be taken as the estimated value of the house erected by the tenant in terms of his obligation; and finds a deficiency of any precise evidence to supply the place of the valuation which the parties neglected to have taken; but finds, considering the small value of the wood supplied, which formed the whole wood used in the house, and the small sum furnished by the landlord as his share of money for the building thereof, it must be presumed that the said house was originally not of large value, and that the sum of £150 may safely be taken, in absence of precise evidence, as a valuation, which the said houses certainly did not exceed: Finds the value of the said dwelling-house, with its meliorations, at the end of the lease, proved to have been £254, 8s. 7½d.; and finds it proved that these meliorations were not unsuitable to the farm; and finds the pursuer entitled to the difference, being £104, 8s. 7½d. 2do, Finds it proven, that the ~~value of~~ all the houses or biggings on the farm of Morphie, ~~except the dwelling-house on that farm, above mentioned, at the~~

Gibson, the original tenant under the lease libelled, must be held to have been £51, 6s. 9d., which sum, in toto, is to be set against the total sum of the values of the houses and biggings, for which the pursuer is entitled to claim, as being left on the said farm at the expiry of the said lease, i. e., being either the old houses and biggings, or being meliorations of, or in lieu of the same; and in relation to the said houses and biggings last mentioned, finds as follows, viz. 3to, In respect to a stable and bothy, for which a claim is next made, finds it admitted by the defender, that they were built by the pursuer, near the site of one of the old houses of the farm, the foundations of which were cleared away before the stable was built; and finds it expressly averred by the pursuer, and not sufficiently denied by the defender on record, that the old house was of the same nature as the stable and bothy erected in lieu thereof; and finds it not proved that the said stable and bothy were unsuitable for the farm; Therefore, finds the pursuer entitled to claim for the value of the same, as at the termination of the lease, which finds to have been £156, 3s. 4to, In respect to a granary and poultry-house, for which a claim is next made, finds it not proven that the granary was a melioration of, or in lieu of any of the old houses or biggings on the farm, and that, therefore, the pursuer is not entitled to claim for its value; but sustains his claim for the poultry-house, as coming in lieu of an old poultry-house, and not appearing to be unsuitable to the farm, and finds the amount thereof to be £11, 9s. 5to, In respect to a cattle-shed and pig-stye, for which a claim is next made, finds it not proved that the same were on the farm, or were ameliorations of, or in lieu of any old buildings on the farm, and therefore repels the pursuer's claim. 6to, In respect to two barns, for which a claim is next made, finds it sufficiently proved that these were built in lieu of other old buildings of the same kind on the farm, and not proved that they were unsuitable for the farm, and therefore sustains the claim for the value of them at the expiry of the lease, which finds to be £247, 12s. 9d. 7mo, In respect to the byres, oxen-byres, and cattle-shed, for which a claim is next made, finds that the erection of the byres, in lieu of old byres existing on the farm, is averred and not denied on the record, and therefore sustains the pursuer's claim, on account of the value of them, and finds that it amounted, at the termination of the lease, to £63, 17s. 5d. In respect to the oxen-byres and cattle-shed, finds it not admitted or proved that they were meliorations of, or erections in lieu of old buildings of the kind existing on the farm, and therefore repels the pursuer's claim in respect to them. 8vo, In respect to the servants' houses, with byres, on account of which a claim is next made, finds it not denied that one of these houses was on the farm at the commencement of the lease, and is still used as a servant's house; finds no precise evidence of its separate value at the termination of the lease; but finds it must have formed a considerable part of the total value of £55, 18s. 6d., at which this article is estimated; finds, therefore, that it

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No. 337. value may be taken, as claimed by the pursuer, at £15, 4s. 9mo, In respect to the next article on account of which a claim is made, viz., servants' houses and byres, west from the steading walls, finds that it is in substance admitted by the defender, that these are, or were erected in lieu of old houses or biggings that were upon the farm; and finds the value, at the termination of the lease, proved to have been £31, 8s. 1d. 10mo, In respect to the garden walls, on account of which a claim is made, finds it not proved that the same were erected in melioration, or in lieu of any garden-wall existing on the farm at the date of the lease; or that the same are useful to the farm as ordinary fences, and therefore repels this article of claim. 11mo, In respect to twelve cot-houses, for which a claim is made, finds it admitted that there were eleven of them on the farm at the date of the lease; and finds that the value may be taken to be proved, as the pursuer now states it, viz., £89, 6s. 9d. 12mo, Finds the pursuer entitled to legal interest, from the 31st day of December, 1820, to the 14th day of July, 1830, on the meliorations due to him, but this under deduction of any sums due to the defender, for rent or otherwise. 13mo, Finds the pursuer entitled to the sum of £205, 3s. 9d. of expenses of process, as now claimed by him; and, with these findings, appoints the cause to be enrolled, in order to decerniture or other procedure."

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Both parties reclaimed, but the Court, with a slight variation, adhered.

JAMES MILLER, S.S.C.—J. J. FRASER, W.S.—Agents.

No. 338.

JAMES FINLAY and COMPANY, Pursuers.—*Jameson—Russell.*
MISSSES MARGARET and LILIAS CAMPBELL, Defenders.—*Shene—Cowan.*

Arbitration.—1. The terms of a general submission, construed by reference to the previous correspondence and subsequent pleadings of the parties. 2. Circumstances in which the Court held that a decree-arbitral was not ultra vires—that it was not pronounced parte inaudita—that an objection of its binding one party, and not the other, and not exhausting the submission, was ill founded, and that it was not reducible.

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Ld. Moncreiff.
B.

THE lands of Nether Whiteflatt, belonging to Misses Campbell, contain several considerable springs of water, and lie surrounded by the grounds of Holm and Whiteflatt, belonging to Sir James Boswell, which are on a lower level. The Catrine Cotton Works, belonging to James Finlay and Company, are situated in the vicinity of the lands of Sir James Boswell, and the Company having erected extensive buildings and machinery for bleaching, and being desirous to obtain a supply of spring water, Mr Buchanan, manager of the works, in 1824, entered into an agreement with Sir James Boswell in reference to that object. The agreement ~~was~~ James Boswell considered that the proposed draining of

carrying off the water would be beneficial to his lands, and he therefore No. 338.
 empowered the Company "from time to time, during the space after men-
 tioned, and till this permission be withdrawn, to make all necessary drains June 25, 1834.
 in the said lands of Holm and Whiteflatt for collecting said water from the Finlay v.
 springs within the same, or water coming into the same from springs in Campbell.
 lands adjoining, so far as we have right to grant the same: As also in the
 said lands of Holm and Whiteflatt to place a cistern or cisterns for the
 collection and reception of the said water, and to lay pipes therefrom
 through the said lands of Holm and Whiteflatt, and that in the direc-
 tion most convenient for conveying the water to the said bleachfield;
 which cisterns and pipes, I the said Sir James Boswell, with advice and
 consent foressaid, bind and oblige myself, my heirs and successors in the
 entailed estate of Auchinleck, to allow to remain undisturbed for the
 space of nineteen years from and after the date hereof." Sir James
 bound himself, if he, after the said period, required the permission to be
 discontinued, he should give twelve months' notice to the Company be-
 fore they should be bound to carry off the pipes and cisterns. On the
 other part, Buchanan bound the Company to pay "the annual sum of
 £20 sterling yearly, and that at the term of Whitsunday in each year
 during the said space of nineteen years, should the said springs continue
 the supply of water for that period, or as long thereafter as the said per-
 mission shall be continued, or the said Company require the use of the
 water, beginning the first term's payment thereof at the term of Whit-
 sunday 1825; but should the springs dry up, or the supply of water fail,
 then the said rent shall cease, and no farther demand for the same shall
 be competent to the said Sir James Boswell and his heirs; as also to
 make payment to the tenants in the said lands of the whole surface
 damage occasioned by the operations of the said Company."

At this time, the lands of Nether Whiteflatt were let, at a rent of
 £21, to a tenant, whose lease empowered him to make drains on his
 farm. As these drains were to discharge the water on the grounds of Sir
 James Boswell, the Catrine Company made an arrangement with the
 tenant of Nether Whiteflatt, under which they sent men in their own
 employment, who formed substantial drains in that farm, which carried
 the water to two points in the grounds of Sir James, most suitable to
 the Company, where it was collected by them in cisterns, which commu-
 nicated with their apparatus for carrying off the water from the grounds
 of Sir James. In these proceedings, the Company did not apply for
 authority from the Misses Campbell, or hold any communication with
 them. It was not till 1826 that the Catrine Company began to use the
 water so derived from the lands of Nether Whiteflatt. On June 7,
 1826, one of the Misses Campbell addressed this letter to Buchanan:—
 "As we understand the Catrine Company have got a supply of spring-
 water from our farm of Whiteflatt for their bleachfield, my sister and I

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are willing to let them have it on similar conditions to those they have got from Sir J. Boswell, and will be glad to have your answer when convenient." Buchanan answered, "Our Company have every wish to make good all damages that our various operations may occasion, and even to benefit our neighbours where any reasonable pretext occurs for so doing. I am not aware, however, of any injury being done to your farm of Whiteflatt by our operations. It is true, there was a bog or piece of wet ground in the garden, which your tenant wished much to get drained, and by his directions a drain or drains were run through at our expense, as we had done to several others, and by which he said that part had been benefited at the rate of 20s. per acre annually. The water to our bleach-work is taken from Sir James Boswell's lands, and we have not found it increased by the drains from your lands, nor has the quality been improved; and if you do not like them, the drains shall be filled up as they were, to your satisfaction. It must be evident to any competent judge of such matters, that we could have collected the whole water from the springs in your property upon that of Sir James Boswell's, at no greater expense; but in that case we would not have drained your garden, so much desired by your tenant, and who we wished to oblige, conceiving he had the usual powers to improve his farm. Viewing the subject in this light, I do not see how I can recommend the proposal you make to our Company;—at sametime, if you can make out any case by which any benefit has been derived by us from your property, I am sure it will meet with the most favourable construction, and which I shall be glad to transmit."

Misses Campbell then proposed to have an enquiry made, for finding the proportion which the water of their Nether Whiteflatt spring bore to the whole supply of water derived by the bleachwork from Sir James's lands. Buchanan answered, that if the ladies meant to assert a right of property in the water taken by the Company from the lands of Sir James Boswell, that question should be decided first of all; and he proposed a meeting, "that the whole matter may be properly understood, so far as we are concerned, before we go farther."

It was agreed by the parties that a submission should be entered into. The Misses Campbell proposed a submission of a special character; the Company's agent proposed one, "so far particular as to bring the point as to the claim of Misses Campbell for remuneration for the water to which they claim right, immediately under the view of the arbiter. In discussing this point, the whole of the grounds of claim will be brought forward,—particularly, it will be ascertained how far the water which came into Sir James Boswell's lands before the drains were cut, has been increased by the cutting of these drains; and if increased, how far the ladies have right to remuneration in consequence." He added, "after all, I cannot see any thing so well fitted to bring the case to

as a general submission, leaving it to the Misses Campbell to make their No. 338.
claim under it as broad as they think right."

The parties then entered into a submission, referring "all clags, ^{June 25, 1834.}
claims, questions, demands, and differences, of whatever nature, presently ^{Finlay v.}
subsisting between them, either arising out of the acts of the said James ^{Campbell.}
Finlay and Company, the said Archibald Buchanan as an individual, or
as acting in his capacity of partner of James Finlay and Company, and
manager of their works at Catrine, or any other person on behalf of them
or either of them, or the acts of the said Misses Margaret and Lillias
Campbell or either of them, or of any other person on behalf of them or
either of them," to the Sheriff of Ayrshire as sole arbiter, "with power
to him to receive the claims and answers of the parties, hear them or
their agents thereon, take all manner of probation he may think neces-
sary or proper in the course of the submission, either by writ, witnesses,
or oath of party, and to examine personally the subject-matter of dis-
pute." The parties bound themselves to abide by whatever the arbiter
should determine by interim or final decree.

In the pleadings of the parties, reference was specially made to the
correspondence already quoted as containing the claim made by the
Misses Campbell. The Misses Campbell also stated their claim to be,
"1st, Damages from the Catrine Company for making encroachments
on their property without their consent. This damage may reasonably be
stated at forty pounds sterling, corresponding to a fair rent for the
springs, from the date of the encroachment in April, 1824, until June,
1826, when the Company applied the water to profitable use. In the
second place, they claim rent or remuneration from the Company for the
beneficial use and possession of Nether Whiteflatt springs and water,
since the day of June, 1826, at the rate of twenty pounds per
annum."

Misses Campbell repeatedly insisted on their right to be placed by the
Company on the same footing with Sir James Boswell, in regard to the
spring-water of their respective grounds; and they urged the production
of the lease or agreement with Sir James, so as to give information to
the arbiter. The agreement was produced by the direction of the arbiter.
The Misses Campbell objected to agree to an offer by the Catrine Com-
pany to fill up the drains, and replace matters in statu quo, and they
stated, that they would not allow the Company again to enter upon their
grounds. On the other hand, the Catrine Company pleaded, that they
could have had the full use of all the water in the Nether Whiteflatt
grounds without having made any drains in them, because the whole
must naturally descend on the grounds of Sir James, where the Company
could collect it, under their agreement with him; that no damages
could be due, as they were ready to prove the operations were made
with the sanction of the tenant, who had full power to drain, and were
highly beneficial to the property; that they were willing to fill up the

No. 338. drains, and place matters in statu quo; and that they did not wish to have the Nether Whiteflatt water, if either a rent was to be paid for it, or if the Misses Campbell could keep it to themselves.

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The discussions before the arbiter continued for a period of three years, during which a claim and revised claim, with relative answers, and also condescendence and answers, were put in. It was, inter alia, much insisted by the Misses Campbell throughout these pleadings, that so long as the Company used the water from Nether Whiteflatt, they ought to pay for it. A proof was led on the grounds, and the arbiter twice inspected the grounds, being attended on one occasion by an engineer, Mr Stevenson, who was appointed to make a survey at the request of both parties. The engineer reported, inter alia, that the drains were beneficial to the Nether Whiteflatt grounds; that they did not impede the tenant in any use which he previously had of the water; and that the whole Nether Whiteflatt water, except a small portion allowed for evaporation, would have found its way naturally into the grounds of Sir James, even if the Company had not made the drains in question. Written pleadings followed on the report.

The arbiter repeatedly issued notes, indicating the tendency of his opinion. On 3d September, he intimated, as his final views of the case, that the Company had made an unwarrantable intrusion into the Nether Whiteflatt lands; that their object in so doing was to obtain a supply of water, improved either in quantity, quality, or steadiness; that they had gained benefit in these respects by their operations; that they were as justly liable for some rent to Misses Campbell as they were to Sir James; that Misses Campbell were not bound to submit to the experiment of filling up the drains again; and that, on comparing the quantity of water from Nether Whiteflatt, with the whole quantity flowing through the pipes in the grounds of Sir James, he was disposed "to find the Company liable in payment of £10 per annum to them, from Whitsunday, 1826, as long as the water shall be conveyed by the course of pipes now existing, or a similar course of pipes, through the grounds of Sir James Boswell to the Catrine works;" and that each party should pay his own expenses.

The arbiter prepared a relative draft of the proposed decreet-arbitral, and stated, "if any alteration occurs to the parties on the terms thereof, to the effect of better carrying into execution his views, he will be ready to receive their observations. But after so ample a discussion, he begs that no farther argument on the general merits of the case may be entered into." In the draft decreet, the payment in favour of Misses Campbell was ordained to be made "aye, and while the Company shall continue to use the water coming from Nether Whiteflatt."

Each party lodged a representation; and in that for Misses Campbell, they stated, that an award of £10 per annum, "aye, and ~~the Company shall continue to use the water coming from Nether~~

would probably be defeated by the Company ceasing to take the water so soon as they found they were to pay for it, and thus the Misses Campbell would be left with a load of expenses incurred in defending against an act of unwarrantable aggression. They prayed the arbiter to prevent such a result, and to award damages for the original wrongous intrusion, and the use of the lands had in time past, also such remuneration for the water in future as might seem just; and, lastly, the expenses.

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The arbiter, without appointing either representation to be answered, issued notes, stating, "that he remained of his former opinion in all points."—"On one point only have either of the parties made observations tending to carry into effect the views of the arbiter, as expressed in his draft decret. This has been done by the claimants, in their suggestion, that in the present unfortunate state of feeling between the parties, the respondents may attempt wholly to defeat the decision of the arbiter, appointing a rent to be paid for the water of Nether Whiteflatt, by abandoning the use thereof altogether, as, for instance, by conducting it in a surface drain down to the river. They complain of the hardship which this would occasion to them, and suggest, that instead of a prospective rent, or an addition thereto, a slump sum should be found due to them in name of damages and expenses. The arbiter had already partly contemplated the possibility of the above consequence, and does think, that on his views of the case, such a contingency would be unjust towards the claimants. In fixing the annual rent of £10, the arbiter proceeded on the view of its relation to the rent payable to Sir James Boswell, both in duration and in amount, and contemplated the continuance of its payment to the claimants during the currency of Sir James's lease. He now thinks, therefore, that the best way of obviating the contingency above supposed, is simply to find the respondents liable for the appointed rent during the currency of Sir James's lease (with which the present interest is so much involved), leaving the parties, if they think proper, to agree to the redemption of the rent during the lease, by payment of a principal sum; and after the expiry of the lease, to adjust their interests by a new agreement. This appears to the arbiter to be a better way of proceeding than either to find the respondents liable in one slump sum, in lieu of all compensation; or to fix the compensation partly in a slump sum, and partly in an annual payment. He has therefore made a change in the decret-arbitral to the above effect."

After these notes had been three weeks issued, without either party asking leave to be farther heard, the arbiter pronounced his decree-arbitral. He found, "in the first place, although the foressaid submission is quite general in its terms, comprehending all disputes and differences between the parties, of whatever kind, yet the only matter brought before me has been a claim of damage or remuneration on the part of the Misses Campbell, for the water in their property of Nether Whiteflatt, taken by the Catrine Company for their bleaching-works. 2. In regard to the above matter,

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for the reasons set forth in the notes issued at several times by me, I find and declare that the said Archibald Buchanan (or such other manager as the Catrine Company shall employ to superintend their works) shall be bound and obliged to pay, in name of the said Company, to the Misses Campbell, the sum of £10 sterling yearly, from and since the term of Whitsunday, 1826, aye and until the term of Whitsunday, 1843, being the issue of the lease or agreement now subsisting between Sir James Boswell of Auchinleck, Baronet, and the said Company, relative to the water in his lands of Holm and Whiteflatt; but declaring that the rent above payable to the Misses Campbell by the said Company shall not be dependent on the subsistence of the lease with Sir James Boswell, but shall continue till the aforesaid term of Whitsunday, 1843, although the lease with Sir James Boswell should be ended, by agreement of parties, before the said term; but providing always, that the said run of water from the Misses Campbell's lands does not stop and dry up during the above period, in which event the said rent shall cease and determine from the period of said stoppage; the arrears of rent to be paid up at the term of Whitsunday next, and the rent to be paid thereafter at the term of Whitsunday yearly, with the due and legal interest of each term's payment from and after the term of payment until paid. 3. I find and declare that the said Company shall not be entitled to stop or fill up the drains already cut by their co-operation, through the grounds of Nether Whiteflatt, without permission of the said Misses Campbell. 4. The Misses Campbell shall be bound and obliged, during the continuance of this engagement, to preserve the whole water on their said lands of Nether Whiteflatt, pure and uncontaminated, and without unnecessary use or waste, so far as in the power of themselves or their tenants, for the sole use and benefit of the said Company, the said obligation being always subject to a reasonable use of the water for ordinary purposes by the Misses Campbell, or their tenants in the said lands; and also, the Misses Campbell shall allow the Company access into their said lands, to support or repair the drains, on all necessary occasions, and permission to place pipes therein, and to keep the same in repair, if they shall find it advantageous; and in general, shall give the said Company every reasonable facility in securing a pure, abundant, and steady supply of water."

The Catrine Company raised a reduction of the decree, and pleaded—

1. The arbiter had exceeded his powers by deciding a matter not submitted to him. The general terms of the submission must be construed in reference to the preceding correspondence of the parties; and upon reference to it, and to the whole pleadings, it appeared that the defendants had never made any claim, except in name of damages for wrongs

intrusion into their grounds, or of remuneration for the use of water derived from their grounds, or of the expenses of the submission. But the award of a sum of £10 per annum in name of rent, for seventeen years certain, which was made payable whether the Company used the water or not, and whether their agreement with Sir James Boswell subsisted or not, did not fall under any head of the claim made by the defenders, and therefore was *ultra fines compromissi*.

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2. The decree was irregularly pronounced, *parte inaudita*. In the notes of the arbiter of 3d September, 1829, afterwards referred to in his decree, he did not intimate to the parties any intention of enforcing payment of a rent for a prospective term of years certain, and independently of the Company's using the water. He spoke of the defenders only as entitled to claim "remuneration for the use of their water." In the representation then offered by the defenders, they never asked for future rents after the water should be no longer used. Therefore, when the arbiter took that mode of frustrating the supposed abandonment of the water by the Company, he should have called the attention of parties to it, or at least should have allowed the defenders' representation to be answered by the Company. But the Company had no opportunity to be heard upon this most important question, and therefore the decree was *ex parte*.

3. It imposed conditions upon the defenders, obliging them to keep the water on their farm pure, and without unnecessary waste; and also to allow the Company to lay pipes on their grounds, and to repair the drains. But the defenders were not bound to submit to these conditions unless they chose, because the right of access to their grounds, or their mode of using and preserving the water there, was not submitted. On the contrary, they had declared in the pleadings, that they would not suffer the Company to enter their grounds again. But if the decree could not be enforced against the defenders, if they chose to repudiate it *in toto*, it could not be enforced against the pursuers, as the decree was only valid in virtue of the contract of submission, and no contract could be good to bind one party, unless it was good to bind both.

4. The submission was not exhausted, 1st, as the decree only settled the questions in dispute for a certain term of years, and left every thing open after that period; and, 2d, as a claim of damages, made by the defenders, was never disposed of.

The defenders pleaded—

1. Construing the submission, in reference to the previous correspondence, the arbiter had not decided any point which was not submitted. The claim of the defenders substantially was, that they should receive similar terms for the Nether Whiteflatt water to those which Sir James Boswell had received for the water on his lands. That was just a claim for an annual payment, proportioned to the worth of the water, and to be made for a term of years certain; the term, of course, being that of

No. 338. which Sir James had been made certain under his agreement. The arbiter's award had substantially done this, and no more.¹

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2. Parties had been fully heard. The decree merely gave effect to what was substantially the arbiter's opinion throughout; and what had been expressed in his previous notes; and even his last notes, explaining the decree, were issued three weeks prior to the decree, without any party craving to be farther heard.

3. When the defenders claimed rent for the use of the water, they necessarily subjected themselves to an obligation to perform those conditions, imposed by the arbiter, as the counterpart of their claim. If they failed to do this, the pursuers would be free of all claim; but, if they were willing to perform the conditions, they were entitled to enforce the decree.

4. The submission was exhausted. 1. The arbiter had fixed, absolutely, and for ever, that the pursuers could not use the Nether Whiteflat water, as derived from the present drains, without paying a consideration for it. He had also fixed the precise terms for a certain period, leaving them to be the subject of adjustment after the lease from Sir James came to an end; and this was a substantial settlement of the questions submitted. 2. He had not omitted the question of damages. His decree bore that the matter to be disposed of was "a claim of damage, or remuneration," &c.; and immediately added, "in regard to the above matter, I find and declare, &c. that the Company shall be bound to pay £10 sterling yearly," &c. The defenders were ready to discharge the pursuers of all claim in name of damages if desired. Besides, parties were bound to implement whatever was awarded even by an interim decree; and even if some findings were reducible on the ground of excess, the rest might remain good.²

The Lord Ordinary ordered Cases, and reported them to the Court.³



¹ M'Callum, May 23, 1826; 2 W. S. 344; Pitcairn, May 20, 1825; 1 W. S. 194.

² Johnston, July 8, 1817; 5 Dow. 247.

* NOTE.—"The Lord Ordinary thinks it proper to report this Case to the Court, from respect to the learned arbiter, whose decree is challenged, entertaining at least very serious doubt how far the decree stands on firm ground in point of competency.

"Certainly the merits of the subject under arbitration are not fit matters of consideration here, and though, when one sees it proved by such an engineer as Mr Stevenson, that all the water descending from the grounds of the defenders into Sir James Boswell's, and as much as now comes into them, could have been collected in Sir James's grounds, though no new drains had been made in those of the defenders—proved by the tenant, that the drains were made by his authority, and under his superintendence, having power by his lease to do so—and proved, that these drains produced great benefit and no damage to the lands—it may be difficult to see the legal ground on which the claim to compensation rested; the Lord Ordinary holds it to be his duty to exclude from his consideration any difficulty of that kind, and to take it as conclusively fixed by the arbiter's judgment, if it be proved that there were legal grounds for such a claim.

PRESIDENT.—I consider this to be a clear case. The pursuers admit the arbiter might have awarded a slump sum against them; and he might have put it as high as £300, or £400, if he saw cause. Yet they object to an award of more than £100.

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The Lord Ordinary has doubts of the competency of the decret. It does not find that any wrong was done, though from the arbiter's notes it appears that he had an opinion to that effect. It does not find that any damage had been sustained by the operation of cutting the drains, and it would have been difficult to have so found on the evidence. Nevertheless, it might be abstractly possible, without any such findings, at once to award some specific benefit to the pursuers, on an assumption that some damages or compensation were due. The Lord Ordinary, looking to the terms of the submission, and to the nature of the dispute put forward in the previous correspondence, and more especially in the representation to the arbiter, doubts the competency of the decret in these respects. 1st, Whether, generally, it was competent for the arbiter to force the pursuers to such a specific arrangement or contract (whether strictly a lease or not) as was actually laid down in the decret. 2d, Whether, at any rate, it was competent, to claim and issue joined between the parties, to ordain the pursuers to pay rent for the water coming from the grounds of the defenders whether they used it or not, and whether the agreement with Sir James Boswell should stand or not. When the Lord Ordinary sees in the first draft of the decret the words 'aye and while the said Company shall continue to use the water from Nether Whiteflatt,' &c. and sees also, that the representation for the pursuers prayed for a finding of damages and expenses, but not for a continued payment of rent, whether the water were used or not, and indeed quite the reverse of what is now found, he does not doubt the fact, whatever may be the effect of it, that no such specific finding had been made; and he finds nothing like it in any of the papers quoted by the defenders. 3d, Whether the conditions laid on the defenders, and specially that the laying of pipes and cisterns to be laid in their grounds, could be legally enforced, in the powers of the arbiter (more especially as the tenant was no party); and whether, if they could not, the decret can stand at all. Clearly, it must not stand in the option of one party whether it is to be effectual or not. 4th, Whether the decret exhausts the submission, in respect that the arrangement is only a lease, and that it has not decided, one way or the other, the material question, apart from the cutting of the drains, the pursuers can be liable to pay any rent for the water collected in the grounds of Sir James Boswell, whether coming from those of the defenders or not. The act of cutting the drains would surely alter the legal rights of the parties in perpetuity. The plea of the defenders is, that their claim was, to be put on a footing with Sir James Boswell, or, that the case should be held to stand as if a similar agreement had been made with them as with him. The Lord Ordinary cannot think that this would be the meaning of their claim, in the literal sense now insisted on. If the pursuers had been to make such an agreement, they surely never would have paid a rent for the water of the defenders, even though they should cease the agreement with Sir James Boswell. The difference between the two cases is overlooked;—the pursuers could get no water collected, without entering the grounds of Sir James, and they could only get that coming from the grounds of the defenders, by collecting it in those of Sir James. It is always much to be regretted, when a decret-arbital, which ought to end litigation or end it, becomes the source of greater litigation than the original dispute; and certainly it is not on light grounds that the Court will set aside a decree as that now before it. If it can be held, that the arbiter has in fact confined himself to an award on the matters submitted, and sufficiently

No. 338. award, decerning payment of £10 per annum for seventeen years, which only amounts to a payment of £170. I am perfectly satisfied that it was not *ultra vires* to award the annual payments.
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LORD BALGRAY.—I am of the same opinion. The submission was of so general a nature, that it is necessary to have recourse to the letters of the parties for explanation. Upon looking to them, I conceive that, in substance, the matters ultimately decided by the arbiter were specifically brought before him from the first. He gave the subject a most patient and complete investigation, and I see no ground for alleging that he decided *parte inaudita*. On the contrary, he gave both parties the fullest opportunity of being heard. At the time when the arbiter finds the first annual payment should have been made, there were two years already run of the nineteen years' lease from Sir James Boswell, and accordingly the arbiter has decerned for annual payments for seventeen years only. I am far repelling all the reasons of reduction.

LORD GILLIES.—I take the same view. A great deal is founded on the plea that the decree-arbital has not settled matters for ever. But, having reference to the existing disputes, as submitted, it appears to me that they are sufficiently disposed of, to remove all ground of challenge on this head.

LORD MACKENZIE.—I am of the same opinion which has been expressed by the other Judges.

THE COURT accordingly repelled the reasons, and assolizied with expenses.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—HUNTER, CAMPBELL, and CATECART, W.S.
 —Agents.

No. 339. ALEXANDER MITCHELL, (Williamson's Trustee) Pursuer.—*H. J. Robertson.*

JAMES RODGER and NEIL SMITH, Defenders.—*Rutherford—Moir.*
 WILLIAM CLYNE, Defender.—*Ivory.*

Bankruptcy—Sale.—The principal obligant in a bank cash-account, having informed one of his two cautioners that he desired to sell heritable property, and pay up his cash-account, that cautioner found a purchaser, and got an order from the principal on the purchaser for the price, which by desire of the principal he received, and paid into the cash-account; and the principal became bankrupt within sixty days thereafter;—held, that, though none of the cautioners then knew the principal to be embarrassed, and one of them knew nothing of the sale; and though the disposition was good to the purchaser, and the payment of cash into the bank was irreducible as to the bank, yet, the sale having been made through the instrumentality of one cautioner, with the design and effect of relieving both, the transaction was liable to reduction, under 1696, c. 5, and 54 Geo. III. c. 137, in so far as the cautioners obtained benefit thereby.

exhausted them, though in a very particular form, there may be ground for sustaining the decree. But still the case must be dealt with according to the rules of law applicable to it; and all that the Lord Ordinary can say is, as at present, ~~the case is~~ should find great difficulty in coming to that conclusion.
 "Cases were ordered at the desire of both the parties."

In July, 1825, Williamson, fletcher in Aberdeen, obtained a cash-
 account with the Aberdeen Town and County Bank for £300; and
 James Rodger, tanner, and Neil Smith of Bogfonton, became his cau-
 tioners. A bond was granted to the bank in the usual terms. William-
 son's cash-account was all drawn out, prior to 8th October, 1829. Of
 that date, he executed a disposition of a house and ground in favour of
 William Clyne, leather-merchant, for a price of £295. Rodger had
 gone to Clyne, and informed him that the property was for sale, and he
 had done this, as he said, in consequence of Williamson telling him that
 he wished to pay up his cash-account, and desired to sell this property to
 enable him to do so. Of the same date with the disposition, Rodger
 obtained from Williamson an order on Clyne for the price; and Clyne
 being infest on 10th October, paid the price to Rodger, who carried it to
 the bank, and paid it into the credit of the cash-account. Rodger was a
 creditor of Williamson to the extent of £60; but he applied no part of
 the price in extinction of this debt, and alleged that he could not have
 done so without breach of trust, having received it solely for the purpose
 of carrying it to the bank, and paying it in as he did. Smith, the other
 cautioner, knew that the property was for sale; but he had no concern in
 effecting the sale, and did not hear of it until after the price had been paid
 into the bank. The estates of Williamson were sequestrated on 7th
 November following, and Mitchell, the trustee, raised an action against
 Rodger and Smith, and Clyne, libelling on the acts 1696, c. 5, and 54
 Geo. III. c. 137, to reduce the transaction, or at least to make the full
 value of the subjects forthcoming to the estate.

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Clyne pleaded that he was a bona fide purchaser of the subjects at a
 fair price; that he was ignorant of Williamson's insolvency, or of any
 intention to apply the money so as to create an unfair preference of any
 sort; and therefore the transaction was unimpeachable so far as regarded
 him. No proof to contradict this statement was led.

Rodger and Smith alleged that they were ignorant of Williamson being
 either insolvent or embarrassed at the time of the sale. No proof was
 led to contradict this.

Pleaded by Rodger and Smith.

1. If the principal obligation by Williamson to the bank was effectually
 extinguished, the accessory obligation of the cautioners could not sub-
 sist, because the sole obligation of the cautioners was to see the principal
 obligation satisfied. But this had been done. The price paid by Clyne,
 a bona fide purchaser, was paid into the bank, whose bona fides was not
 impeached. This cash payment to the Bank was therefore unchallenge-
 able, and accordingly the Bank had not been made parties to the reduc-
 tion. The effect of a valid payment to the Bank necessarily was to
 extinguish the accessory obligation of the cautioners to the bank.

2. Both cautioners were ignorant of Williamson's embarrassments at
 the date of the transaction, and one did not even know of the transaction

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at the time. The other, Rodger, had merely acted as the hand of Williamson, in carrying the price from the purchaser to the Bank; and, accordingly, he had paid no part of his own debt of £60, but paid the whole into the cash account. There was thus no circumstance, in the conduct of the cautioners, which could bar them from the plea that the effectual extinction of the principal obligation must operate the extinction of the accessory.

The case of Speir¹ was essentially different. Money was there deposited, in advance, in the hands of the holder of a bill, in order to meet the bill when it should fall due; and the bill did not fall due till after sequestration. That was clearly not a payment in cash, in extinction of a debt, but a transaction out of the ordinary course of business, for the purpose of giving an unfair preference, by way of security against a future debt, to a favoured creditor. But here, the cautioners had a right to insist for instant relief at any time. The payment to the Bank did not anticipate the term when the obligation was due; and it was strictly a cash payment within the statute.

Pleaded by the Pursuer.

1. Whatever voluntary deed conferred a preference, by way of satisfaction or security, directly or indirectly, on a favoured creditor, within 60 days of bankruptcy, was reducible. A payment in cash was excepted, not being a deed in the sense of the act. But the cautioners were not within the exception. The whole transaction of selling the heritage and handing over money to the Bank, did not amount to any payment in cash to them, while it was a transaction which conferred, and was executed for the purpose of conferring, a preference on them as contingent creditors.

2. In a reduction on the Act 1696, c. 5, it was not necessary that the creditor, unduly preferred, should be privy to the insolvency of the debtor. It was enough if an undue preference had been given, by way of satisfaction or security for a prior debt, even if this were done by the sole act of the debtor; but here Rodger had, by his own active instrumentality, brought about the sale of the subjects, and the payment of the price to the Bank. In this he acted for both Smith and himself, whether Smith knew it or not, and the preference so acquired was reducible against both.

The case of Speir involved a principle which was enough to decide this question. A payment or transfer of money was there made, in order to provide for an obligation, the term of which was not yet come. It was held to be a reducible transaction; and, in like manner, here, as the whole transaction was just an alienation of property for the relief and satisfaction of the cautioners, as contingent creditors, it fell under the statute, notwithstanding the money payment.

¹ May 30, 1827 (ante V. 729).

he Lord Ordinary found "that the sale in question having been
le and completed within sixty days previous to the sequestration of the
te of the vender, George Williamson, and it being sufficiently admit-
on the record, that it was so made on the part of the bankrupt, through
instrumentality of the defender, James Rodger, with the design and
ct of relieving the defenders, the said James Rodger and Neil Smith,
eir cautionary obligation on account of the said George Williamson,
£300, by enabling the said defender, Roger, to receive and pay into
bank the stipulated price of the property in question, the said trans-
on is, without the necessity of any farther proof, liable to reduction,
o far as the said defenders, Rodger and Smith, obtained benefit there-
in virtue of the provisions of the Statute 1696, c. 5, as confirmed by
54th Geo. III. c. 137, and reduced the same accordingly to that ex-
, and decerned; superseded, in hoc statu, pronouncing any judgment
he other grounds of reduction, or on the conclusions of reduction, as
cted against the defender, William Clyne."*

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* NOTE.—The Lord Ordinary is of opinion, that, on the admitted facts, this case clearly under the principle of judgment finally adopted by the Court, under remit by the House of Lords, in the case of Speir against Dunlop (Shaw and son's Appeal Cases, II. 253, and Shaw and Dunlop, May 30, 1827.) Here the was confessedly made by the bankrupt for the purpose of relieving his caurs in the bank credit, and it was transacted by the instrumentality of Rodger ly acting for himself and Smith, whether with Smith's knowledge or not; and money having been paid to Rodger himself, he paid it into the bank, as on act of Williamson, and thereby effected the relief to that extent. This was not a cash payment so far as the Bank was concerned; and the sale might be to Clyne, the purchaser. But so far as concerned the cautioners, the whole action, according to the case of Speir against Dunlop, was an alienation of pro- for the relief and satisfaction of them, as contingent creditors, within the prin- of the Act 1696. In that case, the verdict of the Jury had expressly negatived idea of there having been any previous agreement to make the sale for the pur- of the contingent creditors obtaining a preference, or even a security; and this expressly held to be conclusively settled. In the present case, it is not denied Rodger was privy to the purpose of making the sale, in order to relieve him Smith. But supposing it were otherwise, it is clear, on the case of Speir, that er the existence of such an understanding, nor any knowledge by the creditors state of insolvency, is at all necessary to such a reduction. The averments at subject would require careful consideration, if the case were to depend on Act 1621, or on fraud at common law. But having the opinion above expressed, Lord Ordinary, adverting to the great expense and trouble which was occasioned e jury trial in that case of Speir, has thought it proper to decide on the Act simply, and to supersede the other points.

At present, the Lord Ordinary is inclined to think that there is scarcely a rele- case against Clyne. Mere inequality in the bargain, without knowledge of in- mcy and accession to positive fraud, would not be relevant, and it is very doubt- whether there are sufficient averments on these points.

The present case, in the view taken of it, is very like the case of Ross against son, June 15, 1830, with the conclusive difference that here the transaction was in 60 days of bankruptcy."

No. 339. The defenders reclaimed, and the cause having been pleaded before
 LORD PROBATIONER, JEFFREY, he delivered this opinion.

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I am unable to concur with the Lord Ordinary in the judgment which he has pronounced in this cause. Laying aside, for the present, every allegation of fraud or collusion, and confining myself exclusively to the challenge in the act 1696, I do not see any thing sufficient to set aside the transaction quoad the cautioners. There is a decided difference between the case of Speir and this; yet the case of Speir, in itself, was one of great difficulty. That was the first instance in which an actual transference of cash to a creditor, to meet a future debt, was held to be struck at by the act. It was so held, because the transaction was not viewed as being properly a payment, but was held to be a mere security or deposit, so as to provide for a current obligation when it should have reached maturity. Accordingly, Lord Glenlee describes the transaction "as a deposit, that the defender might take up the bill when it did become due."¹ It was, on that account, finally held to be a transaction which was reached by the spirit of the statute, though it did not fall within its words. It is true that, on advising that cause on the occasion, before it went to appeal, both the Lord Justice-Clerk and Lord Glenlee appear to have held, that a transaction by which a debtor should make a transference of cash to his cautioner, in order to provide prospective relief or security for him, would be struck at by the act. But they clearly contemplate the case of a transference of cash made to a cautioner in circumstances parallel to those in the case of Speir; that is, a transference, not properly as a payment, but as a deposit to secure against a future demand. There is a great distinction between that case and this. The cautioners here did not receive a deposit of money to keep in their hands against a future demand. The debt of Williamson to the Bank, which was the principal obligation, was effectually extinguished by the cash-payment which was made. The Lord Ordinary assumes it to have been admitted that the payment was made "with the design and effect of relieving the defenders of their cautionary obligation." I do not perceive an admission that the payment was made, any more for the secondary purpose of relieving the cautioners, than for the primary purpose of satisfying the Bank. But suppose it to have been made, from any cause or consideration peculiar to the Bank itself, as, for instance, from a wish on the part of the debtor not to have the Bank as a creditor under the sequestration, I should conceive that the debtor's paying cash to the Bank, in these circumstances, would effectually extinguish the principal obligation; and if it were so extinguished, I am at a loss to see how the cautionary obligation could remain. The mere circumstance, that there was a resulting benefit to the cautioner, could not suffice to bring him within the act 1696. It does not appear to me that the case can, *hoc statu*, be viewed as substantially different from that which I have supposed. Laying aside fraud, it would seem to be just the same as if the debtor, having possession of the requisite amount of cash, which he had got in any other way, had gone and paid it into the Bank. That would have been an effectual payment to the Bank, and any resulting preference to the cautioners would seem to be legitimate and un-

¹ June 15, 1825 (*ante*, IV. p. 42).

engeable. I am the more inclined to this view, as the case of a cautioner de- No. 596.
 as to be favourably considered.

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he Court postponed the decision of the case, and, on again advising
 the following opinions were delivered.

LORD BALGRAY.—The case is one of importance and difficulty, but my opi-
 is in favour of the Lord Ordinary's interlocutor. I am inclined to rest chiefly
 those admissions of the cautioners, in which they say that Williamson told
 of them, Rodger, that it was necessary for him to sell his heritage to enable
 to pay up the cash-account; that he intended to pay up that account; that
 Rodger went and informed Clyne, who then came forward as the purchaser; that
 Rodger got from Williamson an order on Clyne for the price, and Rodger accord-
 uplifted the price from Clyne, and he himself carried it to the Bank and paid
 the cash-account. I think the cautioner in this way mixed himself rather too
 up with the transaction. He went out of the usual course, and became sub-
 stantially the party carrying on the sale, and thereby causing the disposition to be
 made, the object and effect of which was his own relief. Undoubtedly, it is said
 he got possession of the price only under particular instructions; but for what
 use did he get it? I think, as a deposit to provide against the cautionary
 obligation. Under all the circumstances, I think the principles involved in the de-
 cision of the case of Speir are sufficient to support this interlocutor.

LORD GILLIES.—I consider this a case of very great difficulty and importance;
 I doubt whether it is possible for the Court to reduce this transaction without
 ascertaining some matters of fact, which can only be learnt from the verdict
 of the jury. It is true that, in some classes of cases, it is not essential to a reduc-
 tion under the act 1696, that mala fides be brought home to the party receiving the
 preference. If a debtor indorses a bill for £500 to one of his creditors, not in the
 ordinary course of trade, but for the creditor's satisfaction and security for a prior
 claim while the debtor is on the verge of bankruptcy, it will not save the transac-
 tion from reduction, though the creditor should be ignorant of his debtor's embar-
 rassments at the time. The mala fides of the debtor in giving the preference, by
 a voluntary deed and assignation, is enough, and the statute cuts down the transac-
 tion. But it is quite different, if the debtor, in place of indorsing the bill to the
 creditor, chooses to sell or discount it, and pay over the cash-proceeds to the cre-
 ditor; if the creditor take the cash payment in bona fide, he is safe. The question
 in the present case is, whether or not, upon the facts, so far as admitted, *hoc statu*,
 there has been a cash payment effectually made, so as to relieve the cautioners, as
 to extinguish the principal obligation. Now, the cautioners say, that they
 know nothing of Williamson's insolvency or embarrassment at the date of the
 transaction; and that, while there was a cash-payment, on the one hand, they are
 not prejudiced by any mala fides from having the full benefit of it, on the other. But
 they say that Rodger had taken no share in the transaction at all, and that he, as
 James Smith, had had no participation in effecting the sale, and had been igno-
 rant of the transaction. Suppose that Williamson, *proprio motu*, had sold his
 heritage, and had himself applied the price, as a cash-payment, to extinguish the
 obligation to the Bank; I am at a loss to see on what ground such a transaction
 could be set aside, so far as regards the cautioners. But if this be so, what is the in-
 terest of Rodger, taking it to the extent only to which he has made advance-

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sions, been such as to render the transaction reducible as to him and his co-cautioner? Does his interference prove that he knew Williamson to be insolvent, or does it expose him to the charge of mala fides? There is a cash-payment here, which is confessedly effectual to extinguish the principal obligation by Williamson to the Bank; and it does seem to me to be a strange doctrine to hold, that the accessory obligation of the cautioners can still remain to any effect. Their obligation was, that the principal debt should be paid; and when it is confessedly paid and extinguished, it is difficult to see what part of the cautioner's obligation remains unimplemented. But if there be any conceivable ground on which it can be maintained that the payment by the debtor to the Bank shall be good to the Bank, and yet not good to the cautioners, it must be, that the Bank was in bona fide, and the cautioners were not. That, however, cannot be assumed, *hoc statu*, when one of the cautioners had no concern whatever in the transaction, and the other states, that he knew nothing of Williamson's embarrassments. On that account, I conceive the Court cannot reduce the transaction as to the cautioners, without a proof of their mala fides, a proof of the fact of their cognisance of Williamson's insolvency, or of their being in some manner participes fraudis with him, in an attempt to carry through a transaction by which a preference should be conferred on them. I see no evidence of such facts now before the Court, and I apprehend that it will be necessary to have recourse to a jury trial, in order to the farther extrication of the cause.

LORD MACKENZIE.—I consider the case to be one of extreme difficulty. The inclination of my mind is, though not without much doubt and hesitation, that the Lord Ordinary has arrived at a correct result, though I cannot coincide with his Lordship as to the grounds on which he rests his judgment. The reduction is rested, not on fraud, but on the act 1696. The first view to which I shall advert, relative to the application of that act, is rested on the analogy of the case of Speir, on which the Lord Ordinary has proceeded. By that case, it was fixed, that, even though there was a transference of cash, still, if it was not properly a payment in extinction of a debt, but a payment or provision in security of a debt to become due, it was a transaction reducible under the statute. The case of Speir established that doctrine, and nothing farther. It is of no moment whether the cash was got from the sale of land, or had been lying for years in the debtor's repositories; if he ultroneously paid it over as a security against a debt to become due at a subsequent period, the transaction was reducible. It is said that principle applies here; but I should consider this the narrowest case that is conceivable, if the reduction had no other principle to support it. In this case, there was a cash credit. The precise amount of the debt due at any period, could be ascertained as definitely as in the case of an heritable bond for a specific sum. This amount was instantly exigible by the most summary method. There was therefore no contingency in the obligation, and it was not postponed to any subsequent period, nor was it in the power of the debtor to postpone it at his pleasure. A payment made to the creditor in this obligation was not a payment in security of a debt to become due; it was necessarily an actual and immediate extinction of a debt already due and exigible. But it is said, that even though Williamson had the money provided, and might have paid it himself to the Bank, yet a different result is produced if he gives the money to the cautioner in place of the Bank. I doubt extremely whether such a plea has any foundation. The cautioner in an instant ~~is relieved~~ to instant relief; and accordingly, when a summons of relief is

tioner in such a case, it always concludes that the principal debtor shall either pay the creditor, or pay to the cautioner, that he may relieve himself. Now, is not a payment of cash, made by the principal debtor to the cautioner, just an actual implement of the debtor's obligation of relief? Is it not an actual extinction of that obligation in which the cautioner is creditor as against the principal debtor? And if it be a cash payment, in actual extinction of an obligation, I apprehend it falls within the class of exceptions from the statute 1696. Indeed, the recent case of Gibson¹ appears to me to have carried the exception from the statute much farther than it is necessary to do in this case; for there it seems to have been held, that specific implement of any obligation whatever fell under the exception. I should much doubt whether such an extension as that was well founded. But it is unnecessary to go so far, as cash-payments, in extinction of an obligation, are undoubtedly excepted, and the payment of cash by the debtor to the cautioners appears to me to be within that exception. The cautioner has right to instant relief; the debtor is under an obligation to give such relief as soon as it is demanded; and if he extinguishes this obligation by making a payment in cash to the cautioner, I do not see how such transaction is to be excluded from the well-known exception just noticed.

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But I do not think there was a payment made to the cautioners, or any of them, in extinction of the debtor's obligation of relief; I think there was no proper payment to the cautioners at all. The cautioners admit that the money was placed in the hands of the cautioner, Rodger, not as a payment, but merely that he might carry it to the Bank. They admit that Rodger was a mere hand, and that it would have been an act of fraud if he did any thing with the money, except to carry it and pay it into the Bank. I do not think, therefore, that there was any proper payment to the cautioners. At the same time, if I conceived that William-son would, under the circumstances, have freed the cautioners by paying the price of the property into the Bank with his own hands, I should think it by far too thin a distinction to hold that the cautioners lost the benefit of the payment in consequence of the debtor using one of them as the hand by which he paid in the cash. It is upon a different view that I conceive the reduction is to be supported.

According to this latter view, the whole circumstances should be regarded as parts of one deed or transaction, the practical object and effect of which was to confer a security and preference upon the cautioners. Beginning with the debtor's communicating to Rodger that it would be necessary for him to sell his heritage to enable him to pay up the cash credit, and keeping in view that Rodger found a purchaser, uplifted the price, and paid it into the bank, I think the whole, viewed as one transaction, is reached by the statute. It is a voluntary deed by the debtor, (and *deed* is a wide word,) by which, in substance, a conveyance of the estate is made, whereby a preference is given to the cautioners. Suppose the debtor had executed a written deed, giving power to the cautioner to sell the property, uplift the price, and pay it into the bank, I conceive this would be a deed conferring a voluntary preference which is struck at by the act. But though no such deed was reduced to writing, the actual *res gesta* was substantially the same. It is proved that the debtor had said to the cautioner, that "I will sell—you will aid me—and I will pay the price into the cash credit." An agreement of this tenor is not only proved, but *rebus ipais et factis*, its full completion is established. The whole of this

¹ July 9, 1833 (ante, XL p. 916).

No. 338. occurs within the sixty days, and as I must consider the whole to be a voluntary deed, by which the cautioner got satisfaction or security, I hold it conferred a preference, which is struck at by the act.
 June 26, 1834. Steel & Co. v. Hoome & Co.

LORD PRESIDENT.—I agree almost entirely with the opinion of Lord McKensie. After the case of Speir, it is in vain to contend that fraud is an essential element in a reduction on the act 1696; and to that extent, that case is an authority in point. And it appears also from other cases, that there is no inconsistency in holding a transaction to be good as to one of several parties, and yet not to the others. When the circumstances of this case are looked to, I cannot resist the conviction, that the admissions of the cautioners implicate Rodger too much to allow them to plead that he was in bona fide to receive the money. I therefore, conceive, that there is no need to send the cause to a jury. There is no allegation that the bank had ever called up the money, or intimated any demand either to the debtor or the cautioners. The cautioner could have no motive for his interference, except to provide for his own safety. The debtor told the cautioner he was going to pay up the cash credit, but that he could not do this without selling his heritage. Such an intimation might, under the circumstances, have put the cautioner a little on his guard; but he goes and finds a purchaser, and then uplifts the price and pays it into the cash credit. I think all this is quite enough to warrant the Court in reducing, without having recourse to farther expiscation of facts before a jury.

THE COURT adhered.

W. DUTHIE, W.S.—J. BOOTH, W.S.—J. JOFF, W.S.—Agents.

No. 340.

JAMES STEEL and Co., Advocators.—*Russell.*
WILLIAM HOOME and Co., Respondents.—*A. Wood.*

Agent and Principal.—Commission-agents who did not guarantee their sales, but were not to conclude a sale without approval of their employers, having with such approbation sold goods to A, to be paid by an acceptance of B, for whom the goods were intended—held, on A's failure, that the agents had not rendered themselves personally liable for the price, by delivering the goods without having obtained the bill.

June 26, 1834.

2D DIVISION.

Ld. Fullerton.

T.

THE advocates, James Steel and Company, commission-agents in Glasgow, were employed by William Hoome and Company, manufacturers there, to dispose of their goods, on the footing that, as they did not guarantee the sales made by them, they should not conclude any without the approbation of Hoome and Company. In December, 1827, some verbal communication, as to the import of which the parties were not agreed, took place between them in regard to a proposed sale of a parcel of veronas, with reference to which Hoome and Company wrote Steel and Company a note in these terms:—"Please put down the ~~name~~ of the Liverpool house who gets the Veronas." This was answered by the following answer, written beneath by a clerk of the company:—"W. and J. Brown and Company, Liverpool

Alexander Graham, purchasers from us." Hoome and Company there- No. 346.
upon wrote to a correspondent in Liverpool, enquiring the character of June 26, 1894.
the house of J. and W. Brown and Company; and having received a Steel & Co. v.
satisfactory answer, they verbally authorized Steel and Company to con- Hoome & Co.
clude the bargain, which the latter accordingly did. In point of fact, the
sale was to Alexander Graham, mentioned in Steel and Company's
answer to Hoome and Company's note; but the goods being bought by
him for Brown and Company, he was to pay for them by a bill from
Brown and Co. at four months. The goods were thereafter delivered, but
no bill was received at the time; and though Hoome and Company were
aware of this, they never objected to Steel and Company that they had
violated their duty in delivering the goods before receiving the bill stipu-
lated for. The price of this parcel was afterwards settled for by Graham
in cash, without the intervention of any bill from Brown and Company.
In the month of January following, another sale was approved by Hoome
and Company, on a general representation by Steel and Company that
it was in all respects similar to that already mentioned. The invoice bore
the goods to have been sold for nett cash down, and they were delivered
on the 16th of that month, neither the price nor any bill of Brown and
Company being received at the time of delivery. Between the 15th and
18th, though on which day exactly could not be ascertained, the account
sales of the transactions for the month of December was reported by
Steel and Company to Hoome and Company. In this account sales,
the purchaser of the first parcel of veronas was set down as Alexander
Graham, and to this Hoome and Company stated no objection, though
they marked, as a notandum, under it, "For W. and J. Brown's bill, of
Liverpool." In February, Graham became bankrupt, and Steel and
Company, not having received from him any bill of Brown and Company
for the second parcel of veronas, Hoome and Company contended that
they were liable for the price. To have this matter determined, they
presented a petition to the Sheriff of Lanarkshire, setting forth, that the
goods under the first sale had, as authorized by them, been sold by Steel
and Company to Graham, on behalf of Brown and Company, and as to
the second sale, that the goods, as they were given to understand, "were
sold to Graham on the same footing as the former quantity, namely, that
the said W. and J. Brown and Company's bill was to be given for the
amount," and therefore craving to have Steel and Company ordained to
deliver up a certain quantity of the goods in their hands unsold, on recei-
ving payment of a balance brought out on the footing that Steel and Com-
pany were to be debited with the price of the second parcel of veronas
above mentioned.

In defence, Steel and Company contended that they could not be so
debited, and consequently were only bound to deliver up the goods in their
hands, on receiving payment of the full balance due them, not subject
to such deduction.

No. 340. In the farther discussion of the case, Hoome and Company mainly rested their action on the plea that Steel and Company, by delivering the goods without at the same time getting Brown and Company's bill, had rendered themselves liable for the price; but they also stated alternatively that the first sale was represented to them as made not to Graham but to Brown and Company, and that both it and the second were authorized by them on that understanding; and on this alternative view, they pleaded, that as the sale had been authorized to be made to Brown and Company only, Steel and Company had violated their duty in selling to Graham, to whom no sale had been authorized.

(case 26, 1834.
Steel & Co. v.
Hoome & Co.)

The Sheriff allowed a proof, in which evidence was led as to the usage of trade in regard to sales in such circumstances, how far it was the practice to give delivery of the goods before cash or bill be received; and farther it was deponed to by Steel and Company's clerk, who had written the answer to Hoome and Company's note previous to the first sale, that the word "*purchasers*" had been by mistake written by him in the plural, instead of in the singular. The Sheriff pronounced an interlocutor, containing a variety of findings as to the facts of the case, and, in particular, the following:—"Finds it instructed by the invoice of the said second parcel of goods, that they were sold for nett cash down, and that the defenders, Steel and Company, were therefore bound in law, and in mercantile usage, before parting with the second parcel, to have procured the value of the same, either in cash, or by Messrs Brown and Company's bill, which seems to be considered equally good as cash, unless the defenders had previously obtained the consent of the pursuers to part with the said second parcel of goods to Graham on the loose terms which they appeared to have done on their own responsibility alone;"—and on the whole case he repelled the defences, and ordained Steel and Company to deliver up the goods in their hands, on payment to them of the balance tendered by Hoome and Company, which debited them with the price of the second parcel.

Steel and Company thereupon brought an advocacy, in which the Lord Ordinary pronounced the following interlocutor:—"Finds the respondents, manufacturers in Glasgow, employed the advocates as commission-agents in the same place, for the sale of their goods: Finds it admitted that the advocates did not undertake to guarantee the sales, and, on the other hand, that they were not authorized to conclude sales without the respondents' approbation: Finds it proved, that, in December, 1827, the advocates sold a quantity of goods belonging to the respondents, to Alexander Graham, to be paid by a bill at four months, accepted by Messrs Brown and Company of Liverpool: Finds it proved, that this sale had been communicated to, and approved by the respondents: Finds it proved, that these goods were delivered by the respondents to the advocates, and by the advocates to Graham, so

Messrs Brown's acceptances were placed in the advocates' hands: Finds No. 340. it proved, that the conduct of the advocates in this particular, was consistent with the usual practice in Glasgow in similar circumstances; and finds it not proved that the respondents, in approving of the said sale, had received from the advocates any representation, or acted under the impression that the goods were to be retained by the advocates until the acceptances were delivered: Finds, that a sale of another quantity of goods, belonging to the respondents, was effected by the advocates to Graham in January, 1828: Finds it admitted by the respondents, that this second sale was represented to them, generally, as being similar in its terms to the former, and that they, in reliance on that representation, approved of it: Finds it proved that this second sale was a sale to Alexander Graham, for an acceptance by Messrs Brown and Company, at four months, and was a sale on the same terms as those of the prior sale, in December: Finds, that some time after this second sale, and after receiving the goods, Graham became bankrupt before either paying the price, or delivering Brown and Company's acceptance for the amount: Finds that, in these circumstances, the advocates did not incur, on the ground of misrepresentation, or breach of duty in any other particular, a personal liability to the respondents for the price of the goods last mentioned, sold in January, 1828: Therefore advocates the cause, and recalls the interlocutors complained of, but in respect that the present process is brought by the respondents for the recovery of certain goods belonging to them, and retained by the advocates in security of the balance said to be due to them, which balance is not yet ascertained; appoints the cause to be enrolled, in order that parties may be heard upon the amount of that balance, as affected by the preceding findings, and on any other points essential to the final disposal of the cause."

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Hoome and Company reclaimed, and now rested the case chiefly on the ground that the representations as to the first sale were such as must have led them to understand that Brown and Company were the purchasers, and not Graham, and so that their approval of the second sale was only on the footing of its being to Brown and Company.

The Court being equally divided (Lord Justice-Clerk and Glenlee for adhering, and Lords Cringletie and Meadowbank for altering,) ordered minutes of debate to be laid before the other Judges for their opinions.

The following were returned—

LORD MONCRIEFF.—It is agreed, that the second sale was made on the same terms as the first; and that the respondents, Hoome and Company, understood that it was to be so.

It is agreed, or not disputed, that both sales were in fact made to Alexander Graham, as the party purchaser. There would otherwise be no question, as it is his bankruptcy that produces the opposition of interests.

It is further clear, that, in both sales, the stipulation, as between Steel and

No. 340. Company and Graham, was, that a bill accepted by W. and J. Brown and Company, of Liverpool, should be given for the price.

June 26, 1834. It is not alleged, that in either sale the advocates, either expressly, or by implication, undertook to guarantee the price. But it was understood, that the respondents were to approve of each sale before it was concluded.

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The price in the first sale was paid in cash; and it is not stated that the bill of Brown and Company ever came into the possession of the respondents. The goods had been delivered by the respondents to the advocates, and by them to Graham, before any bill was received.

The goods in the second sale having been also delivered, and Graham having become bankrupt, before either the price was paid, or the stipulated bill granted, the question is raised, whether the advocates, as agents, are liable to make good the loss to the respondents?

I am of opinion, that no sufficient ground has been laid, in the facts admitted or proved, to establish such liability; and that the interlocutor of the Lord Ordinary ought to be adhered to.

Two points have been maintained by the respondents:—

1. That the advocates were not justified, either by the terms of the transaction, or by the usage of trade, in delivering the goods to Graham before receiving the bill of Brown and Company; and,

2. That the advocates had represented the first sale, and consequently the second, as a sale to Brown and Company as purchasers, and that the respondents had not approved of any sale to Graham.

I. I do not understand that there is any difference of opinion, at least among the consulted Judges, on the first point. At any rate, I am clearly of opinion, that there is no ground for that plea. The evidence taken before the Sheriff is conclusive, that, according to the usage of trade, if the sale made and approved of was a sale to Graham, with the stipulation only that a bill accepted by Brown and Company should be given for the price, the advocates were justified, as agents, in delivering the goods, before the bill drawn by Graham had been accepted by Brown and Company. And it is farther very clear to me, on the whole statements in the record, that the respondents were perfectly aware that the goods sent by them for the first sale had been delivered, although the bill had not been received, and that they made no objection on that account.

It does not appear to me to be necessary to go more particularly into that point. But I humbly think it a fact of considerable importance in the cause, that that was the main ground of action maintained by the respondents in the Sheriff Court.

II. The case of the respondents is now chiefly rested on the second point, viz. an allegation that the first sale was represented to them as a sale to Brown and Company as the direct purchasers.

As there is no doubt, that that sale was in fact made to Graham, and had never been objected to, it was clearly incumbent on the respondents to aver and to prove the fact, that the advocates represented it to them as different from what it really was. I do not find that it is so averred in the record, in such a distinct form as that I can hold it as the deliberate statement on which the respondents, in preparing the record, meant to put their case; but if it could be taken as sufficiently averred, I am of opinion, that it is not only not proved, but disproved.

The respondents make statements sufficiently direct and positive in their

note of debate. But, when their condescendence is looked into, the material averment is of a very different kind. In article 2d, referring to a particular note, they say, that they were distinctly informed, "that W. and J. Brown and Company were the purchasers, at least that the parcel of goods in question were sold for their bill, on condition of which the goods were to be delivered." That is a long and rather desultory article; and, towards the end of it, they use certain other words, by which they deny "that they authorized the defenders to conclude any transaction with Graham, or to deliver any part of their goods to him, acting on his own account," and they add that he was represented as a mere agent. These last quoted words cannot, I apprehend, take away the express qualification of the averment in the previous part of the article. But the matter is made still more precise in article 3d, where it is said that the information given was, "that they (Brown and Company) were the purchasers, or, what is the same thing, that the goods were sold for their bill." They go on to amplify this; but the amplification amounts merely to a statement, that they did not authorize the advocates to deliver the goods to Graham, on the mere promise of the bill of Brown and Company, or before receiving it.

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On these statements, I cannot hold that there is in the record any specific averment, that the sale of which the respondents approved was represented to them as a sale, not to Graham, but to Brown and Company, as themselves the purchasers. On the contrary, the averment in the qualified alternative is so expressed, as to accord accurately with the actual case of a sale to Graham, under the stipulation of the bill of Brown and Company being given for the price. It differs from the actual case only in this, that they say, that they did not authorize delivery of the goods to Graham upon the promise of the bill, or before it was received. But this is evidently stated with a view to the ground on which the case was brought before the Sheriff, and argued throughout in that Court,—that is, on the ground that the advocates were not justified in delivering the goods before getting the bill.

But, supposing that the averment were sufficient, is it proved? I humbly think that it is not.

It is unfortunate, that the communications between the parties, as to these sales, were almost entirely verbal. The first sale was made in the beginning of December, 1827. In their original petition to the Sheriff, the respondents stated distinctly, that they were informed at the first, that the sale was to be made to Alexander Graham, though they added that it was said he intended purchasing, on account of a Liverpool house of responsibility. It is clear, therefore, that there had been a verbal communication, in which the name of Graham was expressly mentioned as the purchaser. To prove that Brown and Co. were represented as the purchasers, the respondents state, that they sent a note to the counting-house of the advocates, in these words:—"Please put down the firm of the Liverpool House, who gets the veronas," and that they got an answer in these words,—"*W. and J. Brown and Co., Liverpool, acceptance to Alexander Graham, purchasers from us.*" It will be observed, that the name of Brown and Co. had clearly not been mentioned in the verbal conversation; and I find it difficult to conceive, that, if it had been stated that the sale was to them, their name should not have been mentioned, or even asked, at the time. On the other hand, the note is not inconsistent with the actual transaction. The advocates have always stated, that Graham, in making the purchase, intended to send the goods to Brown and Co., and it was plainly on that footing (*implying delivery*) that he expected to get their bill. The respond-

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ents naturally wished to know, who the parties were who were to grant the bill; and therefore, not stating the Liverpool House as the purchasers, they simply ask the firm of the Liverpool House 'who gets the veronas,'—by no means the natural expression, if they had thought the Liverpool House to be the vendees. The answer is proved to have been written by a clerk; and that clerk has sworn distinctly, that the word purchasers, in the plural, was written by him by mistake. I can have no hesitation in believing this; because it could not be otherwise than a mistake, seeing that this clerk could have no motive to state the matter incorrectly, that the transaction stood entered in the books as a sale to Graham, and that the invoice and account sales were afterwards rendered in the same form. Neither do I think that it could possibly mislead the respondents; because the note stated distinctly, that the bill was to be accepted to Graham, and because, according to every reasonable probability, the respondents themselves knew the actual state of the transaction, by the previous verbal communication.

Nevertheless, if there were nothing more in the case, these two notes might be of some weight, in absence of all proof of the verbal communing. They seem to me, however, to constitute all the evidence which the respondents have of their material averment. For I can attach no weight to the communication with Mr Malcolm of Liverpool. Whether the sale was made to Brown and Co., or only made on the faith of their bill being given, it was equally natural to enquire concerning their credit; and Mr Malcolm's letter being produced, it shows nothing applicable to the one case more than the other. The Court called for the letter to which it is an answer. But it cannot be found; and I can by no means receive the statement, either of Mr Malcolm or of Mr Morrison, on loose recollection, as any evidence at all of what that letter may have contained. An enquiry concerning the credit of a Liverpool house might very naturally leave the impression, that sales to that house were intended, though no such thing was said; and it would be very dangerous to take letters obtained by the agents of the respondents as evidence of a more precise state of the fact. I therefore lay this entirely out of view.

But, while I think the evidence relied on by the respondents very unsatisfactory, I am of opinion, that it is far outweighed by the facts on the other side.—1. The transaction is fairly put down in the books of the advocates. 2. It is clear that Graham was mentioned in the first communication. 3. When it was stated in the clerk's note, that the acceptance was to be to Alexander Graham, why did the respondents make no enquiry how the transaction came to take that form? 4. The form of the averment in the condescendence, even after the cause was in Court, convinces me that the respondents themselves did not originally contemplate any such thing as an averment, that, when they approved of the first sale, they believed Brown and Co. to be the actual purchasers from the advocates. These things I consider as extremely strong. But one matter of written and real evidence remains, which appears to me to be altogether insuperable.

The first sale was concluded in the beginning of December. At what precise time the goods were delivered does not appear from the record. But the sale was completed, the price was paid, and at last the account-sales of that transaction was rendered. That account-sales is admitted to have set forth distinctly that Graham was the purchaser. The respondents say that they did not receive it till the 14th or 18th January, 1828. This is not admitted precisely; but it is ~~admitted that they did not~~ be of little or no importance. It is admitted, that they did not

saring that form. By their own statement, the second sale had been previously No. 340.
 included, approved of, and the goods delivered, on the footing that it was on the
 same terms with the first sale. Receiving, then, the account-sales of the first trans- June 26, 1834.
 action, showing Graham as the purchaser, did they then object to it, or represent Steel & Co. v.
 at the second sale should not be held to stand on that footing? I find no such Hoems & Co.
 ing in the record. Nor is it any where averred, that they ever made an attempt
 object, until after Graham had become bankrupt. In the second article of the
 undescendence, indeed, it is insinuated, that the account-sales were so made out
 audulently, in order to entrap the respondents. I can see no ground for imagi-
 ng this, especially as the invoice had been made in the same form. But where
 there any statement, that the respondents objected before Graham's bankruptcy?
 find none; and I regard the fact of their holding the account-sales without
 jection, as conclusive of their own knowledge that it agreed with the actual state
 the transaction.

It does not appear to me, that the effect of this is taken off or at all lessened,
 the circumstance of the account-sales not being rendered till after the second
 le was concluded. On the contrary, if it had been rendered before, it might have
 en overlooked, the first sale being arranged satisfactorily. But it could not be
 overlooked, when the second sale had just before been sanctioned on the same
 rms with the first, if the respondents truly believed that Brown and Co. were
 e purchasers. It is not in the delivery of the account-sales, but in the holding
 it without objection, that the force of the evidence lies.

Neither did the respondents overlook it, if any faith can be given to their
 statement as to the alteration made upon that document before it was produced.
 ertainly, it cannot be assumed, that that alteration was made at the time. But if
 e respondents were to receive credit for this, it must prove, that they particularly
 tended to the form of the account; and yet they neither stated any objection to
 e advocates, nor did they make the alteration such as to accord with their pre-
 sent averment, but merely added below the name of Alexander Graham, as pur-
 aser, the words, 'for W. and J. Brown's bill of Liverpool,'—an addition, which
 evidently in perfect accordance with the actual case, of the sale being made to
 raham, on his engaging to deliver the acceptance of Brown and Co.

On the whole matter, therefore, I am of opinion, that the respondents have
 led to establish any ground on which the advocates should be subjected to the
 s in question, and that the Lord Ordinary's interlocutor should be affirmed.

LORD PRESIDENT.—I concur.

LORD GILLIES.—I concur.

LORD COREHOUSE.—I concur.

LORD FULLERTON.—I concur.

LORDS BALGRAY and MACKENZIE.—The parties in this case, residing in the
 me place, and having transacted their business partly by personal communica-
 ns, without the intervention of writing at all times, has occasioned an obscurity
 some of the matters which has given rise to the present dispute. As happens
 all questions of the kind, presumptions and inferences must be made and ad-
 dted, so as to enable a reasonable and equitable determination to be come to,
 der the whole existing circumstances of the transaction between the parties.

There are some points upon which the parties appear to be agreed, and these
 material to be kept in view.

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1. The defenders, as agents, were not bound to guarantee the sales which they made on behalf of the pursuers.

2. The defenders were bound, on the other hand, to make no sale without the previous approbation of the pursuers.

3. The enquiries made, relative to the responsibility of Messrs W. and J. Brown of Liverpool, were undertaken and made by the pursuers themselves.

4. The second sale to Mr Alexander Graham, in January, 1828, and that now in question, was authorized by the pursuers, Hoome and Company, to be conducted on the same terms on which the defenders had made a previous sale to the same person.

These admissions simplify the case much; and it is evident that the pursuers can insist upon the liability of the defenders, only on the ground that they had represented the bill of the Messrs Brown as the consideration, and that it was a breach of duty to deliver the goods to Graham before obtaining the bill. But, as the defenders were not ex concessis guaranties, there is nothing in this argument, 1st, Because, in the first sale, the goods had been delivered before the bill arrived with the pursuers' approbation; and, 2d, Because it is proved that this is the practice of the trade.

The case is now made to turn on the point, that the pursuers were informed, that the sale was made, not to Alexander Graham, but to Messrs Brown and Company. The whole circumstances of the case are adverse to this supposition. The transaction, as stated by the defenders, is plain, simple, and usual in the trade. The sales were made to Alexander Graham, and he was to furnish the acceptances of Messrs Brown and Company.

There appears to be no evidence of the allegation of the pursuers on this head, that can be relied on.

It seems to be clearly established by the invoice, by the evidence of Alexander Graham, and by the books of the defenders, that truly the sale was made to Alexander Graham.

The whole evidence of the alleged misrepresentation (which the defenders had no interest to make), rests on the note of William Macalister, the clerk of the defender (p. 14), where it is obvious, that the pursuers are taking advantage of the clerk writing, in a hasty answer, at the foot of the note, 'purchasers' for 'purchaser.' He expressly depones, that this was a mistake. P. 60, B.

This note, with great submission, could have deceived no person; for it is scarcely possible to conceive, that the words would have been so collocated, if it was really understood by all concerned, that Messrs Brown and Company were to be stated as purchasers. The statement would have been 'W. and J. Brown and Company, Liverpool, purchasers from us, acceptance to Alexander Graham.' This is evident to any mercantile person.

Now, in opposition to this note, and clearly corroborative of William Macalister's evidence, we have the account of sales rendered, in which Alexander Graham is expressly stated as 'purchaser,' and this account of sales was retained by the pursuers, without any remark, for at least a month.

The account of sales of the 2d parcel was rendered in the same terms, and also without remark, and then, when these accounts are produced after repeated orders, they are found to be vitiated and altered by the pursuers. This is not correct.

The statement of the pursuers in their condensation ought

of view. In article 3d of that condescendence, they say, 'that the enquiries made previously by the pursuers regarding that house (Messrs Brown and Company), were made in 'consequence of information given them by the defenders, that they were the purchasers, or, what is the same thing, that the goods were sold for their bill.' No. 340.
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Now, these are very different things, and if the second alternative of their statement be the true one, the pursuers have confessedly no case.

Under these circumstances, and considering the reasons contained in the interlocutor of the Lord Ordinary, it does not appear that there are grounds for subjecting the defenders, and of course that the interlocutor should be adhered to.

LORD MEDWYN.—The pursuers employed the defenders as commission-agents for the sale of their goods; they were not to guarantee the sales, but, on the other hand, they were not to conclude sales without the pursuers' approbation. Two sales were effected, the one in December, 1827, and the other in January, 1828, and it is admitted, that the second sale was made on the same terms as the first. The question between the parties properly is, not what really were the terms of the first sale, according to which the second sale is to be regulated, but what were represented and held out to the pursuers as the terms of the first sale, to which their approval, without which it was not binding against them, was obtained.

The defenders allege, that Alexander Graham offered for the goods, as purchaser on his own account, and promised an acceptance of W. and J. Brown and Co. of Liverpool in payment; that this offer was communicated to the pursuers, who soon after authorized the defenders to conclude the sale. On the other hand, the pursuers allege, that the defender's information was, that they had received an offer from a Liverpool house of respectability; that, on asking the name of the house, they were informed it was W. and J. Brown and Co., and that on enquiring and being satisfied of the responsibility of that house, they authorized the sale to them.

These are the respective statements of the parties, and perhaps it has not been sufficiently attended to how very important a difference there is between the two contracts. It might at first sight appear of little importance, whether the sale was directly to Brown and Co. or to Graham, on the promise to furnish Brown and Co.'s acceptance for the price; nay, it might seem that, in this latter case, the sale was the best secured of the two, as Graham also would be bound for the price. But it is most material to attend to this circumstance, that when an offer for a sale is received by a commission-agent, the price to be paid in cash, or by the acceptance of a specified house, and this is reported to and approved of by the owner of the goods, the agent is, by the usage of Glasgow, justified in delivering the goods to the purchaser, on the faith, that cash or the bill will be given in a day or two, and is not bound to refuse delivery till one or other of these is done. The owner of the goods is of course satisfied with the credit of the purchaser, before he approves of the sale to him, and knows that he can, without risk to himself, trust the goods with him without the cash paid down, or the bill immediately delivered. But it is quite different if the sale is to a person whose credit has not been approved of, and where the owner of the goods would have refused delivery, till the cash was paid or the bill delivered; there the agent would not be entitled to give delivery without the cash or the bill.

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The whole question then comes to this, Was the sale approved of by the pursuers as a sale to Alexander Graham?

The sale was verbal, and what is more, the communication of it to the pursuers was verbal also, and therefore there is no direct written evidence of the terms on which it was represented to them, and to which their approbation was required. But there seems sufficient evidence that the sale approved of by the pursuers was one to Brown and Company of Liverpool. Immediately after a verbal communication between the parties, the pursuers send this note to the defenders:—"Please put down the firm of the L.pool house, who get the Veronas." The answer which is received is in these words:—"W. and J. Brown and Company, Liverpool, acceptance to Alexander Graham, purchasers from us." The pursuers, I think, could understand nothing else from this, but that Brown and Company was the firm of the Liverpool house who were to get the Veronas. Accordingly, they so understood it. They immediately set about enquiring as to the credit of that house, and there is tolerably good evidence that they made this enquiry, because they understood that Brown and Company were the purchasers. Mr Malcolm has not preserved Mr Morrison's letter of 8th December, 1827, which was enclosed to him, making the enquiry on behalf of the pursuers, but his present recollection of the import of it is, that the enquiry was made about Brown and Company, "to whom I was given to understand a house in Glasgow, friends of his, were about to make a sale of goods." The recollection of Mr Morrison, who wrote the letter to Mr Malcolm, is pretty much the same; he says he enquired about the Messrs Brown, "as friends of mine here were about to make sales to them." This seems to prove that the pursuers at the time put the construction they allege on the communication from the defenders, as they were well entitled to do, and acted upon it; and that obtaining a most satisfactory answer to their enquiries about the credit of W. and J. Brown and Company, the sale they approved of was a sale to that house.

It is not so much as alleged, nor is there the smallest reason to believe, that they made any enquiries as to the credit of Graham.

The defenders think they get rid of the inference from the answer to the pursuers' note of enquiry, as M'Allister, their clerk, says, that 'he made a mistake in writing the word "purchasers" in said card, in place of purchaser, as it ought to have been, as applicable to Alexander Graham.' I have great difficulty in accepting this explanation, when the card is viewed as an answer to the note of enquiry; and I cannot help thinking that, if the intention had been, not so much to supply the desired information, as to correct the misapprehension, which, according to this view, it plainly imported, it would have been couched in very different terms. It would have been in some such terms as these:—"Alexander Graham is the purchaser of the veronas, and he gives a bill of W. and J. Brown and Company of Liverpool, for the price.'

But suppose that it was a mistake of the clerk's, and that he did mean to represent Graham as the purchaser, he has not done so; and it is clear that the pursuers did not so understand it—so that, when the pursuers verbally approved of the sale, they approved of a sale to W. and J. Brown and Company, to whom or to their agent, and on their credit, by this approval, according to the usage of the trade, they authorized delivery of the goods, without waiting for the counter-delivery of cash or a bill.

So much as to the first sale in December, 1827.

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A second sale was made, and it is admitted by the defenders. "The transactions were entirely similar;" and according to the pursuers "having been given expressly to understand from the defenders," that the transaction was to be settled "exactly in the same terms" with the first, "they authorized this second transaction to be concluded."

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It is not stated by the defenders, in the answers to the condescendence, on what day this approval was given; but they have assumed that, by this time, the pursuers had learnt from the account-sales that Alexander Graham was the purchaser of the first parcel; and the Lord Ordinary's interlocutor bears, that, "some time before Messrs Brown's acceptances were placed in the advocator's hands," which might have called upon the pursuers to enquire who were really the purchasers, when a fresh sale was to be made. But it appears by the statement of the defenders themselves, that no bill of Brown's was ever given to the pursuers; the account being settled by a payment of £40 in cash, "on the 15th of January, and not till then was a settlement made by the defenders." This settlement is the account-sales produced by the pursuers; and by the invoice to Graham (Pro. 20-22), it appears that the delivery to him was on the 16th January. The probability is, that the sale of the second parcel was approved of when a settlement was making of the price of the first parcel, (the goods being delivered the next day); and this is strengthened by the statement in the original answers to the petition, which bears—"About the middle of the month of January last, Graham again made an offer to the defenders for a parcel of goods belonging to the petitioners, exactly in the same terms with the former. The defenders had part of the goods in their hands. They received the rest from the petitioners on the 15th of January, and, with their approbation, concluded the sale." Hence, the approval of the second sale was probably given before the actual delivery of the account-sales of the first, for it is not averred in the record that the account-sales was delivered first. But suppose the account-sales was actually delivered at this time, it would be little attended to in opposition to the assurance, that the second sale was on the same terms as the first. It is stated by the defenders, that the pursuers were told that Graham was the purchaser of the second parcel; but no evidence *prout de jure* is adduced of this, and only the account-sales referred to.

It is very possible that the defenders made the sale to Graham, and that they may have thought that the pursuers' approbation was given to a sale to him, when, through their failure to give information sufficiently explicit, the pursuers understood they were asked to approve of a sale to W. and J. Brown and Company, and did approve only of a sale to them.

I am thus unable to see that the pursuers approved of a sale of their goods to Alexander Graham; and as they were delivered to him, and he has failed without paying the price, the defenders must be responsible; and, therefore, I am of opinion that the interlocutor of the Lord Ordinary ought to be altered.

LORD CRAIGIE.—I concur in the above opinion.

On the cause being put out for decision, Lords Cringletie and Meadowbank stated that now they concurred with the majority of the consulted Judges; and

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THE COURT accordingly adhered to the Lord Ordinary's interlocutor.

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M'Kenzie v.
Sinclair.

HAMILTON and COOPER, W.S.—THOMAS LANDALE, S.S.C.—Agents.

No. 841.

REV. WILLIAM M'KENZIE, Pursuer.—*M'Neill.*

SIR JOHN GORDON SINCLAIR and D. SCOTT, Defenders.—*D. F. Hope—*
Cunninghame.

Minor—Teinds—Valuation.—1. Decree obtained in an action raised by tutors in name of their pupil, not reducible on that ground by a third party. 2. Averments not held relevant to infer reduction of a decree of valuation of teinds.

June 26, 1834.

2D DIVISION.
 1d. Moncreiff.

IN 1798, the tutors of the defender, Sir John Sinclair of Murkle, then a pupil, raised in his name a process of valuation of the teinds of his lands, lying in the parishes of Reay, Thurso, and Olrig, in which decree in absence was obtained, valuing severally the rental and the teinds in the respective parishes, the rent of the lands in the parish of Olrig being found to be £128, 12s. 2d., and the teind consequently valued at £25, 14s. 5d. This valuation, so far as regarded the parish of Olrig, was founded on and given effect to in two augmentations of stipend, one depending at the date of the valuation, and the other raised in 1808. A third augmentation having been brought in 1828, the defenders, Sir John Sinclair and Mr Scott (who had bought a portion of Sir John's property) made a surrender of their teinds as valued. The minister, the pursuer M'Kenzie, thereupon raised the present process of reduction of the decree of valuation, on the grounds, 1st, that the process of valuation was inept, as carried on in name of a pupil; 2d, that the minister had not been duly cited, or, at least, that the decree was pronounced in absence of him; and, 3d, that certain irregularities had taken place in regard to the proof, and that the decree proceeded on insufficient evidence. The only evidence extant in the process of the minister having been cited, was the extract decree, but this bore that he had been cited; and, in regard to the proof, it appeared that a commission had been granted to Mr Kermack, assistant-clerk to Mr Jeffrey, depute-clerk of Session, who was one of the tutors, and the ordinary factor and agent for the Sinclair family, but who took no charge of this particular process—that he and one Bisset, who had been a clerk in his office, were the witnesses examined, and deponed that the lands were all under lease, and that Mr Jeffrey had produced the leases, showing a rental which was adopted in fixing the valuation, but that the value of the mansion-house had been deducted from the rental of the lands in Olrig parish, it being assumed to lie in that parish, whereas, as it now appeared, it truly lay in the parish of Thurso; and the minister further alleged that certain grassums, which, if ~~deducted from the valuation~~

leases, would have raised the rental by £5, 14s., had not been taken into view, "or at least the full amount thereof," and also, that at a period not more than a year and a half after the date of the decree, the sub-tenants were paying a rent of £628.

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In these circumstances, the minister contended, that besides the ineptness of the whole proceedings as pursued in name of a pupil, there was no legal evidence of the minister for the time having been cited—that the evidence of the factor and agent, who was also one of the tutors, and his clerk, was not sufficient to prove the rental which the large sub-rent, paid so shortly afterwards, showed to be much beneath the true value, and that these circumstances, with the omission to take into view the grassums—the irregularity in granting the commission to the assistant-clerk of Mr Jeffrey, and the deduction of the value of the mansion-house, were sufficient to warrant a reduction of the valuation.

The Lord Ordinary found "that no relevant grounds have been condescended on for reducing or opening up the decree of valuation called for in this reduction," adding the following note, which sufficiently details the grounds of defence:—

"A process of valuation is of a peculiar nature. The decree does not pass in absence, as a matter of course, as in ordinary actions. If the proper parties be called, the pursuer is entitled to proceed; but he cannot obtain decree without proof being led and considered by the Court. In the present case, both the minister and the titular were called; and the titular made appearance. A proof was led; and it was only on that proof that decree passed. That decree stood unchallenged for thirty years, and was judicially recognised in subsequent processes, to which the minister and heritors of the parish were parties. It certainly can only be on strong and precisely defined grounds, that the Court will admit a new investigation by evidence, as to the correctness of the proof taken, and of the valuation made upon it.

"The circumstance of the defender having been a pupil at the date of the action, is irrelevant; because it was the act of his tutors, and no lesion to him existed, or can be stated by any party in this cause.

"The allegation as to grassums not having been estimated, or duly estimated, seems to be irrelevant,—1st, Because it is clear, that the only grassums alleged to exist were stated in the proof, and were taken into consideration; and even if there were any error in the estimate, the Lord Ordinary doubts the competency of reconsidering the correctness of the judgment on the proof, to the effect of reducing the decree. 2d, Because the allegation in the condescendence is much too loose to afford a relevant ground of reduction; it being merely that 'Mr Jeffrey did not take into account the grassum paid by Mr M'Leod and others, or at least the full amount thereof,'—a statement which leaves the possibility, that there might be a mere fractional deficiency. The pursuer's counsel averred

No. 341. more strongly at the bar ; but these are the words of the record. 3d, Because, upon any estimate of the grassums, it would not make a difference as to the teind, sufficient to make lesion to the extent of one-third. The difference on the rental would only be about £5, 14s., or about £1, 3s. of teind.

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“ The circumstance, that the lands are averred to have been sublet at a much higher rent, ‘not more than a year and a half after’ the date of the valuation, appears to be irrelevant—1. Because the rent taken was the true rent at the date of the valuation ; 2. Because it is not usual to estimate by subrents in such cases ; and 3. Because that subletting, a considerable time after the decree, might arise from accidental causes which cannot now be traced.

“ The statement, that the value of the mansion-house of Murkle was deducted, though situated in the parish of Thurso, is irrelevant ; because it was clearly taken to be in the parish of Olrig, and was first valued, with the lands around it, as in that parish.

“ The statement, that the lands of Whitefield and Buchts were not included in the valuation, is too vague to be admitted to proof ; and the fact stated in answer, that they made parts of the estate of Murkle, and were always included in that description, is not sufficiently met.

“ The statements with regard to Mr Kermack being commissioner, and Mr Jeffrey being a witness, have no relevancy. The proceeding was according to the ordinary practice at the time ; and unless it can be shown that some great wrong was done, there can be no justice in opening up such proceedings, after thirty years’ acquiescence, and after all the witnesses are dead, and other means of proof probably lost.”

The minister reclaimed ; but

THE COURT adhered.

Horne and Rose, W.S.—J. BALFOUR, W.S.—Agents.

No. 342.

M'FARLANE'S EXECUTORS, Pursuers.—*Keay—Shaw.*
JOHN FERGUSON, Defender.—*D. F. Hope—Houston.*

Agent and Client—Reparation.—A party sent a bill to a law-agent with the view of his attending to his interests in the estate of the acceptor, who had died ; and the agent lost the bill. Held that the agent was responsible to his client for the amount of the bill ; but an enquiry ordered, as to certain circumstances averred by the agent to have the effect of exonerating him from that responsibility.

June 26, 1834.

2d Division.
d. Moncreiff,
F.

THE late George M'Farlane held a bill for £100, dated 21st November, 1820, drawn by him upon, and accepted by James M'Nee, dealer in Balfour. M'Nee having died, and his son ~~James M'Nee~~

certain proceedings regarding his estate, in the Commissary Court at No. 342. Glasgow, M'Farlane, in March 1821, transmitted the bill to the defender Ferguson, writer in Glasgow, with a view to steps being taken for recovery of the amount. Sometime thereafter, M'Farlane raised an action in the Sheriff-court of Stirlingshire, against M'Nee's son, who had incurred a representation to his father, for constituting against him certain debts due by his father to M'Farlane, including this bill; and for the purpose of producing it in that process, he applied to Ferguson to return it. On a search, however, by Ferguson, he could not discover it, but he offered to obtain the consent of M'Nee's son to hold the bill as produced, or to be at the expense of a process of proving the tenor. This offer M'Farlane refused, and it was alleged that the Sheriff of Stirlingshire, in consequence of the non-production of the bill, assoilzied M'Nee's son from the claim therefor, though of this statement no evidence was produced in the present process. In 1823, M'Farlane raised an action against Ferguson, before the Sheriff of Lanarkshire, founded on the loss of the bill by him, and concluding for payment thereof. In his defences, Ferguson, besides alleging that the bill was without value, and calling on M'Farlane to specify the value given for it, again offered to obtain the consent of M'Nee's son to hold the bill as produced in the ranking of his father's creditors, or to be at the expense of a proving of the tenor. This offer was in like manner refused by M'Farlane, who insisted that he was entitled to full payment of the bill from Ferguson; but the Sheriff holding the offer of bearing the expense of a proving of the tenor to be reasonable, sisted procedure till such process should be raised and brought to a conclusion. A proving of the tenor was accordingly raised, but, of date 9th March, 1826, it was dismissed by the Court. In the meantime, M'Nee's son had executed in favour of M'Farlane a trust-disposition of all his estate and effects, for payment of his own and his father's debts, and on the cause being resumed before the Sheriff, Ferguson called upon M'Farlane to rank on M'Nee's estate, for the amount of the bill. This M'Farlane declined doing, on the ground, that without production of the document of debt, he was not entitled to do so; and thereafter being sued by M'Nee, in an action of count and reckoning for his intromissions under the trust, he, of date 21st January, 1829, obtained from him a discharge, paying over a certain sum, as the surplus balance remaining in his hands. After some further procedure in the action before the Sheriff, the following judgment, of date 4th April, 1831, was pronounced:—"Finds that the bill in question, went amissing while in the hands of the defender: Finds, that the pursuer was trustee on the estate of the late James M'Nee, the acceptor of that bill: Finds, that although said bill had gone amissing, that circumstance did not prevent the pursuer from claiming to be ranked as a creditor on M'Nee's estate, for the debt for which that bill was granted by M'Nee to the pursuer, if

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said bill was truly given for value : Finds, that the pursuer does not allege that he claimed to be ranked on M'Nee's estate for that debt, or that he took any steps for constituting the same against said estate : Finds, that if the pursuer had taken such steps, and instructed resting owing the debt, all that could have been required of him, would have been to have found caution judicially, that the bill itself, if it should ever cast up, would not be acted on, or payment of it attempted to be recovered, and in the whole circumstances of the case, the great delay in which, on the part of the pursuer, throws suspicion on the claim, dismisses the action ; but finds no expenses due to, or by, either party, and decerns."

Decree having been extracted by Ferguson, M'Farlane raised the present action of reduction thereof, (carried on after his death by the pursuers, his executors,) on the ground that Ferguson, by the loss of the bill intrusted to him as agent, incurred a personal responsibility for the debt, which could not be elided by pleading that the debt might not have been recovered, even though such loss had not taken place.¹

In defence, it was pleaded—

That even admitting that general doctrine, (though subject to some doubt from the decision in the case of *Pentland v. Wright*,)² it could not warrant reduction of the decree in the present case, because,

1. M'Farlane had failed to specify any value given for the bill, which, therefore, must be presumed to have been without value, the more especially as he took no measures to prove the debt aliunde against M'Nee's estate.

2. As trustee on that estate, he was bound to have set apart a dividend for this claim for relief of Ferguson, and was not entitled to pay the residue to M'Nee, without providing therefor ; and,

3. The bill in question was included in the account, for which he obtained from M'Nee a discharge of his intromissions as trustee.

This last statement was denied by M'Farlane's executors, and some other matters of fact were disputed by the parties.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note : *—" Finds it admitted, that the bill in question was put into the

¹ *Chatto and Co. v. Marshall*, Jan. 17, 1811 (F.C.); *M'Millan v. Gray*, March 2, 1820 (F.C.)

² June 28, 1833 (ante, XI. 804).

* "The Lord Ordinary thinks himself bound, by the principles of law applicable to such cases, to repel the grounds of defence which the Sheriff has sustained. The rule he holds to be, that where, by the act or neglect of a party acting under legal responsibility, a creditor has lost his legal right, or legal position regarding it, he must either be restored to that position, or the debt must be paid ; and it is incompetent to plead in defence, that payment might not have been obtained, through loss or omission had occurred. This is the clear doctrine of the cases of *Chatto and Co. v. Marshall*, January 17, 1811, and *M'Millan v. Gray*, &c., 1

defender's hands as an agent, with the view, at least, of considering what measures were proper to be adopted for recovering the contents thereof from the acceptor, and that it was lost in his hands, or through some act of negligence on his part: Finds, that as it is not denied that the said bill bore to have been granted for value, the legal consequence of the bill being so lost, was, that the defender became liable in payment of the sum in the bill, unless he had either proved the tenor thereof, or proved, by the writ or oath of the original pursuer, M'Farlane, that it had been granted without value: Finds that the attempt to prove the tenor failed, and no offer was made to prove non-onerosity, by writ or oath of the pursuer: Finds that it was not incumbent on M'Farlane to make any claim on the estate of M'Nee, the acceptor, on account of the debt involved in the said bill, when he was disabled from producing the bill itself: Finds, that if the defender had tendered payment of the said bill, he might then have been entitled to demand an assignation of any claim of debt competent to the pursuer against the estate of M'Nee, on account of the transaction in which the bill originated, and to have made a claim against

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though the case of Pentland and Others v. Wright, June 28, 1833, has been referred to, as indicating a different application of the law, it appears to have been a very special case, and cannot, in the Lord Ordinary's opinion, be held to have established a different principle. It follows, from the principle held in the cases above mentioned, that M'Farlane could not be called on to take the hazards of an ordinary action or claim for constituting a debt against M'Nee. If he had had the bill, non-onerosity could only be proved by his writ or oath; whereas he would probably have had no means of proving the debt, but by the writ or oath of M'Nee. Neither could he be required to explain the nature of the value paid, unless upon reference to his oath, or, at least, upon tender of payment of the debt on an assignation. This last was the defender's proper course, though it might possibly have remained doubtful, what was incumbent on the pursuer. But nothing of this kind having taken place, the Lord Ordinary cannot see how the defence could be sustained consistently with law.

"Still there is something remaining, and the Lord Ordinary thinks, fairly within the record:—1st, Though the defender has lost his opportunity of referring 'no value' to M'Farlane's oath, it is still possible that it might be proved by his books or other writ: 2d, If the debt was stated in the accounts with M'Farlane, as M'Nee's trustee, clearly, second payment cannot be obtained: but, 3d, If it should appear that M'Farlane had the means of seeing that the debt could be proved by the books or other writs of M'Nee, he was bound to retain the funds in his hands as trustee, and inform the defender that he did so for his relief. If, with such knowledge, he not only divested himself, and took a discharge of his intromissions, but paid over £40 to M'Nee, it would be very unjust that he should now recover the contents of the bill from the defender. As trustee, he was bound to attend to all debts, and specially bound to attend to the defender's interest in regard to this debt.

"The Lord Ordinary has taken no notice of the statement as to the decree of the Sheriff of Stirlingshire, because, the process being lost, there is no proper evidence of the fact of its existence, and it is not admitted."

No. 342. the estate, in virtue of such assignation; but finds, that no such tender or demand was ever made; therefore, reduces the decree brought under challenge, and decerns: But before farther answer, Appoints the cause to be enrolled, and the defender to be prepared to state, 1st, Whether he will undertake to prove by the writ of the deceased George M'Farlane, or by the oath of any of the present pursuers, that the bill in question was granted without value; or, 2d, Whether he will undertake to prove, that the debt which was the foundation of the bill, was estimated and included in the accounts, on which the deed of agreement, and discharge produced, which was executed between M'Nee, junior, and M'Farlane, as trustee on his estate, proceeded; or, 3d, Whether he will undertake to prove, that the said debt, if not included in the settlement, did appear, and might have been proved from the books or writings of M'Nee, in the pursuer's possession, as trustee, or made known to him; and, in the meantime, reserves all questions as to the competency or relevancy of such proof, if offered, and reserves also all questions of expenses."

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Ferguson having reclaimed,

THE COURT, while they adhered to the Lord Ordinary's interlocutor, in so far as it reduced the Sheriff's decree, remitted to allow, before farther answer, an investigation into the whole circumstances of the case.

J. LIVINGSTON, W.S.—R. BURN, W.S.—Agents.

No. 343.

ALEXANDER STOTT and Others, Appellants.

THOMAS GRAY, Respondent.—*Neaves.*

Jurisdiction—Appeal to Circuit Court.—1. In determining whether the subject matter of a suit does not exceed the value of £25, so as to render an appeal to the Circuit Court incompetent, the Court look only to the terms of the conclusions of the summons. 2. A summons concluded for payment of "£21, 5d. or such other sum, less or more," as should appear, on accounting, to be the just balance of the defender's intromissions; decree was pronounced for £21, 1s. 10d; the defender appealed,—held, after certifying the case, that the appeal was incompetent.

June 26, 1834.
2d Division.

GRAY raised an action against Stott and his cautioners before the Sheriff of Kincardineshire. He set forth, that he had engaged Stott to manage a spirit shop for him, and that Forbes and Berry became cautioners for Stott's intromissions, to an extent not exceeding £100; that, when Stott's engagement ceased, "there remained due by him to the pursuer the sum of £21, 5d., being a balance unaccounted for, of the goods committed to his charge in the said management, and cash arising from the ready money sales thereof," and that the pursuer had often required payment "of the said sum of £21, 5d." The summons concluded, ~~that the~~ defenders should be decerned, "jointly and severally, to

to the pursuer of the said sum of £21, 5d., or such other sum, less or more, as, on a fair and accurate state of accounts, shall appear to be the just and true balance of the said Alexander Stott's intromissions, as manager foreshaid, with interest thereof since the 2d of December last." No. 343.
June 26, 1834.
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The Sheriff, after a remit to an accountant, gave decree for £21, 1s. 10d. and Stott and others took an appeal to the Circuit Court. Gray objected to the competency of the appeal, that the summons concluded for a balance of indefinite amount, being "£21, 5d., or such other sum, less or more," as should prove to be the true balance upon an accounting. It would have been competent, under this conclusion, to have given decree for a sum exceeding £25, if the true balance, upon accounting, had shown such sum to be due. And even if it could be alleged that such decerniture would have been incompetent, or that the conclusions were not regularly deduced from the premises, it was sufficient to render an appeal incompetent, if the conclusions, de facto, demanded a sum of indefinite amount. Had the summons concluded for £100, the action could not have been appealed, though only £20 had been awarded; and, in principle, this case was on the same footing.¹

The appellants answered, that the summons specially set forth the sum of £21, 5d. as due, and as the sum for which they had required payment; the conclusion of the summons should therefore be read as if substantially restricted to that amount. But, farther, decree had been given for £21, 1s. 10d., and the pursuer had not appealed against that judgment. The defenders alone had appealed, and thus the sum in issue between the parties, as brought under appeal, was definitively fixed as not exceeding £25. The cause brought under appeal was therefore expressly within the rule of the statute, because "the subject-matter of the suit did not exceed in value the sum of £25 sterling."

The Lords of Justiciary certified the case to their Lordships of the Second Division, who directed the summons to be printed, and the question of competency to be discussed in the robing-room. The Court found the appeal incompetent. Their Lordships considered that the terms of the conclusions of the summons formed the test for determining whether, in the words of the statute, "the subject-matter of the suit did not exceed in value the sum of £25 sterling;" and that, as a sum of indefinite amount had been concluded for, the action did not admit of being appealed to the Circuit Court.

J. BURNS, S.S.C.

—Agents.

¹ Giffen, Nov. 19, 1824 (ante, III. 301).

No. 344. JOHN MARTIN and Others, (Trustees for Guardian Assurance Company),

Jameson—Rutherford—Anderson.

June 27, 1834.
Martin v.
Goldie.

ARCHIBALD WATSON GOLDIE, Defender.—*D. F. Hope—Shene—
G. G. Bell.*

Process—Agent and Client—Reparation.—1. A summons subsumed that the defender, in consequence of fraud and imposition practised on the pursuers, in relation to a security for a loan of £8000, "was bound to make good to the pursuers all loss and damage which they may sustain by the perpetration of the said fraud," and that the defender "was bound to make good to the pursuers any loss which may arise to them in consequence of their having been fraudulently induced to lend the said sum of £8000; the conclusions were, that the defender should relieve the pursuers "from all loss and damage which they may sustain, in consequence of their having been induced to lend the said sum," and that, in order to ensure such relief, he should be decreed to pay the said sum to the pursuers, on being assigned to their security, or at least to pay "such sum as may, together with the sum that may be recovered by the pursuers operating upon their security, make up to the pursuers the full amount of £8000,"—held, that as the summons contained a subsumption simply of damages, it was inept to deduce conclusions of relief where no actual damage had yet been sustained. 2. Question—If the agent of a borrower fraudulently represents his client's lands to be held in fee simple, knowing them to be entailed, and fraudulently states a false rental to the lender, can the lender bring a direct action against such agent, concluding to have the loan taken off his hands? or must the lender first attempt to make his security available for what it will bring in the market, and must he try the point, in a question with the heirs of entail, whether the lands are entailed?

June 27, 1834. In 1833, John Martin and others, trustees for the Guardian Assurance Company of London, raised an action against Archibald Watson Goldie, 1st Division. W.S., alleging, that he, as the agent of Lord Duffus, had, by fraud and Lt. Fullerton. D. deception, induced them to grant a loan of £8000 upon inadequate security.

The summons set forth that, in 1825, Lord Duffus applied to the Guardian Assurance Company for a loan of £8000, and Goldie, as his agent, represented the lands of Westerseat as a fee-simple property, worth £430 per annum, while he was aware that the chief part of the property was strictly entailed, and that the rental which he produced and averred to be correct, "was worthless, false, and deceptive:"* that Metcalfe, the English agent of the Company, being deceived by Goldie's representations, solicited his agency and assistance in getting the bond and disposition in security, in the Scottish form, prepared for the Company, and that these instruments, together with the sasine, were expedited by Goldie: that the pursuers had since learnt the true situation of the lands contained in their security, and their insufficiency, and had required

* It was afterwards averred at the bar, that the rent of the ~~lands~~ was only £30.

repayment of the loan : " that Goldie having thus been actor, art and part, with the said Lord Duffus, in fraudulently inducing them, the said Assurance Company, to accept of a security which was known to them to be wholly insufficient, is bound to make good to the pursuers, for behoof of the said Assurance Company, all loss and damage which they may sustain by the perpetration of the said fraud : " " that the fraud, misrepresentation, and concealment on the part of the said Archibald Watson Goldie, by means of which alone the said Assurance Company were induced to lend their money, as aforesaid, were greatly aggravated by the consideration, that the said Assurance Company reposed the most unlimited confidence in the said Archibald Watson Goldie, and, instead of employing an agent in Scotland to attend to their interest and complete the security, were induced to employ the said Archibald Watson Goldie for that purpose." The summons subsumed, " that Goldie is therefore bound to make good to the pursuers any loss which may arise to them, in consequence of their having been fraudulently induced to lend the said sum of £8000 to the said Benjamin Lord Duffus, as aforesaid : Therefore, it ought and should be found and declared " that Goldie was bound " to free and relieve the pursuers from all loss and damage which they may sustain, in consequence of their having been induced to lend the said sum of £8000 to the said Benjamin Lord Duffus, as aforesaid ; and, in order to ensure this relief to the pursuers," he should be decerned to pay £8000 to them, on being assigned to the security, or to pay them " such a sum as may, together with the sum that may be recovered by the pursuers operating upon the said bond and disposition in security against the lands truly and effectually contained therein, make up to the pursuers the full amount of the said debt due to them of £8000, with interest thereof from the term of Whitsunday last, and all expenses they may incur in operating upon the said bond and disposition in security." This action was raised before the premonition of six months, required in the bond, had expired, subsequent to the demand for payment.

Goldie, in defence, repelled every imputation of fraud or impropriety, as totally without foundation ; and pleaded, as a preliminary defence, that the premises of the summons were irrelevant to infer the conclusions, as the action was substantially an action of damages, and yet it was not alleged that any damage had been sustained or was inevitable.¹ Damage could only arise from the insufficiency of the security, and that could not be proved without trying to sell the lands. This was not done, and could not be done before raising the summons, as the six months' premonition had not expired. Besides, it was impossible to ascertain whether any ground of damage existed in respect of part of the land being entailed, until a judgment should be obtained, in a question with the heirs of entail, whether the lands were entailed or not.

¹ *Allan and Son, Jan. 24, 1834 (ante, 329).*

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The pursuers answered, that premonition was necessary, only to enforce payment in terms of the bond, and could not affect an action founded on the loan having been fraudulently impetrated: that the summons contained a conclusion of relief, in which it was competent to insist, before actual damage had accrued, and, as they were ready to prove the whole marketable land in their security was not worth more than £30 per annum, they were not bound to incur the delay or trouble of selling that land, and trying questions with the heirs of entail as to the rest, but were entitled to recur at once to the agent whose fraud had imposed the bond upon them, and require him instantly to relieve them. In such an action they were entitled to try with the agent, so far as might be necessary, the question whether the lands were entailed or not.

The Lord Ordinary found "that the conclusions of the summons are not regularly or legally deduced, according to the form and nature of the action, and therefore dismissed the action, and decerned: found the defender entitled to expenses, reserving to the pursuers to bring such new action as they may be advised, in competent form, and to the defender his defences thereagainst." *

* "NOTE.—Looking at the grounds of the present action, it is, in substance as well as in form, an action of damages. It proceeds upon the statement of various circumstances, given at most unnecessary length, and in most unnecessary detail, importing that the pursuers had been induced to lend the sum of L.8000 on heritable security, to Lord Duffus, by the misrepresentation of Lord Duffus, and the defender, acting as his agent, both of them, and particularly the latter, having, as it is said, described the lands as rented at particular sums, and as unentailed, while both of them, and particularly the latter, knew, as it is said, that they were not let at such rents, and that the greatest part of them were truly included in Lord Duffus's entailed estate. Accordingly, the subsumption is, that the defender having been actor, art and part with Lord Duffus, 'in fraudulently inducing them, the said Assurance Company, to accept of a security which was known to them to be wholly insufficient, is bound to make good to the pursuers, for behoof of the said Assurance Company, all loss and damage which they may sustain by the perpetration of the said fraud.' But the essential requisite of a summons, resting on such grounds is wanting. It is not stated that any damage has been actually incurred, nor is there even a statement of any specific fact from which damage must necessarily arise. The transaction into which the pursuers were induced to enter, as it is said, by the act of the defender, was a loan to Lord Duffus of the sum of L.8000, upon heritable bond, in the year 1825. It is provided by the bond, that if the granter fail to make payment, within six months after a demand intimated in due form, the pursuers shall have power to sell and dispose of the lands. The damage, then, arising upon such a transaction, must be occasioned by the failure of the debtor to pay, coupled with the inefficacy of an attempt to sell, or the inadequacy of the price obtained by a sale. But no such ground of action is, or indeed can be set forth; for it was admitted at the debate, that, although premonition had been given, the summons was raised before the period of six months had elapsed. And the fact is undoubted, that no sale has been attempted, and no question ever raised in any quarter, of the validity of the security. In these circumstances, the Lord Ordinary thinks that the summons cannot be sustained. Viewing the groun

LORD PRESIDENT.—I think the interlocutor of the Lord Ordinary is right. This **No. 344.**
 is an action of damages ; and yet it is not stated that any loss has been sustained. —
 It is quite possible that the pursuers may be exposed to no damage at all. It **June 27, 1894.**
 would be a hard doctrine for law-agents, if the creditor in an heritable bond, as soon **Martin v.**
 as he saw cause, or believed he saw cause, to apprehend that his security would **Goldie.**
 prove inadequate, was entitled to insist that the agent should take it off his hands,
 without his having tried the usual means of recovering payment by raising an action
 of mails and duties, or selling the land, or the security.

I conceive, also, that, as to one of the grounds of probable damage, viz. the alleged entail of part of the lands, the proper parties for definitively settling that question, are not made parties to this action.

LORD BALGRAY.—I am for adhering.

an action of damages, resting, not on the allegation that damage has been actually suffered, but upon the assumption that damage possibly may be suffered. And, looking at the conclusions, they are not conclusions for any specific damages, and could not authorize the liquidation of any specific damages, but resolve truly into mere declaratory conclusions, for determining beforehand, that the defender shall be liable in damages, if damage shall eventually be incurred. The Lord Ordinary is not aware of any authority for such a summons as this ; and nothing could afford a better illustration of the practical inexpediency or incongruity of such a procedure than the circumstances of this very case. The essential element of the fraud charged against the defender, as the ground of his liability, is the insufficiency or invalidity of the security ; so that, while the defender, having ostensibly no interest in the matter, is singly called upon, under most unfavourable circumstances, to defend the pursuers' right, the pursuers, in order to fix a hypothetical liability for damages upon the defender, place themselves in the extraordinary position of disparaging their own security, which has never been, and for any thing yet seen, never may be called in question.

“ Besides the main grounds of action urged against the defender, as acting in the transaction for Lord Duffus, the summons contains the statement, that the defender was employed by them in the completion of the bond ; and that, acting as their agent in the completion of the security, he was bound to disclose all the circumstances in his knowledge regarding the estate, under the penalty of being liable for any loss which might be sustained by the pursuers. This, it will be observed, being a ground of action directed against the defender, as agent for the pursuers, is essentially different from that hitherto considered, and might, if distinctly brought forward, possibly warrant conclusions different from mere conclusions for damages. But, in the first place, it does not seem to be distinctly stated here, either as a substantive ground of action, or as founding any different liability. It is said (p. 16, 17), ‘ that the fraud, misrepresentation and concealment, on the part of the said Archibald Watson Goldie, by means of which alone the said Assurance Company were induced to lend their money as aforesaid, were greatly aggravated by the consideration, that the said Assurance Company reposed the most unlimited confidence in the said Archibald Watson Goldie,’ &c. ; and, 2dly, If the action were to be rested by the pursuers on the defender's breach of duty, as acting in the capacity of their agent, the summons would require to be amended to an extent totally altering its character. In these circumstances, the Lord Ordinary has thought it best to dismiss the action, under the reservation authorized by the statute.”

No. 344. **1 LORD MACKENZIE.**—There is one ground, though somewhat narrow, which appears to me sufficient to support the Lord Ordinary's judgment, and I think it is on that ground that his Lordship has rested it. He views this as an action of damages only; an action containing nothing but a subsumption of damages; and therefore not warranting the incongruous conclusion of relief. Upon that ground I think it was right to dismiss the action; but not to assoilzie; reserving to the pursuers to frame a better summons, containing conclusions more regularly deduced.

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As to any of the other grounds touched on, in argument, I wish to guard my opinion. Assuming, as I must assume in a question of relevancy, that the facts stated in the summons are true, and that by allegations, wilfully false, as to the value of lands, and their being unentailed, Lord Duffus and his agent cheated the pursuers into this transaction, and got them to make a large loan, I am not prepared to say that a conclusion directed against the fraudulent agent to compel him to take the loan off the pursuer's hands, may not be a perfectly relevant conclusion. Suppose that a creditor was cheated into a loan upon lands not belonging to the client who borrows, and the trick is discovered next day, I conceive that the fraudulent agent in such a transaction would be liable in instant relief. And if the allegations of this summons were proved, I should think it a difficult matter to hold that the agent was not bound to take the loan off the pursuer's hands. As to the lapse of time before the pursuers learnt the true nature of the transaction, and raised their summons, that does not affect the principle. And it would appear to me to be a very doubtful doctrine, that a creditor should be forced to keep to his bad security, and try questions with heirs of entail, &c., in place of coming at once upon the agent and insisting on relief. As it is, I rest my opinion on the ground stated by the Lord Ordinary.

LORD GILLIES.—I am for adhering. I think the interlocutor well founded, and that the views stated by the Lord Ordinary are correct.

THE COURT accordingly adhered.

WALKER, RICHARDSON, and MELVILLE, W.S.—H. D. HILL, W.S.—Agents.

No. 345. **THOMAS COOPER and Others, Suspenders.**—*Cunninghame*—*W. Bell*.
RICHARD BLAKEMORE and Co., Chargers.—*D. F. Hope*—*Keay*.

Cautioner—Bankruptcy.—Circumstances in which it was held, that, where a sequestrated bankrupt, being discharged under a composition-contract, offered payment of the composition to a creditor, who refused it, because he believed he had a claim for payment of part of the debt in full; and no notice of refusal was given to the cautioners for the composition; and the bankrupt after some years was again sequestrated,—the creditor had lost his claim for the composition against the cautioners under the first sequestration.

June 27, 1834. IN 1821, Richard Blakemore and Co., tinplate-manufacturers at **Mosmouth**, entered into an agreement with Robert Brittain Blyth and Co., merchants in Edinburgh, relative to the disposal of their tin-plate. **1st** DIVISION. **Ld. Fullerton.** **B.**

their agreement with the Edinburgh house, a considerable amount of tin-plates was sent from time to time, to R. B. Blyth and Co., who made sales to their customers in Edinburgh, and rendered monthly accounts to Blakemore and Co., granting their acceptances, payable in London, at six months, for the nett proceeds of the sales, after deducting commission, &c., in terms of their agreement. In February, 1826, the estates of R. B. Blyth and Co., were sequestrated. A quantity of tin-plates, then on hand, was restored to Blakemore and Co. as their property, and Blyth and Co. remained indebted to Blakemore and Co. in the sum of £1909, 17s. Part of this sum arose from sales which had been effected in July, August, and September, 1825. For these the monthly acceptances of Blyth and Co. had been granted, and were still current. The accounts for October, November, and December, 1825, and January, 1826, remained unsettled.

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In November, 1826, a composition of 5s. 6d. per pound was accepted under the sequestration, and Blyth and Co. being discharged by the Court, resumed the management of their estate. Thomas Cooper and others became cautioners for the composition, the whole of which was payable within sixteen months after the date of approval. Blakemore and Co. had not ranked on the estate, but, in March, 1828, they made a demand on Blyth and Co., which was rested on the allegation that that firm had acted merely as del credere agents of Blakemore and Co. in effecting sales, and had not acted as purchasers from them, and resellers to the Edinburgh customers. Blakemore and Co. therefore claimed payment, in full, of all that part of the debt of £1909, which arose from sales, in which the price was not paid until after the bankruptcy of Blyth and Co. They contended that the prices paid, after the bankruptcy, either to the trustee, or to Blyth and Co. themselves, when reinstated in their affairs, ought to have been handed over to Blakemore and Co., as forming no part of the bankrupt's sequestrated estate; and they also claimed payment of the composition of 5s. 6d., upon that part of the debt of £1909, which arose from sales, in which the price had been paid to Blyth and Co., prior to their bankruptcy.

There was a separate obligation of guarantee, which had been undertaken by R. B. Blyth, for the transactions of a house in Glasgow, (Charles Berry Blyth and Co.) which failed, and was owing £1036, 10s. 2d. to Blakemore and Co. Upon one-half of that sum, or £518, 5s. 1d., the composition of 5s. 6d. was also demanded.

R. B. Blyth and Co. rejected these demands, and maintained that they were truly purchasers from Blakemore and Co., and resellers of the tin-plates to their own Edinburgh customers; that the whole debt of £1909, was therefore an ordinary debt, on which no more than the composition of 5s. 6d. was due; and that no part of it required to be paid in full. They also stated, that, in offering their composition they had made a calculation

No. 345. upon that assumption ; that they could not have offered so large a composition, if they had not relied on the whole £1909, being an ordinary debt, and, as Blakemore and Co. had kept back from claiming, until after the composition-contract was adjusted, they were now barred, by personal exception, from asking more than the composition. R. B. Blyth and Co. tendered payment of the composition upon the debt of £1909.

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In regard to the obligation of guarantee, R. B. Blyth and Co. contended that no larger debt than £240, 19s. 1d., was due under it. No tender of composition, upon the sum due under the guarantee, was made.

Blakemore and Co. refused to accept the composition as upon the whole debt of £1909, and maintained that they were liable to no personal exception from mora, because, if the bankrupt estate was legally liable to pay any part of that sum in full, R. B. Blyth and Co. had no right to compute their composition upon any other footing.

No intimation was made to the cautioners, of this offer of composition being rejected by Blakemore and Co.

After this, Blakemore and Co., in April, 1828, raised an action against R. B. Blyth and Co., to enforce the demands already mentioned. The cautioners for the composition were not made parties to that action, and no intimation was given to them. On 17th February, 1831, the Court pronounced this judgment. "In respect that R. B. Blyth and Co. admit that Blakemore and Co. are entitled to the composition of 5s. 6d. in the pound on the sum of £1909, 17s, acknowledged to be due by them to the pursuers, and also upon the sum of £240, 19s. 1d., also acknowledged to be due by the defenders, under their guarantee for Charles Berry Blyth and Co., to the pursuers, decern against the defender for payment to the pursuers of £591, 9s. 5d., being the amount of the composition upon the said two sums ; and allow an interim decree for the same to be extracted, without prejudice to the further claims of the pursuers in this action. Further, find that the defenders acted as agents for the pursuers. But before further answer, remit to the Lord Ordinary to enquire how far the defenders, or their cautioners for the composition, have been, or may be, affected by any mora on the part of the pursuers in bringing forward their claim ; and to do therein, and as to the other points of the cause, as to his Lordship shall seem proper."¹

R. B. Blyth and Co. became a second time bankrupt, and Blakemore and Co. did not prosecute their action to a conclusion. But they threatened to charge Thomas Cooper and others, (the cautioners for the composition,) for £591, 9s. 5d., under the interim-decree of 17th February, 1831, which ordained payment of that sum in name of composition. Cooper and others suspended on these grounds—

¹ Ante, IX. 468.

1. The whole composition on the debt of £1909, 17s., had been offered to Blakemore and Co., and rejected. They had not intimated to the cautioners the offer and rejection. Had they done so, the cautioners could have protected themselves, by calling on R. B. Blyth and Co. to consign an amount corresponding to the composition. R. B. Blyth and Co. remained solvent for some years after their offer was refused, but the cautioners did not even receive intimation of the action raised against them, and were allowed to remain in the belief that this debt was settled along with the others, until the time when they were threatened with a charge. This was after the second bankruptcy of R. B. Blyth and Co., so that the cautioners had lost all effectual recourse against them, if they were now to be subjected in payment of the composition. But when the creditor had refused the offer of payment from his principal debtor, and that too without notice to the cautioner, he could not, after a change of circumstances, come upon the cautioner, but must take the risk of any loss of that debt upon himself.

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2. These arguments applied, a fortiori, where no proof was adduced that the creditor had any reasonable cause for refusing the offer. As Blakemore and Co. had not prosecuted the action against R. B. Blyth and Co. to a conclusion, they were not in a condition to show that the offer of composition, as made in March, 1828, was not all that they had ever a title to demand even from Blyth and Co.

3. As the action against R. B. Blyth and Co. claiming a preference, would, if successful, have carried off part of the fund which the cautioners had relied on to provide the composition, Blakemore and Co. could not afterwards recur on the cautioners, as that would be both approbating and reprobating the composition-contract.

Blakemore and Co. answered—

1. The offer of composition to them, if accepted, necessarily implied that they discharged the bankrupts of all farther claim. But they bona fide believed they had a claim for a large part of the debt in full. They therefore could not accept of the composition as offered; but they did not on that account forfeit the benefit of the cautionary obligation. Neither had the cautioners any right to plead that they were prejudiced; for they had lost no right of relief except in consequence of their own negligence. They had bound themselves that the composition should be paid on this debt, and it was both their duty and their interest to see that it was either paid along with the other debts, out of the funds given up to the bankrupts, or at least that a sum was consigned to meet the amount of it. They had full power to do this, and if they chose to neglect it, and leave the bankrupts the uncontrolled administration of their estate, they must take the consequences, but they could not plead on any prejudice thence arising as a ground for freeing them from their cautionary obligation.

2. It was enough for the chargers, that they bona fide believed they

No. 345. could not accept the composition, as offered, without forfeiting a good claim of preference; and if the action against R. B. Blyth and Co., which had gone far enough to fix the character of agents upon them, had not been allowed to stand still in consequence of the second bankruptcy, the chargers expected to have shown that the claim of preference was well-founded.

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3. If the charger's claim of preference was well-founded, the cautioners had no right to compute the composition upon the supposition that such a claim was not to be enforced. If the claim was not well-founded, it could not carry away any fund on which the cautioners had relied, and they sustained no prejudice. There was no room for the doctrine of approbate and reprobate.

The Lord Ordinary pronounced this interlocutor:—"Finds that the chargers, in the year 1831, entered into an agreement with Messrs Robert Brittain Blyth and Company, in regard to the furnishing tin-plates by the former to the latter: Finds that under this agreement a series of transactions took place between these parties: Finds that the tin-plates furnished to Messrs Blyth and Co. to the month of June, 1825, inclusive, were paid by that company: Finds that Messrs Blyth and Co. became bankrupt, and were sequestered in the month of February, 1826: Finds that, at the date of the sequestration, the amount of the tin-plates furnished by the chargers, and unpaid for by Blyth and Co., was £1940, 16s. 7d. reduced by certain deductions for freight, &c. to £1909, 17s. sterling: Finds that that sum consisted partly of the price of tin-plates furnished during the months of July, August, and September, 1825, and partly of the prices of these articles furnished in the months of October, November, and December, 1825, and January, 1826: Finds, that in regard to the tin-plates furnished in July, August, and September, 1825, the accounts had been settled, and bills granted by Blyth and Co. to the chargers for the amount, being £778, 13s. 4d., which bills had been dishonoured: Finds that the accounts for the months of October, November, and December, 1825, and January, 1826, had remained unsettled at the period of the sequestration: Finds that, besides the debt due as above stated, Robert Brittain Blyth, one of the partners, was liable to the chargers under a guarantee granted by him for his brother Charles B. Blyth: Finds that the sequestration was closed by a composition of 5s. 6d. in the pound, finally approved of by the Court on the 23d of November, 1826, and that the suspenders became cautioners for payment of said composition: Finds that the chargers did not appear or claim in the sequestration: Finds, that in the beginning of the year 1828, fifteen months after the sequestration had closed, and after B. Blyth and Co. had resumed business, a demand was made by the chargers on B. Blyth and Co. for payment of the sums said to be due to them: Finds that the parties differed in regard to the principle of the settlement of the debt due directly by B. Blyth and Co. to the chargers, and also as to the amount of the

sum due under the guarantee : Finds, in regard to the first of these debts, that the chargers refused to accept of the composition on the said sum of £1909, 17s., being the gross amount of the price of the tin-plates, and insisted that, in regard to that part of the said sum which consisted of the prices of the tin-plates furnished during the months of October, November, and December, 1825, and January, 1826, which had been drawn by the trustee on the sequestrated estate from the third parties to whom they had been resold by B. Blyth and Co. they, Brittain Blyth and Co. were to be held to have received those prices as the agents of the chargers, and were consequently liable for the full amount of the prices so received : Finds it proved that, in the month of April, 1828, the amount of the composition on the foresaid sum of £1909, 17s. was tendered by Brittain Blyth and Co. to the chargers, and was refused by them : Finds that no notice of this tender, or of the refusal or grounds of it, was given by the chargers to the suspenders, the cautioners : Finds, that immediately after this tender was made and rejected, an action was raised by the chargers against Messrs B. Blyth and Co., concluding, first, for the composition at the rate of 5s. 6d. in the pound upon the sum of £1140 sterling, or such sum, less or more, as should be ascertained to be the amount received by the suspenders by the resale of the tin-plates prior to the sequestration ; secondly, for the full amount of the prices on the resales, which had been drawn by them or the trustee subsequently to the date of the sequestration ; and, lastly, for the composition on the sum due under the guarantee, which sum is there stated at £518, 5s. 1d. sterling : Finds, that Messrs Blyth and Co. in that action, denied their liability on account of the tin-plates furnished to them, beyond the composition on the foresaid gross sum of £1909, 17s. ; and also disputed the amount of the sum due under the guarantee, which they limited to the sum of £240, 19s. 1d. sterling : Finds, that after various steps of procedure in that action, the First Division of the Court, on the 17th day of February, 1831, pronounced an interim-decree for the sums admitted by the defenders, Blyth and Co., being, first, the composition on the sum of £1909, 17s. ; and, secondly, the composition on the sum of £240, 19s. 1d., and, quoad ultra, “re-mitted to the Lord Ordinary to enquire how far the defenders or their cautioners for the composition have been, or may be affected by any mora on the part of the pursuers (chargers) in bringing forward their claim :” Finds, that no farther procedure has taken place in that action ; and that in the course of it Messrs B. Blyth and Co. became again bankrupt : Finds, that the said action was neither directed against, nor intimated to, the cautioners : Finds that, after the said interim-decree was pronounced, and after the second bankruptcy of Messrs B. Blyth and Co., a demand was made against the suspenders, on the strength of the said interim-decree, as liquidating the amount of the composition due by them ; and that the question is now raised in the form of a suspension of a threatened charge on the bond of caution : Finds, in regard to the composition on the

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and Co.

No. 345. sum of £1909, 17s., being the debt due directly by Brittain Blyth and Co. to the chargers, that the chargers have, by their rejection of the tender of payment made to them by the principal debtor in April, 1828, their failure to intimate such tender and rejection to the cautioners, and the adoption of separate measures against the principal debtors, on grounds inconsistent with the payment of the composition now demanded, lost their recourse against the cautioners, the suspenders, for the amount of the said composition, and to that extent suspends the letters simpliciter, and decerns. Quoad ultra, and in regard to the composition on the sum of £240, 19s. 1d. sterling, being the sum due under the guarantee as liquidated by the interim-decree, repels the reasons of suspension, finds the letters orderly proceeded, and decerns: Finds the suspenders entitled to expenses, and allows an account thereof to be given in, and to be taxed by the auditor." *

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* "NOTE.—The claim for the composition on the sum of £240, 19s. 1d., being that due under the guarantee, as liquidated by the interim-decree of the First Division of the Court, of the 17th of February, 1831, appears to be unobjectionable. The only delay which took place regarding it was that required for its liquidation, as the parties differed on its amount; and there is no proof of a tender of any sum on that account having been offered to the chargers by B. Blyth and Co.

"The other and more important article of the chargers' claim, being that for the composition on the sum of £1909, 17s., stands in a very different situation. It appears from the agreement between the chargers and B. Blyth and Co., that both parties contemplated the resale of the tin-plates to third parties. At the date of the sequestration, the tin-plates, to the amount of £1909, 17s., had been resold to third parties by B. Blyth and Co., part of the prices on such resales had been drawn by B. Blyth and Co., who had granted their bills for the amount; while the balance of those prices had not been drawn until after the sequestration. The chargers did not appear in the sequestration at all. In April, 1828, fifteen months after the sequestration was closed, and when Messrs B. Blyth and Co. had resumed business, they made a demand, but a demand very different from that for a composition on the £1909, 17s. They contended that, although in regard to the prices drawn before the sequestration, and for which the bills had been granted, their claim was limited to the composition as on a debt due by the bankrupts, the prices drawn after the sequestration were to be held as having been drawn by the bankrupts or the trustee, for their behoof, and were payable to them in full; which proposition they maintained, on the ground that B. Blyth and Co. were, according to the true construction of the agreement, not the purchasers of the tin-plates, but the agents for the chargers in their disposal. Accordingly, an action having been raised against Messrs B. Blyth and Co., this was the main point in dispute in relation to the direct claim held against B. Blyth and Co. by the chargers. It turned upon the true construction of the agreement, a point which was not decided in that action, as the interlocutor of Court merely decerned, ad interim, for the composition, the admitted sum, and reserved the point in the remit, under which no further procedure has taken place.

"But, whatever may be the construction of the agreement, and whatever might be the amount of the claims of the chargers against B. Blyth and Co., it is indisputable that the liability of the suspenders, the cautioners, could not exceed the composition on the sum of £1909, 17s.; and that upon the tender of that composition they were entitled to a discharge. But it is established by the

The chargers presented a reclaiming note against the judgment, except No. 345. in so far as related to the guarantee debt of £240, 19s. 1d. The suspenders presented a reclaiming note as to that part of the judgment.

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LORD GILLIES.—In this case, Blyth and Co. made a tender of the composition on the debt of £1909, 17s. to Blakemore and Co., who refused it. Sometime after this, Blyth and Co. having again failed, a demand is made upon the cautioners for payment of that same sum which had formerly been tendered by the principal debtor, and refused by the creditor. In general, where payment is tendered by the principal debtor, and refused by the creditor, and loss afterwards arises, the creditor has no right to come against the cautioner for making good the payment which was formerly refused. I see nothing in this case to prevent that rule from applying. By the mere refusal, time was given to the debtor; no notice was made to the cautioners, who could then have provided for their own security, and it is too late to come against them now when the debtor is again bankrupt.

LORD MACKENZIE.—I look on this as an important and difficult question. If the offer of payment be made unconditionally by a debtor to his creditor, and the creditor refuses to accept it, in general it must be held that the creditor takes the risk of subsequent loss upon himself, and, if loss arises, he cannot recur upon any cautioner of the debtor to make good the payment which he has once refused. But it is a different thing if the offer of payment be made only upon certain conditions, and is refused on reasonable cause. Suppose that a sum is offered as full payment, and the creditor says he conceives it is not the true amount of the debt, and that he requires to make some investigation to ascertain this, so that he cannot immediately accept the sum on condition of giving a full discharge, I am not at present prepared to lay down, that, so refusing on fair grounds, he is to lose the benefit of having recourse against his debtor's cautioner, even if it should turn out on investigation that the full sum had been offered. It has been argued there should have been intimation of the rejected offer to the cautioners; but what prejudice have they sustained through want of intimation? The cautioners plead that they knew nothing of the matter, and I cannot see how they are in a worse situation than if no offer had ever been made at all. On the whole, however, although I have thrown out these doubts, and view the case as one of much difficulty, I rather incline to adhere to the interlocutor of the Lord Ordinary.

LORD PRESIDENT and BALGRAY concurred in the interlocutor of the Lord Ordinary.

THE COURT adhered, and refused both notes.

G. TODD, JUR.—SMITH and KINNAR, W.S.—Agents.

chargers in the former action, and the proof, that a tender of the composition was made in April, 1828, by Messrs B. Blyth and Co. to the chargers, and rejected. No notice, either of the tender, the grounds of rejection, or the subsequent action, was given to the cautioners, but the chargers went on litigating with Messrs B. Blyth and Co. until these parties again became bankrupt. In these circumstances, the Lord Ordinary thinks that the claim against the cautioners cannot be sustained."

No. 346.

THOMSON'S TRUSTEES.—*D. F. Hope—Monteith.*MONTEITH'S TRUSTEE.—*Rutherford—Davidson.*

Competing.

June 27, 1834.
Thomson's
Trustees v
Monteith's
Trustees.

Right in Security—Payment—Discharge.—Circumstances which held sufficient to infer that an heritable bond was extinguished without any regular discharge.

June 27, 1834.

2d DIVISION.
Ld. Medwyn.
R.

IN 1819, John Monteith, merchant in Glasgow, and carrying on business with his son, Robert, under the firm of John and Robert Monteith, granted to the late Robert Thomson, of Camphill, an heritable bond over certain premises in Glasgow, in security of the sum of £3000, whereof receipt was acknowledged in the bond, on which infestment followed. In 1820 Mr Thomson died, leaving a trust-deed of settlement, whereby he conveyed all his property to certain parties, as trustees. In 1825, John Monteith conveyed a portion of the premises above mentioned to James and Adam Monteith, merchants in Glasgow, under burden of this bond. In 1826, James and Adam Monteith became bankrupt; and their estates having been sequestrated, and the subjects conveyed to them by John Monteith having been sold, a multiplepoinding was raised as to the disposal of the price. Claims were, inter alia, given in for the trustees of the late Mr Thomson, on the one hand, under the heritable bond for £3000 in his favour, and, on the other, for the trustee on the estates of James and Adam Monteith, who alleged, that no money had actually been advanced by Mr Thomson to John Monteith at the date of granting the bond, but that it had been granted in security of bills and obligations, under which J. and R. Monteith lay to Thomson, which were then current, but which, together with all debts due by them to him, had been extinguished by payments or transactions between them. In support of this averment, the trustee referred to the books of John Monteith, of J. and R. Monteith, and of Thomson and Son, which showed no trace of any sum of £3000 advanced by the latter, and proved, as the trustee alleged, that nothing whatever was now due to him or his trustees.

Thomson's trustees, on the other hand, contended, that the bond remaining undischarged in possession of the creditor, and acknowledging receipt in gremio of it, payment or extinction could only be proved by a regular discharge; and, farther, that they were at all events entitled to hold the bond in security of two obligations certainly not extinguished, one being for £2000, advanced by Thomson to Robert Monteith, and the other a contingent obligation, under a contract of marriage of a daughter of John Monteith, in which Thomson had become a cautioner for payment of the portion.

The Lord Ordinary pronounced this interlocutor, adding the subjoined No. 346.
 note : *—" Finds, in the peculiar circumstances of this case, that, on the June 27, 1834.
 trustees of the deceased Robert Thomson being relieved of the obligation Thomson's
 in the contract of marriage between John Monteith's daughter and Mr Trustees v.
 John Pattison, they have no farther claim against John Monteith or his Monteith's
 estate, under the bond dated 30th July, 1819."

Thomson's trustees having reclaimed, the Court remitted to an accountant " to examine the books of Mr Thomson, as well as those of Mr John Monteith, and of Messrs J. and R. Monteith, of which copartnery Mr John Monteith was a partner, and any other books or documents calculated to throw light on the subject-matter of the present dispute, and to report whether at or subsequent to the date of the bond in question, there appeared to be any debt due to Mr Thomson, either by Mr John Monteith, as an individual, or by any company of which he was a partner, and what was the amount of the said debt; and also to report whether any, and what part of such debts, supposing any to have existed, appears from the said books and documents to have been paid since the date of the said bond."

The accountant reported as follows :—" In pursuance of this remit it

* " The Lord Ordinary is quite aware of the difficulty of admitting facts and circumstances to get the better of the distinct narrative of a formal instrument, such as the bond in question. But there are circumstances in the case fully established, which seem to support the statement of the granter, when opposed only by the statement of the trustees, who profess their ignorance of the transaction, except what they gather from the bond itself, and their inability to admit or deny the statement on the other side.

" The mercantile books, both of Mr Thomson and Mr Monteith, are reported to be accurately kept. If the sum of £3000 had been advanced by Mr Thomson to him on 30th July, 1819, the date of the bond, corresponding entries must have been made in their respective books; but nothing of the kind is to be found there. It appears, however, that large sums were due at this time to Mr Thomson, in security of which, it is, in these circumstances, extremely probable that this bond was taken, as stated by Mr Monteith. It appears that these sums were finally paid up on 6th April, 1824, by a payment then made of £69, 5s. 5d., so that it does not appear that the trustees have any right to refuse a reconveyance of the subjects, and discharge of the bond, on the ground of outstanding debts. In the answers to the minute, at p. 17, they seem inclined to wave the discussion of their claim, under the strict terms of the bond, and tacitly admitting, that the debt appearing from the books to be due at Mr Thomson's death has been finally paid up, they wish to retain this bond on account of two other claims. The first is for £2000. But this is a debt due by Robert Monteith, and not by John, and is so entered in Mr Thomson's books repeatedly. It therefore does not fall under the bond as a debt due by John Monteith. The other claim is a contingent one, but it seems to stand in a different situation. It is true that nothing has been paid as yet under the cautionary obligation in Mr Pattison's marriage-contract. But, as this is a debt of John Monteith's, and may be exacted from the cautioner, security must be given to relieve Thomson's trustees of this claim, before they can be called upon to discharge the bond and reconvey."

No. 346. has not been found necessary to examine the books either of Mr Thomson or of Messrs J. and R. Monteith, or any books or documents, excepting those contained in the printed appendix. Both parties agreed to confine the investigation to these printed accounts.

June 27, 1834.
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"From the account in pages six and seven of the additional appendix, it appears, that in July, 1819, when the bond in question was granted, there was due to Mr Thomson, by Messrs J. and R. Monteith, the sum of £1334, 19s. 10d., that is, there would have been such a balance in Mr Thomson's favour, provided the transactions had then been stopt, and the bills current had been then retired. The parties, however, had, at and after that period, very extensive transactions in money and bills. But whatever may have been the amount of the debt due to Mr Thomson, at the date of the bond, or at any after period, or the extent of the obligations come under by him, it is satisfactorily shown by the accounts in pages 18, 19, and 27 of the appendix, and pages 18 and 19 of the additional appendix, that there is now no debt due to Mr Thomson, either by Mr John Monteith or Messrs J. and R. Monteith; and there is no entry in the accounts to show that there is any debt due to Mr Thomson by any other company of which Mr John Monteith was a partner.

"In the year 1813, Mr Thomson advanced the sum of £2000 to Mr Robert Monteith, one of the partners of Messrs J. and R. Monteith. This sum, it appears, is still owing; but, it is quite evident, from the account in page seven of the appendix, that it was a loan to Mr Robert Monteith as an individual. It is stated in this account, taken from Mr Thomson's own books, that the money was advanced to Robert Monteith 'on his bill for a stock to put in with his father.' It is clearly shown from this entry from Mr Thomson's balance-sheets, in pages 10 to 17, inclusive of the appendix, and from the excerpt from his journal in page 26 of the revised answers for Mr Thomson's trustees, that this is a debt due by Mr Robert Monteith as an individual, and cannot be considered as a debt of Mr John Monteith or of Messrs J. and R. Monteith."

THE COURT thereupon adhered to the Lord Ordinary's interlocutor, with expenses since the date of the remit.

W. A. G. and R. ELLIS, W.S.—GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—Agents.

No. 347. JOHN DEMPSTER and MANDATARIES, Pursuers.—*Monteith*.
WALLACE, HUNTER, and Co., Defenders.—*D. F. Hope—Keay*.

Expenses—Auditor.—Where the auditor reserved a point for the consideration of the Court, and objections were taken against other parts of his report, which were repelled,—held not imperative to award expenses against the objector, in respect that there must have been a discussion, at all events, under the result of the auditor's report.

IN auditing the account of expenses in the case reported ante, p. 548, No. 347. the auditor reserved for the consideration of the Court the question, whether fees for a third counsel should be allowed to the pursuers. The pursuers took objections to the report for having disallowed a large part of a country agent's account, also the expense of bringing a witness from abroad; and certain fees to counsel. The Court, in the circumstances, repelled the objections, and, on the reserved point, held that only two counsel should be chargeable against the defenders. The defenders then moved for expenses, as all the objections had been repelled, and the reserved point was decided in their favour.

June 28, 1834.

1st Division.

Bentham v.

Richardson.

LORD GILLIES observed, that there must have been a discussion upon the auditor's report, in relation to the point reserved; and, as he was of opinion that it was not imperative to award expenses against the pursuers, they ought not, in the circumstances, to be awarded.

THE COURT accordingly refused to subject the pursuers in the expense of the discussion.

A. MOWBRAY and J. HOWDEN, W.S.—D. GRANT, S.S.C.—Agents.

JOHN BENTHAM, Suspender.—*Sutherland*.

JAMES BROOM and JAMES RICHARDSON, Respondents.—*Whigham*.

No. 348.

Meditatio Fugæ—Diligence—Process.—1. After the incarcerator has granted a written consent of liberation, and the party has been set at liberty, it is inept to present a bill for letters of suspension and liberation. 2. Circumstances in which the Court, while they refused an inept bill of suspension and liberation, found no expenses due to the respondent.

ON 7th May, 1834, Thomas Holton, residing in Carlisle, presented a petition to the Magistrates of Dumfries, and made oath that John Bentham, sometime butcher and publican in Carlisle, owed £20, 3s. 6d. to him and his brother William Holton, under deduction of a small account for meat; that Bentham had recently made a fraudulent conveyance of his effects in Carlisle to his sister, and had absconded: that Bentham was now in Dumfries, and that the deponent verily believed he was in meditatione fugæ. The Magistrates granted warrant to James Richardson, "sheriff-officer and constable," to apprehend Bentham for examination. Bentham having been apprehended, denied that he owed any debt to Holton or his brother; and declared "that he is not carrying on any business in Dumfries: that he is in lodgings, and has not taken a house in Dumfries, and that he cannot tell how long he shall stay, as he can go anywhere." At this stage of the proceedings, Holton sisted Richardson as his mandatory. The Magistrates ordained Bentham to find caution in the burgh-

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Bill Chamber.

Ld. Moncreiff.

D.

No. 348. *books de judicio sisti, &c., and, failing this, granted warrant to Richardson to imprison him till caution should be found. Bentham was imprisoned under this warrant, and, having obtained an aliment of 1s. per day under the act of grace, Richardson, on 31st May, executed a written recal of the aliment, and consent to the liberation of Bentham. Two days after, being set at liberty, Bentham presented a bill of suspension and liberation, against Bailie M'Harg of Dumfries, who signed the warrant, James Broom, town-clerk of Dumfries, the assessor to the Bailie, and Thomas Holton, and James Richardson, his mandatary.*

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Bentham v.
Richardson.

Bentham alleged that Broom had acted as the agent of Holton, and pleaded that this was alone sufficient to vitiate the whole proceedings; but, farther, that there was a fatal irregularity in the Magistrates granting warrant to Richardson, a sheriff-officer and constable, in place of granting it to one of the burgh officers, and that a warrant to Richardson was also vitious, in respect that he was the mandatary of Holton, &c.

Broom denied that he was the agent of Holton, and pleaded, 1. that as Bentham had been set at liberty, under a written discharge from incarceration, executed two days before he presented his bill of suspension, it was altogether inept; 2. that Bentham, who had no domicile here, and was now at liberty, could not appear without a mandatary; and, 3. that he had acted bona fide, and that the proceedings were regular. Answers were lodged for Richardson in similar terms, but not stating whether he was a burgh officer or not.

The Lord Ordinary "refused the bill, and found expenses due." *

The suspender reclaimed.

THE COURT unanimously adhered, on the merits; but, on the suggestion of Lord Gillies, who observed, that there appeared to be several awkward and unsatisfactory circumstances connected with the proceedings, their Lordships altered as to expenses, and found them due to neither party.

W. BELL, S.S.C.—T. JOHNSTONE, S.S.C.—Agents.

* "NOTE.—The facts admitted in the complainer's declaration are certainly not calculated to refute or even contradict the oath of *meditatio fugæ*. And though the complainer denies the debt, he cannot complain of injustice in being thus required to find caution *de judicio sisti*; seeing that, if he had remained in Carlisle, he would have been liable to immediate arrest, till he found bail, as the commencement of the suit in England. But the complainer being in fact liberated, there can be no scruple in refusing the bill."

SIR GEORGE WARRENDER, Pursuer.—*D. F. Hope—Anderson.*
 HONOURABLE DAME ANNE WARRENDER OF BOSCAWEN, Defender.—
Sol.-Gen. Cockburn—Keay—Shene.

No. 349.

June 28, 1834.
 Warrender v.
 Warrender.

Marriage—Jurisdiction—Citation—Foreign.—A domiciled Scotsman contracted a marriage in England with an Englishwoman, and continued to be a domiciled Scotsman after the marriage; a voluntary contract of separation was entered into, providing a separate maintenance to the lady, who afterwards resided abroad for many years, when a summons of divorce, on the head of adultery committed abroad, was raised against her in the Courts of Scotland—held, 1. That the domicile of the husband being in Scotland, the wife had a legal domicile there, and was amenable to the jurisdiction of the Scottish Courts: 2. That an edictal citation, being accompanied with actual intimation, by serving a copy of the summons on her personally, was good citation: and, 3. That it is competent for a Scottish Court to pronounce a sentence of divorce, although the marriage has been contracted in England.

SIR GEORGE WARRENDER of Lochend, residing at Bruntsfield House, June 28, 1834 near Edinburgh, was born in Scotland, of a Scottish family, and inherited Scottish land-estates. He was returned to Parliament in 1807, and he sat in successive Parliaments till 1832. Originally he sat for a Scottish district of burghs, but afterwards for an English district. From 1812 to 1828, he held an official situation at the Admiralty Board, or the Board of Commissioners for the Affairs of India, which required his attendance in London during a considerable portion of the year.

1st Division.
 Ld. Fullerton.

In 1810, Sir George entered into a contract of marriage with the Honourable Anne Boscawen, daughter of the late Viscount Falmouth. The Lady was of English birth, family, and domicile. The marriage was celebrated in London, according to the rites of the Church of England. She was a minor, and the guardians appointed by her father's will, were parties consenting to the contract. Marriage articles, after the English form, were entered into, by which, inter alia, the lady's fortune was placed in the hands of trustees for her use. Her guardians were parties to these articles. An antenuptial contract, in the Scottish form, was also executed, referring to the marriage articles, and stating, that Sir George had agreed to settle £1000 a-year upon his spouse, in the event of her survivorship, "to be secured on his real estates in Scotland." He therefore bound himself to infest and seize her in the lands of Chesterhall and others in Scotland, in security of her provision of £1000 a-year; and to give infestment, in Scottish estates, to trustees, in security of the stipulated provisions for the younger children of the contemplated marriage. In consideration of these provisions, Miss Boscawen renounced all claim of "terce of land, or third or half of moveables, or whatever else she can ask or claim, by and through the decease of Sir George Warrender;" and

No. 349. the children's claim of "legitim, executry, or what else they can ask or claim by and through his decease," was also renounced. It was provided, that the lands should be redeemable from the trustees on making payment or consignment, at Edinburgh, of the amount of the children's provisions, and that though the marriage should dissolve within a year and day, and without a living child being born, the contract should remain effectual. The deed contained precepts of sasine for infefting Miss Boscawen, and the trustees for the children, and a consent "to the registration hereof in the books of Council and Session in Scotland, or of any other proper Court therein, to remain for preservation, and, if necessary, that all legal execution may pass upon a decret to be interponed hereto, in usual form," &c. It was prepared in Scotland, and forwarded to England, where it was signed, a few days before the marriage, by Sir George and Miss Boscawen, and her guardians and the trustees.

June 28, 1834.
Warrender v.
Warrender.

Infeftment followed on the contract, in favour of Lady Warrender. Immediately after the marriage, Sir George and Lady Warrender came to Scotland, and spent some months there. Parties were at issue as to the amount of time subsequently spent by each of them in Scotland or England, or elsewhere, and as to the animus remanendi with which they were respectively actuated.

On 1st January, 1819, a voluntary agreement of separation was entered into between Sir George and Lady Warrender, to which her Ladyship's two brothers, Lord Falmouth and Mr Boscawen, were parties. It proceeded on this narrative:—"Whereas circumstances have arisen which have induced the said Sir George Warrender and Dame Anne, his wife, to agree to live separate and apart from each other from henceforth, until these presents shall be annulled, as herein aftermentioned; and the said Sir George Warrender has agreed to allow to trustees for the said Dame Anne, his wife, during such separation, the annual sum of £1010 sterling for her separate maintenance, provision, and establishment, to be paid at the times hereinafter mentioned, but to be subject to the deductions hereinafter expressed: And it hath been agreed that the said Viscount Falmouth and John Evelyn Boscawen shall be the trustees for that purpose, which sum of £1010 is to be over and above, and exclusive of the annual sum of £350 secured to be paid to the said Dame Anne Warrender, by the settlement made on her marriage, as or by way of pin money. Now, these presents witness, that the said Sir George Warrender doth hereby" bind himself to pay to Lord Falmouth and Mr Boscawen £1010, "during the joint lives of him and his wife." The sum was to be held, on trust, to pay the same as Lady Warrender should direct, and failing direction, to pay it to herself, "for her separate use, for her maintenance and support, notwithstanding her coverture." It was provided, "that if the said Sir George Warrender shall in any one year be obliged to pay, and shall pay any debt or debts of the said Dame

Anne Warrender, hereinafter contracted, to the amount in the whole of No. 349. upwards of £1010, then and from thenceforth the covenants of the said Sir George Warrender, herein before contained, shall cease and be void." Lady Warrender was to retain not only her present jewels, paraphernalia, &c., but also "all such plate, linen, china, household goods, and furniture, property, estate, and effects whatsoever, as she shall hereafter acquire, either by purchase out of the said annual sum, or by gift, bequest, devise, or otherwise, and that it shall be lawful for her, from time to time, and at all times hereafter, to sell, give away, and dispose of the same at her free will and pleasure." A provision was also made for the appointment of new trustees, in the event of the death or resignation of those first named. It was declared, lastly, "that if the said Sir George Warrender and Dame Anne, his wife, shall jointly be desirous of annulling these presents, and the agreements and provisions herein contained, and shall signify such desire by writing, indorsed on these presents, or on a duplicate thereof of such writing, to be under their joint hands, and attested by two credible witnesses, then, and from thenceforth, these presents, and every article, matter, and thing herein contained, shall cease, determine, and be null and void, any thing hereinbefore contained to the contrary notwithstanding."

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On 6th February, 1819, Sir George Warrender addressed this letter to Lord Falmouth and his brother:—"MY LORD and SIR,—Although I have objected to have any clauses inserted in the articles of separation between Lady Warrender and myself, which should contain a permission from me to her to go and reside where she pleases, or which should preclude me from suing her in the Ecclesiastical Court for restitution of conjugal rites, I hereby pledge myself, that Lady Warrender shall be at liberty, during our separation, to go and reside where she pleases, and that I will not institute any suit against her, for the purpose above mentioned."

On the 28th September, 1833, Sir George Warrender raised an action of divorce, on the head of adultery, against Lady Warrender. He libelled on various circumstances, some of which have been already noticed, for the purpose of instructing that he had been a domiciled Scotsman through his whole life, and particularly at and since his marriage; that, in 1814, Lady Warrender refused to admit him to her bed, and, in September, 1818, declared she would no longer live with him, and she then left his house; that "soon afterwards, at the earnest request of herself, the said Dame Anne Boscawen or Warrender, and her relations, and contrary to the desire of the pursuer, articles of separation were entered into, by which the pursuer and the said Dame Anne Boscawen or Warrender agreed to live separate and apart from each other, until such articles were annulled by mutual consent: That the pursuer and the said Dame Anne Boscawen or Warrender have, in consequence, lived separate and apart ever since, and they have not had carnal in-

No. 349. **tercourse or connexion since previous to the year 1815 : That, ever since**
 June 28, 1834. **the said articles of separation were executed, the pursuer, as aforesaid,**
 Warrender v. **continued to reside sometimes in Scotland, and at other times in London,**
 Warrender. **when required by his official situation, and his duties as a Member of**
Parliament; but that the said Dame Anne Boscawen or Warrender,
soon after the date of the said articles of separation, having gone to the
Continent, resided there till the spring of the year 1821, when she re-
turned to England : That in the latter end of the year 1821, or begin-
ning of the year 1822, the said Dame Anne Boscawen or Warrender
having left England for the Continent, did soon thereafter, namely, in
the month of April, 1822, hire a house or residence, No. 21, in the Rue
de Berthier, Versailles, in the kingdom of France, and having a short
time before, at that time, or soon afterwards, become acquainted, as the
pursuer recently discovered, with a person of the name of Luigi Rabitti,
now or lately residing in London, a music-master, or teacher of the
pianoforte, she did form an improper and criminal intimacy, connexion,
and intercourse with him, the said Luigi Rabitti, and at various times
and places during the years 1822, 1823, 1824, 1825, 1826, 1827, and
1828, the said Dame Anne Boscawen or Warrender was guilty of
adultery, and had carnal and adulterous conversation, intercourse, and
dealing with him, the said Luigi Rabitti."

The summons then enumerated various places, all in the kingdom of France, where acts of adultery were alleged to have been committed, "from all which, it is evident that the said Dame Anne Boscawen or Warrender, presently in France, or elsewhere abroad, defender, has been guilty of the crime of adultery: And therefore, the pursuer ought and should have sentence and decree of the Lords of our Council and Session, finding and declaring that the said Dame Anne Boscawen or Warrender, defender, has been guilty of the crime of adultery, and divorcing and separating her from the pursuer, his fellowship, and company: And also, finding and declaring the said defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to marry any person he pleases, siclike, and in the same manner as if he had never been married, or she, the defender, were naturally dead, conform to the laws and practice of Scotland, used and observed in the like cases, in all points, as is alleged."

The summons was executed against Lady Warrender edictally, as forth of the kingdom, and a copy of it was served on her personally at Versailles, where she was resident. She denied the charge of adultery, but pleaded three preliminary defences; 1st, That she was not subject to the jurisdiction of the Scottish Courts; 2d, That, even if amenable to them, she had not been regularly cited, as there was no citation used against her at the house of her husband; and, 3d, That as the marriage was an English marriage, it was indissoluble, except by the authority of Parliament.

The Lord Ordinary ordered Cases...

As the parties were at issue regarding many of the facts affecting the question of domicile, the following minutes were entered into:—"The Dean of Faculty, for the pursuer, stated, that, in the cases to be lodged for the parties, he consented that the preliminary defences should be argued, on the assumption, that the pursuer was a domiciled Scotsman at the date of the marriage, and has been so ever since; provided always, that the facts stated in the summons for founding his domicile should not afterwards be disputed in discussing the preliminary defences."

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"Mr Solicitor-General, for the defender, answered, that he was willing to discuss the preliminary defences on this understanding, reserving the whole statements respecting the domicile, in so far as they may be of the least avail on the merits."

Pleaded by the pursuer—

1. In virtue of the minutes of parties, the pursuer was entitled to assume, *hoc statu*, that he was a bona fide domiciled Scotsman at the date of the marriage, and had been so ever since. The defender was his wife, and therefore she must have her legal domicile where her husband had his.¹ The rule was not disputed, that, *actor sequitur forum rei*; but the forum of a husband was sufficient to fix the forum of the wife, at least in any question between the spouses. It was true, that it might be necessary to instruct personal notice to the wife of the proceedings against her; but that was done by an execution of personal service of a copy of the summons delivered to her at Versailles.

The existence of a voluntary contract of separation, and the relative letter, did not affect this question. Whether that agreement was made in Scotland or England, it must be held, in a Scottish Court, to be revocable *sua natura*; ² and, in this instance, it was, in *gremio*, declared voidable on certain events, such as the payment of debts, in one year, exceeding £1010, &c. But it was enough to say, that it left the status of husband and wife subsisting, and the legal domicile of the wife was inseparable from such status.

2. Though the wife had a legal domicile where her husband had his, yet, if she had been resident abroad for above 40 days, the proper citation was edictal; ³ provided that it was accompanied with personal notice to the defender. The domicile being here, the Scottish Courts possessed jurisdiction; but, the defender being abroad, the citation was properly and necessarily edictal.

¹ Cod. Lib. X. T. 39, § 9; Voet. L. XXIII. T. 2, § 40; and L. V. T. 1, § 101; 1 St. 4. 9; French, June 13, 1800 (Dict. v. For. Comp. App. 1); Blake, July 6, 1826 (*ante*, IV. 795); Lothian's Consist. Law. Chester, 1822; 1 Adams' Consist. Rep. 19.

² 2 Roper (on Law of Husband and Wife), 285; Beechy, 1 Haggard's Consist. Cases, 142; Sullivan, 2 Adams' Consist. Rep. 299; Marshall, 8 Durnf. and East's Rep. 545.

³ A. S. 14 Dec. 1805; 6 Geo. IV. c. 120, § 53.

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3. It was fixed by a series of decisions, that, though a marriage has been contracted in England, or any other country, the Scottish Courts will grant the remedy of divorce, if adultery be committed, and the parties be amenable to the Courts of Scotland.¹ It was true, that these judgments had not been carried to appeal. But, in disposing of them, the House of Lords was bound to administer the law of Scotland, and not of England; and, in the meantime, it must be assumed, that these judgments would be affirmed. For, although the acts of adultery had, in these cases, been committed in Scotland, and the acts in this case had occurred in France, that circumstance was immaterial.² The injury to the pursuer was the same, wherever the act was committed; and his remedy was the same.

The power of the Scottish Courts was therefore no longer an open question; but, if it were so, the decision must be in favour of their power to divorce. The contract of marriage, though entered into in England, was not meant to subsist solely within that kingdom; or it might indeed be a purely English question, to determine what were the relations arising out of the contract to the parties. But the law of marriage, and the rights of married parties, formed part of the public law of Scotland as well as of England, and every individual contract of marriage must be considered, not merely in regard to the private rights of the parties contractors, but also in regard to the public law and policy of the state in which the marriage is brought before the court, as a ground of action or of defence. Though a marriage has been contracted abroad, yet, if the parties are afterwards domiciled in Scotland, the law will grant the remedy of an action of adherence, in case of desertion; or of judicial separation *a mensa et toro*, in case of *coeuitia*; or, finally, of divorce in case of adultery, precisely as in the case of a marriage originally Scottish. It is the public law and policy of Scotland to recognise these rights as arising to spouses from the marriage relation; and, from whatever quarter foreigners arrive and become domiciled in Scotland, the public law and policy of the kingdom must remain the same.

But, separately, the special facts of the case showed that a Scottish marriage was in the contemplation of the parties. Though the ceremony was performed in England, the husband was a domiciled Scotsman—having landed estates in Scotland—providing his wife out of these estates, and infesting her in them—and similarly providing for the children *nascituri*, at the same time that she renounced her *terce* and *jus relictæ*, and that provision was made for the subsistence of the marriage settlements, though the contract should dissolve within year and day—all which

¹ Edmonstone, June 1, 1816 (F. C.); Butler, June 1, 1816 (F. C.); Duntze, June 1, 1816, and Dec. 21, 1816 (F. C.); Kibblewhite, Dec. 21, 1816 (F. C.)

² Ferguson's Consist. Law. p. 30. 33. 55; Pirie, Aug. 24, 1796 (4394); Fresch, June 13, 1800 (Dict. v. For. Comp. App. 1.)

showed that the parties had in view the contracting of a marriage, giving rise to those relations which were recognised by the law of Scotland.¹

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Pleaded by the defender—

1. The defender had lived separately from her husband since 1819. She was an Englishwoman by birth, family, and connexions, and had for the last twelve years been residing abroad. By the contract of separation, a provision was made, which was at her sole disposal; and the intended permanency of the contract was evident, as the provision was to endure during the joint lives of the parties,—the contract was not to be revoked except of joint consent,—and provision was made for renewing the trustees from time to time. The pursuer had also granted a relative letter, consenting to the defender residing where she pleased, and binding himself not to sue for restitution of conjugal rights. As she had subsequently taken up a permanent residence abroad, she was entitled to plead that she had, with his consent, acquired a separate domicile for herself, which he was bound to recognise.² In farther support of this plea, she was ready to instruct, that, by the law of England, the contract of separation and relative letter, formed an agreement which was not revocable save by the consent of both parties.

2. Even if the domicile of the pursuer necessarily created a legal domicile for the defender, the citation had been erroneously made, as it ought not to have been edictal, but at the residence of the pursuer.³ It was incongruous to cite the defender, as forth of Scotland, seeing that she was held amenable to the jurisdiction only on the fictio juris of being resident with her husband.

3. The defender was an Englishwoman, and she contracted, in London, an English marriage; her guardians were parties to it, and it was celebrated according to the rites of the Church of England. Such a marriage was indissoluble except by the authority of Parliament.⁴ It had been fixed, in the case of Lolly, that the decree of divorce pronounced by a Scottish Court, did not put an end to an English marriage; and accordingly, when Lolly contracted a second marriage in England, he was criminally tried on a charge of bigamy, because of the subsistence of the first marriage, notwithstanding the Scottish decree of divorce. He

¹ Huber de Conflictu Legum, § 10.

² Brunstone, Feb. 9, 1799 (4784); Sharpe, Nov. 14, 1829 (ante, VIII. 49); Scruton, Dec. 1, 1772 (4822); Lindsay, Jan. 26, 1807 (Dict. v. For. Comp. App. No. 6); and 1. Dow, 138.

³ French, June 13, 1800 (Dict. v. For. Com. App. No. 1).

⁴ Bezeley, June 22, 1831; 3 Haggard's Consist. Report. 339; M'Carthy, May 9, 1861.*

* Said to have been decided by the Lord Chancellor (Brougham), at Lincoln's Inn Hall, but not to have been yet reported.

No. 349. was convicted, and sentenced to seven years' transportation, and actually made to suffer at least one year's confinement in the hulks, pursuant to his sentence, in order to show that no doubt was entertained of its validity. The same law was applied to the decree of divorce pronounced in any other country, relative to an English marriage, and accordingly, in the recent case of M'Carthy, where a Dane had married an Englishwoman, and took her immediately to Denmark, where he obtained a regular divorce in the Danish Courts, it was held in England that the marriage was still subsisting. It was therefore incompetent for a Scottish Court to entertain an action of divorce, in which they could not pronounce an effectual decree.

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The Lord Ordinary reported the Cause.

LORD BALGRAY.—Sir George Warrender's domicile is Scottish, and I have no doubt, that, Scotland being the country of his domicile, his wife has a legal domicile in Scotland also. The only circumstance which occurred to me as raising a difficulty, was the effect of the contract of separation. It is true that the defender must have a domicile, *de facto*, where she resides, and that it will be a legal domicile to many effects. But I think she retained, notwithstanding, a domicile *de jure* in Scotland, and that there is no inconsistency in this. On the whole, I would repel the preliminary defences which have been stated.

LORD GILLIES.—I am of the same opinion. I have no doubt that our jurisdiction must be sustained. It is a general rule that *actor sequitur forum rei*; but, the forum of the husband is, and must be, the forum of the wife, so that the rule is directly applied in bringing this action before the Courts of Scotland. Indeed, it would lead to very anomalous consequences, if a wife, by leaving her husband, could carry away a domicile with her, and get rid of the domicile of her husband. The action of adherence is a remedy, known by the law of Scotland, in the case where one spouse deserts the other; but if the defender's doctrine were well founded, a wife, by quitting the kingdom, might deprive the husband of his right to raise the action of adherence before our Courts. Thus the very act by which she inflicted the wrong, would be allowed to become the means of depriving the husband of his remedy; the very act which rendered it proper to raise the process of adherence, would be allowed to become the means of destroying the jurisdiction of the Court where the process was to be raised.

I do not think the contract of separation, and relative letter, are sufficient to take this case out of the general rule. Either party could put an end to the contract.

On looking to the decisions of our Courts, and recollecting the importance of the judicial maxim, *stare decisis*, I cannot think it now an open question whether the Courts of Scotland are barred from entertaining an action of divorce, because the marriage has been contracted in England. The contrary has been repeatedly decided, and I have no doubt that we can entertain the action, and pronounce decree of divorce if the acts of adultery be instructed. And I must own myself unable to discover upon what ground it is, that English lawyers have taken up the position, that marriages contracted in England shall be indissoluble, not only within that kingdom, where alone the English laws have force, but in every other

-kingdom whatever. I am not aware whether there is any other civil contract, in reference to which they maintain the same doctrine, and I am at a loss to discover on what solid ground they can so deal with the civil relations which arise out of the contract of marriage. But I think it unnecessary to examine this farther at present, as the decisions of our own Courts are enough to prescribe the course which we ought now to follow.

LORD PRESIDENT.—I am of the same opinion. There was not only an edictal citation, but also a personal intimation given to the defender. I conceive she has been duly cited, and has had ample notice. Perhaps it might have been more regular had the pursuer first revoked the contract of separation and his letter, and then proceeded to execute his summons; but the execution of the summons was in itself tantamount to a revocation.

The defender being regularly cited, and being amenable, as I apprehend, to the jurisdiction of our Courts, the question remains whether the circumstance of the marriage having been contracted in England, is enough to bar us from entertaining a summons which concludes for divorce on the head of adultery. I am clearly of opinion that it is not; and that we can proceed to pronounce a valid decree if the acts of adultery shall be established. It may be true, that, in England, such divorce proceeds by authority of Parliament, because of a defect of jurisdiction in their Courts to entertain the process; but the power of divorce is a branch of jurisdiction which has been exercised by our Courts in Scotland, ever since the Reformation. While the Roman Catholic religion was the established religion, marriage was not regarded as a civil contract, but as a sacrament, and it possessed a character of indissolubility, leaving the Courts to grant such minor remedies as a separation a mensa et toro. But when the Reformation took place, marriage was placed on its true footing of a civil contract, and, though it would appear that jurisdiction had not been given to the English Courts to grant divorce, it was otherwise in Scotland. In this kingdom the jurisdiction of the bishops was abolished, and, on the erection of the new Consistorial Court, a power of divorcing the civil contract of marriage, on sufficient grounds, was given to it.

I apprehend, therefore, that the indissolubility of a marriage, in the Courts of England, does not arise from the contract of marriage being there regarded as truly indissoluble in its own nature, but merely from a defect of jurisdiction in their Courts, to which the power of divorce has not been given at the Reformation. Indeed, if the contract of marriage were regarded in England as indissoluble in its own nature, Parliament would not have interfered to dissolve it, in any circumstances; but yet, where adultery has been committed, Parliament does interfere and dissolve the contract, by its own immediate interposition. It does this, because of the defect of jurisdiction in the English Courts to grant a divorce; whereas, in most other civilised countries, especially Protestant countries, the power of divorce has been conferred upon the Courts of law. In Scotland, parties do not require to apply to Parliament. The Scottish Courts possess a jurisdiction, derived from and sanctioned by the supreme power of the State, to divorce a contract of marriage upon certain sufficient grounds. The source from which the power of our Courts is derived, is as high as that to which recourse is had in England when a divorce is sought there; and I have no difficulty in holding that we are competent to entertain a process of divorce, on the head of adultery, although the marriage may have been contracted in England.

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No. 349. LORD MACKENZIE.—I have no hesitation in repelling all the preliminary defences. I hold the general rule to be that the domicile of the husband creates a legal domicile to the wife ; and I think it applies at least as strongly to questions of divorce as to any other questions. Indeed, I apprehend more so ; because the status of a person as married or unmarried, does not merely affect the private party with whom a question is raised, but it affects society generally. If the wife could shake off the husband's domicile, by leaving the kingdom where he lived, it would follow, as already observed by Lord Gillies, that the wife, by such desertion, would destroy the jurisdiction of our Courts, and deprive a Scottish husband of his remedy against desertion, in the very case where the necessity for such remedy was most obvious.

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In regard to the contract of separation and the relative letter, I concur in the opinions already expressed.

As to our power to entertain a process for divorcing a marriage contracted in England, I concur with all your Lordships. I beg to be understood as not expressing the slightest impeachment of the accuracy with which the Judges of England have expounded the law of England, in determining those questions which have come before them, and are alluded to in the papers. In the case of Lolly, for example, who was sentenced, as a criminal, for bigamy, notwithstanding that the first marriage had been dissolved in Scotland by a decree of divorce, whatever may be my private sentiments in regard to the question, I must now look at the case judicially, and in no other light, and I therefore hold myself bound to assume that the decision of the English Judges was a correct application of the English law, and was irrefragably right as an English judgment. I am willing to view it in the same light as I should do an English statute, which expressly enacted, that a marriage contracted in England, should not be dissoluble for adultery, or on any other ground, either in the Courts of England, or of any other country on the face of the earth. But I must still remember that the decision is one of English, not of British, law ; and that it would be but an English, not a British statute, to which I could hold it equivalent. Whilst, therefore, I acknowledge the existence of the law, as stated, in England, I must not forget that we have laws, on the same subject, in Scotland, and that I as a Scottish Judge am bound to administer the laws of Scotland. On looking then to our own decisions and practice, it is indisputably fixed, as part of our law, that a marriage may be divorced here, provided the husband is a Scottish resident, and the marriage has been converted into a Scottish marriage. I must read our own decisions as announcing the law to be so, and I conceive them to be as explicit as if there were a Scottish statute expressly declaring that to be the law. The unfortunate but inevitable result of this is, that there is here a direct conflictus legum. This is a source of the greatest hardship and danger to the lieges ; and one painful result has been that Lolly was unhappily trodden down by it. He was convicted as a criminal in England for contracting a marriage, which, if entered into in Scotland, and brought under the cognizance of our Courts, we must have held to be valid and lawful. And the same, or similar things may occur again ; or the converse may happen. For, if any man, against whom a decree of divorce has been regularly obtained in our Courts, shall rely upon the advice of English lawyers, and venture to disregard the divorce and assert the rights of a husband, after having been legally divested of that character, he may be made to stand as a prisoner at the bar of the Justiciary Court, from

whose sentence there lies no appeal, and to pay the penalty of theft, robbery, or rape, according to the nature of the act which he may have committed against the property or the person of his former wife.

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It does not belong to this place to enquire whether the law of England or of Scotland, is in the right. They are of equally paramount authority in each respective kingdom, and they are in direct conflict. On this bench I cannot sacrifice the law of Scotland to the opposite law of any foreign state. But it is a source of satisfaction to your Lordships and myself, in administering our own law, to reflect that our laws on the subject of divorce are similar to those of every other Protestant state but England, and of many of the Roman Catholic countries, such, for example, as France. It is evident from one of the cases quoted, that the laws of England are at conflict with those of Denmark, and the Danes cannot be more expected to make their own laws bend to those of England, than we can be. I have no doubt that the Danes administer their own law in their own country, and hold, that although the English may import all other manufactures for their use, and may carry a stronger fabric of broad cloth into their country than they can make for themselves, they will not suffer an importation of the English law of marriage, or allow the relations arising out of the marriage-contract to be disturbed, or the bonds of marriage to be viewed as more indissoluble, in the Courts of Denmark, because the marriage has happened to be contracted in England, in place of Denmark. In a question between the laws of Denmark and those of England, it might be long before a remedy for the *conflictus legum* was found; but it should be very different in a question concerning England and Scotland. There is one Parliament possessing power to legislate for both kingdoms, and it is to be regretted that a legislative remedy has not sooner been applied to an evil which it would appear that nothing but an act of the Legislature can remove.

THE COURT repelled the preliminary defences.

J. MURRAY, S.S.C.—Æ. MACLEAN, W.S.—Agents.

Mrs JUSTINA OGILVIE, or SIMSON, Pursuer.—*More.*

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HUNTLY GEORGE GORDON DUFF, Defender.—*Tait.*

Lease—Conventional Irritancy.—The tenants in a perpetual tack containing a condition that the right should be *ipso facto* irritated by failure to pay the tack duty for three years, having failed to make payment thereof, and deserted the premises; and the landlord having, after four years' duty had become due, and the premises had been deserted for two years, entered into possession, though without any proceedings at law, and retained possession unchallenged for twelve years—held, that the irritancy had taken effect, and that the tenants were not entitled to be reponed.

IN 1722, Robert Scheviz, proprietor of Muirtoun, granted to one Clark and his spouse, or the longest liver of them, and to their heirs and assigns, a "feu-tack" of a small piece of ground on the Green of Muirtoun, with the houses thereon, "for and during the haill time and

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space of nineteen years" from the date of entry, "and after the expiration of the said nineteen years, for the haill space of other nineteen years, and thereafter from nineteen years to nineteen years in all time coming, for payment of the feu-duty, and with and under the irritant provision and declarator hereinafter mentioned." This irritant provision was in these terms :—"In case the said John Clark or his above-named spouse, or their foresaids, shall happen to fail in the payment of the said feu-duty for the space of three years, so as that three years' duty run together unpaid, then and in that case the present tack shall, as by thir presents the same is declared and appointed to fall, and become null and void ipso facto, siclike as if the same had not been made nor granted; and the said John Clark and his spouse, and the longest liver of them, and their foresaids, either of them, in the possession of the said house, barn, stable, yard, and others foresaid, are, by the acceptation hereof, become bound and obliged, upon their said failure, to remove from, quit, and give up the said house and bounds on south and north, with the barn, stable, and yard aforesaid, all the bigging which shall happen to be then on the ground of the whole or any part of the bounds thereof, with their possession of the same, to the said Robert Scheviz and his foresaids, and that without any previous warning to be given by them to the said John Clark and his spouse, or their foresaids, for that effect, or any decret or declarator in law to proceed thereupon against the said John Clark and his said spouse, or either of them, with which they have dispensed, and hereby dispense for ever."

This tack came by progress to be vested in the late Mrs Janet Sangster or Ogilvie, who died in 1801, leaving the pursuer, Mrs Simson, and two other children. Thereafter, and till 1814, the tack-duty was paid by a writer in Inverness, as agent for Mrs Ogilvie's heirs, to the late Duff of Muirtoun, the proprietor, father of the present defender, whose predecessors had acquired the property by singular titles, but who was alleged to have recognised the lease. Subsequent to 1814, however, no payments were made, and the property having been entirely deserted in 1816, Duff, in 1818, entered into possession, not knowing, as was averred, who the heirs of Mrs Ogilvie were, let the subjects, and drew the rents, without challenge or claim on their part, till 1830, when the pursuer, Mrs Simson, one of their number, and holding assignations from the others to their interest in the tack, raised the present action against the late Mr Duff, transferred, after his death, against his son, the present defender, concluding to have it declared that she had the only good right to the possession of the premises, and to have Duff ordained to remove, and to account for the rents drawn by him.

Besides various other defences unnecessary to be here noticed, Duff maintained the following plea :—"The pursuers or their predecessors having deserted the premises, and having allowed four years' rents to remain unpaid, the lease became ipso facto null and v

irritant clause contained in the original tack, supposing even that that tack had been binding against the defender; and more particularly must the tack be now considered as totally void, after a cessation of all possession or payment of rent by the pretended tenants for a period of sixteen years, and a contrary possession during that period by the defender, without any remonstrance on the part of the pretended tenants, or even any intimation of the assignations to the alleged rights under it."

The Lord Ordinary sustained this defence, and assolizied, but without expenses, adding the subjoined note.*

Mrs Simson reclaimed; but the Court adhered.

JAMES ADAM, W.S.—TAIT and YOUNG.—Agents.

* "NOTE.—In this case the tack (for though perpetual, and the rent is termed feu-duty, it is not a feu-contract followed by infeftment and possession) contains this irritant clause, that if the tenant fails to pay the feu-duty for three years, so that three years' duty 'run together unpaid, then and in that case this present tack shall, and by thir presents the same is declared and appointed to fall, and to become null and void, ipso facto, siclike as if the same had not been made and granted;' and the tenant binds himself to remove, 'without any warning for that effect, or any decreet or declarator in law to proceed thereupon, with which they have dispensed, and hereby dispense for ever.' It is admitted, that the last feu or tack duty paid was in the year 1814. The statement is not denied, that it was after four rents had become due, and two years after the premises were totally deserted—the house being left without doors or windows—that the landlord took possession of the subjects; and, as is stated, not knowing who were the heirs entitled to occupy the subjects, he continued in possession unchallenged for twelve years, when the present action was raised in 1830. The conventional irritancy in this case is thus far remarkable, that, instead of being more penal, it is less penal than the legal irritancy which is incurred on two years' rent being in arrear. To enforce a conventional irritancy, it is not necessary to proceed by declarator or reduction. It is sufficient to proceed by a process of removing. See notes to the last editions of Stair, 2, 9, sec. 43, and Ersk. 2, 6, sec. 44, at least where instant verification of the irritancy can be shown, such as non-payment of rents. *Scott v. Wotherspoon*, 27th February, 1829, the doctrine in which case was again approved of in *Horn v. McLean*, 19th January, 1830. Of course, the action of removing is brought, not to declare the irritancy which it is fitted to do, but to eject the tenant, if he continue in possession, and refuses to quit the premises, because ejection never can proceed *via facti*, but must always be with due order of law. But as the tenant, in the present case, had deserted the possession, left it waste, without any person to occupy or look after it, the landlord had no occasion to bring a removing; but as he was not bound to leave it fruitless to himself, and a nuisance to the village in which it was situated, after waiting two years, he was entitled to resume possession after the irritancy was incurred by four years' tack-duty remaining unpaid. The failure to fulfil the obligations on the one hand, on this mutual contract, for so long a period, cuts off all right to insist on the other party to implement the obligations incumbent on him. Had the heir appeared soon after, and stated ignorance of his rights, the case would probably have been different; but it seems too late now to disturb a possession of twelve years, obtained under such circumstances.

"No expenses have been found due, because it may be thought a hard case to

No. 351. JAMES REAY and Others (STEWART'S TRUSTEES), Advocators.—*Keay—Small Keir.*

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ARCHIBALD CHALMERS, Respondent.—*D. F. Hope—Maitland.*

Lease—Reparation.—A landlord bound himself to perform draining, &c., by missives of lease, in 1813, and the tenant to pay interest on the outlay, and to perform carriages—the operations to be made at the sight of a person mutually chosen; the tenant, after entering to possession, attempted to repudiate the missives; but, in 1817, he was decreed to implement them; and he continued to pay his full rent till 1822; held in an action of damages against the landlord for non-implementation of the draining, &c.; that the landlord was not liable in damages prior to 1817, nor after 1817, unless the tenant could show that he had expressly required the landlord to implement the stipulation.

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ON 4th August, 1813, Archibald Chalmers addressed this letter to the agent of the late Alexander Stewart of Balnakilly. "I have inspected the farm of Arnbothy, and I see it will require a sum of money to be laid out on it in draining and diking; and this ought to be done under the eye of a respectable person, chosen by the proprietor and me; and I think this sum cannot be less than £50 yearly during the first five years; and besides this, I think the tenant ought to have the advantage of a mutual dike betwixt the farm and the property of Evelick. For this being done I will give you £300 sterling of rent, and I will perform the carriage of stones for the diking, as well the mutual dike as cross dikes and drains; and I will farther pay interest for the sum the proprietor lays out in diking and draining, as above. The conditions of the lease to be adjusted by Mr Blair, and I come in the landlord's place in his bargain with the present tenant. The lease to be for twenty-one years. The rent to be payable at Midsummer and Lammas after reaping the crop, and the last rent payable at Martinmas, at which I remove."

The offer was accepted, but afterwards Chalmers intimated an intention of resiling. Stewart refused to free Chalmers, and notified by protest that he was ready to execute a lease in terms of the missive offer and acceptance, and would apply to the Sheriff to compel implementation. Some proceedings were accordingly instituted before the Sheriff of Perthshire, in the course of which Chalmers, though he entered to possession of the farm at Martinmas, 1813, maintained that he did not possess under the missive, but in virtue of a subsequent verbal agreement with Stewart,

forfeit a perpetual right of this kind, and that it was not unreasonable in the pursuer to attempt to acquire possession, but chiefly because much of the record and verbal pleadings has been occupied with matter in which the defender has failed, particularly in the proof, by which he attempted to substantiate his third statement."

of a different tenor, which left it to himself to make a trial of the farm, No. 351. and to say what rent it could afford.

In October, 1815, Stewart raised an action before the Sheriff, to compel Chalmers to enter into a regular lease, and Chalmers maintained, as before, that the missive offer and acceptance had been superseded by a verbal agreement. The Sheriff allowed Chalmers to prove this allegation by the oath of Stewart, who deponed negative, upon which the Sheriff found Chalmers bound to implement the agreement under the missive, but allowed him to state objections to the draft of a lease proposed by Stewart. Chalmers borrowed up the process, and kept it for about five years, without lodging objections, but, in the meantime, he continued, as from the first, to pay the rent of £300 regularly, and without reservation, until Whitsunday, 1822. Stewart then raised an action before the Sheriff, for that rent, and Chalmers pleaded in defence, that Stewart had failed to execute the diking and draining, as stipulated in the missive, and was not entitled to enforce payment of the rent, but was liable in a large sum of damages. He also raised an action of damages, as to the past, and for deduction of one-half from the rent as to the future, on account of the failure to execute the draining and diking, which he alleged that he had repeatedly called on Stewart to execute, but they had not been done. The Sheriff conjoined the two processes, and found "that the defender's letter of 4th August, 1813, containing his offer for a lease of the possession in question, (in virtue whereof, and of the answer thereto, he is now in possession,) the rent which he offered, was on condition of a sum of money being laid out by the proprietor in draining and diking, which he considered would not be less than £50 yearly, during the first five years; and besides this, he thought the tenant should have the advantage of a mutual dike betwixt the farm and the property of Evelick,—he being to perform the carriage of stones for the dikes and drains, and to pay interest on the sum expended: Finds the defender entitled to implement of the stipulation; remits to , to inspect the defender's possession, and consider and report the manner in which the same should be drained and diked, and the probable expense, and also the yearly damage to which the defender may be entitled for the want thereof in time past;—reserving to after consideration whether damages are due, and if so, the period of commencement thereof." Various proceedings took place, in the course of which an inspection of the farm was made, and, in June, 1825, a report of the damages sustained by the tenant for want of draining and diking, was returned. The report, after deducting the interest, which would have been payable by the tenant on the landlord's outlay, if such had been only made, and also deducting the value of the labour which the tenant was to have performed in making the operations, brought out a sum of £359, 8s. 10½d. of damages sustained by the tenant. In 1826, draining was made on the

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No. 351. farm, by the landlord, to the amount of £173, at the sight of an inspector named by the Sheriff. In the meantime, the action for compelling Chalmers to sign the lease having been awakened, the lease was at last signed by Chalmers in June, 1826. After some farther procedure, the Sheriff, in 1832, in the conjoined processes as to rent and damages, found the landlord liable to Chalmers "in £359, 8s. 10d $\frac{1}{2}$. of damages, sustained by him through Mr Stewart's failure in the performance of the obligations incumbent upon him, in reference to draining and diking for crop and year 1825, and precedings, for which decerns." Stewart obtained leave to advocate, and after his death, his trustees were sisted.

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The advocates pleaded—

It was upon the missive that Chalmers rested his claim of damages. But he had, for several years, repudiated the missive as his title of possession, and alleged that he had the farm upon trial, at such rent as it could afford. The landlord was not bound to make any operations of diking, &c., so long as the missive of lease was thus repudiated. Even after the tenant's plea was repelled by the interlocutor of 1817, it was not incumbent on the landlord to make the drains, &c., till the tenant required him; because the operation implied disbursement by the tenant, who was to pay interest on the outlays, and to perform the carriage of stones; and farther, because it was to be made at the sight of an inspector chosen by the landlord and tenant. Especially as the outlay was contemplated as occurring during the first five years of the lease, the landlord was not blamable, after 1817, for not making the operations until required.

The respondent pleaded—

He had always paid his full rent of £300. That rent was only stipulated in consideration of the execution of the draining and diking, within a limited time, at the commencement of the lease, so as to give the tenant the full benefit of the amelioration during his lease. As the landlord had all along founded on the missive^e in enforcing payment of the rent, he was bound to give the equivalent, which was not merely the peaceable use of the farm, but the use of a farm drained and diked within a certain period. Having failed in this, he ought not to have exacted the full rents, and should now make up the loss sustained by the tenant for want of the drains, &c.

The Lord Ordinary pronounced this interlocutor:—"Finds, that the respondent's claim for damages rests on the missive of lease of the 4th August, 1813, and the alleged non-performance by the landlord of the obligation regarding diking and draining contained in that missive: Finds, That the said missive contemplated the execution of a regular lease, the terms of which were to be adjusted by Mr Blair, as referee: Finds, That the respondent entered into possession of the farm at Martinmas, 1813, but that, when called upon, he refused to enter into a regular lease: Finds, That in an action brought against him before the

Sheriff of Perthshire, to compel him to enter into such lease, agreeably to the missive, he averred in defence, that the missive had been departed from, and that he held the possession under a verbal bargain from the landlord: Finds, That the respondent having made reference to the landlord's oath on this point, and the landlord having, in the year 1817, deponed negative, the Sheriff, on the 26th of February, 1817, finally determined that the respondent was bound to implement the bargain as contained in said missive: Finds, That by the said interlocutor, as well as by a subsequent interlocutor of the 26th of March, 1817, the Sheriff appointed the respondent to state objections to the draft of the lease proposed by the landlord: Finds, that this order was not obeyed, but that the process was borrowed up by the respondent, and retained by him until the year 1822: Finds, That from the year 1817 to the year 1822, the respondent continued to pay the full rent stipulated by the missive: Finds, That in 1822 the respondent having refused to pay his rent, and an action having been raised against him for it by the landlord, the respondent raised this action of damages against the landlord, on the ground of the non-performance of the dikings and drainings stipulated in the missive: Finds, that various steps of procedure took place; and that in the course of the said action the diking and draining was performed by the landlord under the authority of the Sheriff: Finds, That, in the circumstances above detailed, the landlord could incur no liability for damages prior to the year 1817, in respect that, until that year, the respondent disclaimed the missive as forming his title of possession: Further finds, in respect of the terms and nature of the obligation in question, as well as the respondent's delay in adjusting the terms of the lease, that the respondent is bound, in order to support the claim of damages subsequently to the year 1817, to prove that he actually required performance by the landlord of the foresaid operations: Therefore remits the case to the Sheriff of Perthshire, with instructions to recall the interlocutors complained of, and to allow the respondent a proof of the averment, that, subsequently to the Sheriff's interlocutor of the 26th of February, 1817, he required the landlord to execute the foresaid operations of diking and draining in terms of the missive, and also a proof of the amount of damage that may have been incurred by the landlord's delay in executing them until the year 1826: Further, reserves the question of the expenses in this Court, and remits the same to be disposed of by the Sheriff at the termination of the cause, and decerns." *

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* NOTE.—"There is no ground for holding the landlord liable in damages for failing to execute the improvements prior to the year 1817; as, until the question was settled in that year by the landlord's oath, the respondent denied that the missive formed his title of possession, and contended that it had been superseded by a verbal bargain: From that period the only question between the parties was the

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LORD PRESIDENT.—The tenant repudiated the missive for several years, and alleged the existence of a different bargain. I do not think the landlord is liable in any damages for not having then made the draining and diking stipulated in the missive. And, in general, I think the interlocutor of the Lord Ordinary is well founded.

LORD BALGRAY.—The operations which were to be performed were not laid exclusively upon the landlord; they inferred certain labour and disbursement on the part of the tenant also. The tenant was to perform the carriages of stone, &c., and he was to pay the interest upon the landlord's outlay. It thus might very well be, that he did not choose to require the operations to be made, and, at all events, I do not see how the landlord should be made liable in damages until it is proved that the tenant required him to make them. I have known cases where a landlord was taken bound to build houses on the farm, the tenant being liable in carriage of the stones, and when the tenant came to occupy the farm, he thought it more for his interest, not to have the houses built. But if such a tenant should, towards the end of the lease, call on the landlord to build these houses, and offer to perform his own part, he would find it in vain to claim damages from his landlord for not having done it before he was required. I look upon this case as somewhat of that sort, and I concur in the interlocutor of the Lord Ordinary.

LORD GILLIES.—The operations of draining, &c. did not contemplate the benefit of one party alone, and lay a burden exclusively on the other. The mutual benefit of both parties was contemplated, and a certain portion of the burden was laid on each. Either party might have compelled the other to insist, but so long as neither made a requisition against the other, I cannot hold damages to be incurred by allowing the operations to lie over. I think the interlocutor of the Lord Ordinary is well founded.

LORD MACKENZIE.—The claim of the tenant cannot be sustained on the footing of the landlord's being locupletior damno alieno. It does not appear to me that he is locupletior at all; for, if he had made the outlays, not only would his land have been enhanced in value, but the tenant would have been liable to pay him interest. It is a common claim of damages, therefore, which the tenant prefers, and I think it not well founded. Down to 1817, the tenant was repudi-

adjustment of the precise terms of the lease; and, as the landlord admitted that, in any view, the lease must have contained the stipulation as to improvements, the Lord Ordinary thinks, that the tenant's delay in adjusting the terms of the lease does not necessarily exclude a claim of damages. But, on the other hand, he thinks that the obligation regarding improvements was one which, from its nature, could hardly found a claim of damages for non-performance, until a demand for performance was made by the tenant; as, in the first place, the tenant was bound to contribute to those operations; and, secondly, was bound to pay the whole interest of the landlord's outlay. In these circumstances, and also keeping in view the tenant's delay in adjusting the terms of the lease, and the payment of his rent until 1822, without any reservation, the Lord Ordinary holds, that the mere circumstance of the non-execution of the improvements is not of itself sufficient to found a claim of damages, and that the tenant is bound to prove that he required performance.

ating the missive ; and, after that time, he was eminently called on to come forward and require the landlord to implement his obligation as to draining, &c., if he meant to insist upon implement at all. This was necessary not only on account of the share of labour and disbursement which the operations were to lay upon him, but also because they were to be performed at the sight of a party mutually chosen by the landlord and himself. Indeed, if the landlord had proceeded to make the operations without an intimation from the tenant that implement of the missive, as to this matter, was now required, I think the tenant would probably have objected that he was not liable in payment of the interest of the outlay incurred by the landlord.

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THE COURT adhered, and allowed expenses since the Lord Ordinary's interlocutor.

M'INTOSH and DUCAT, W.S.—W. MURRAY, W.S.—Agents.

THOMAS M'LEAN, Suspender.—*Keay—Whigham.*
JOHN RICHARDSON, Respondent.—*D. F. Hope—Ivory.*

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Proof—Process—Expenses.—1. Where it is averred that an agreement was made, relating to heritage, which was followed by rei interventus, the acts inferring rei interventus may be proved by parole, but not the agreement itself. 2. Party held not barred from objecting to the competency of parole evidence at a jury trial, though the Court were of opinion, that, in the circumstances, he should have taken his objection at an earlier stage of the proceedings: and neither party found entitled to expenses.

THOMAS M'LEAN, merchant in Annan, and John Richardson, auctioneer in Dumfries, were conterminous proprietors of two houses situated in the High Street of the burgh of Annan. Richardson, on 14th June, 1832, applied to the magistrates for leave to rebuild his tenement according to a plan exhibited, in which it was brought from two and a half to three and a half feet forward, into the street, in place of being on a line with the front of M'Lean's house, as before. On the 27th, leave was granted to Richardson as craved, without intimation being made to any party. M'Lean, on 31st July following, presented a bill of suspension and interdict, alleging that the magistrates had no power to make a grant of part of the public street to an individual; and that the alteration would be injurious to his property. The bill was passed, and, it was averred by M'Lean, in Art. 6 of his Reasons of Suspension, that as soon as he heard of the intended operations, he wrote to warn Richardson against them, but got no answer, "and, as he understood that Richardson intended immediately to commence operations by rebuilding his tenement, not upon the site which it formerly occupied, but by advancing it upon the High Street of Annan in the manner delineated in

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the sketch produced, and thereby most materially interfering with the property of the suspender, &c., he was under the necessity of applying to your Lordships for protection. The counter-averments, in so far as they consist with the suspender's knowledge, are denied—and those that do not, are not admitted." The answer of Richardson to this article stated that he was not in the burgh when the suspender's letter was sent to him, "but the instant he returned, he waited on the suspender, and had a personal interview with him in presence of third parties. At that interview the suspender gave the respondent to understand that the explanations then made to him in regard to the extent and character of the intended operations, were entirely satisfactory, and the suspender himself expressly suggested certain alterations, which were adopted by the respondent, and afterwards acted upon. More particularly, it was agreed between them, that the corner of the respondent's house, should, where it joined to his, be rounded off or sloped away in a particular manner, which was pointed out. The suspender thereupon stated that he withdrew all opposition, and afterwards repeatedly alluded to the matter as finally settled. On the faith of this the respondent proceeded with his operations." Richardson put a relative plea in law upon record, in these terms,—“The suspender having agreed to the respondent's deviation, and having expressly consented to them under certain modifications, proposed by himself, which were adopted and acted upon, he was barred from afterwards objecting when matters were no longer entire.”

The Lord Ordinary, “in respect that the 6th articles of the Condescendence and Answers raise the question, whether an agreement was entered into, between the parties, by which the respondent withdrew his opposition to the proposed building, remits this question to the Jury Roll.”

The following issue went to trial:—“It being admitted, that Richardson, the pursuer, and M'Lean, the defender, are proprietors of contiguous properties on the north side of the High Street of Annan, and that, in the course of the year 1832, the pursuer was about to commence building a house on his said property, and to advance the front wall of the same, from about two and a half to about three and a half feet beyond the front wall of the house, then situated on that property:

“Whether, on or about the 21st day of July, 1832, the said defender, M'Lean, consented or agreed to the said wall being advanced, as aforesaid, provided the corner of the said wall about to be built was rounded or sloped off next to the defender's house?”

At the trial, when Rome, the first witness, was called, M'Lean objected that the alleged consent or agreement could not be proved by parole. The objection was overruled; and several persons were examined to prove, that, at a meeting at the Buck Inn, of Annan, a communing took place between Richardson and M'Lean, at which it was agreed that the new building should be allowed to proceed, provided that the corner was rounded or sloped off, on the side next M'Lean's; that

made with a mason, and wright, &c., after this arrangement; and that part of the back wall of the new building was erected. The jury found for Richardson. M'Lean tendered a bill of exceptions, setting forth that, "upon the trial of the said issue, the counsel for the said pursuer, to maintain and prove the case under the said issue, did propose to examine George David Rome, land-surveyor, to prove the agreement put in issue; whereupon the counsel for the said defender did then and there object and insist, before the said Lord President, that it was not competent for the said pursuer to prove the said issue by parole evidence, inasmuch as it appeared from the admissions prefixed to the issue, and terms of the issue itself, that the question related to heritage; at least, that it did not relate to any of the ordinary known contracts or agreements which, by the law of Scotland, could be proved by parole. The counsel for the said pursuer, however, did insist before the said Lord President, that the said objections taken to the admissibility of the evidence offered was not well founded in law, and that the parole testimony offered to be adduced ought not to be rejected, but that the same ought, according to law, to be admitted to prove the said issue. And the said Lord President did then and there repel the objection by the defender, and deliver it as his opinion, that parole evidence was admissible to prove the case under the said issue, and did admit the same accordingly."

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Pleaded by M'Lean—

1. Parole evidence was incompetent on three several grounds; first, because the consent or agreement related to heritage. The words of the issue were exclusive of the plea of acquiescence, as they bore, that Richardson "was about to commence" building; and although a proof of rei interventus, following on a verbal agreement, might be proved prout de jure, yet the actual agreement itself could not.¹ In like manner, where a promise of marriage, subsequente copula, was alleged, the copula might be proved prout de jure, but not the promise itself; or, in the case of a verbal contract of excambion, followed by rei interventus, the latter might be proved prout de jure, but not the contract itself. Second, parole was incompetent, because the alleged agreement, if it existed, was an innominate contract, of a peculiar sort, which was not allowed to be the subject of a proof by witnesses.² Third, the alleged consent was given without any consideration, and was of the nature of a gratuitous promise; it therefore could not be proved by witnesses.³

2. It was not too late to object to parole proof at the trial. There was a direct precedent for this in the case of Clarke;⁴ and it was equally

¹ Scott, Dec. 18, 1830 (ante, IX. 246); Hatton, 22d Feb. 1830; 5 Murr. Rep. 155.

² 4 Ersk. 2. 20.

³ 4 Ersk. 2. 20, and 3 Ersk. 3. 88.

⁴ 1819, 2 Mur. Rep. 87, and 9th March, 1819, F.C.

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clear in principle, because the remit to prove the agreement could only have in view a proof by competent evidence, and, accordingly, Richardson, for any thing which had previously appeared, might have had written evidence to tender at the trial.

Pleaded by Richardson—

1. Considering the allegations of parties on the record, and the terms of the interlocutor remitting to the jury roll, it was too late to object, before the jury, to parole proof. It was a verbal agreement which was averred, and which was sent to proof, without objection having been taken by M'Lean. 2. Parole proof was competent. The agreement did not properly relate to heritage, as no part of the ground in M'Lean's feu was to be encroached upon. It only related to his waiving a personal privilege of objecting to a neighbour encroaching on the street. But, farther, it was competent to prove acts of acquiescence and rei interventus, prout de jure; and these acts, in themselves, become real evidence of the preceding consent, just as a train of acts of courtship has been held to prove a promise of marriage, without writ or oath of party. There was no absolute rule excluding all innominate contracts from being proved by parole; and there were no conditions affecting this contract which should exclude parole. Neither was there any donation implied in the agreement, and it did not belong to the class of promises excluded from parole proof.

LORD BALGRAY.—Had it not been for the case of Clarke, I should have conceived M'Lean personally barred from objecting to parole proof, after allowing matters to proceed so far as he did. In the circumstances of this case, he should have objected when the remit to the jury was made. But as it seems to be still competent to take the objection, a very important question is raised by it. The agreement appears to me to be one relating to heritage. It is true that it is in some respects peculiar, and that it is not the transference of any right of private property which is involved, but still it affects heritage, and it is in consequence of his property that M'Lean was asked to make the agreement. If it had been a question as to the straightening of marches, there is a fixed rule of law for the admission of parole testimony. But the case does not fall within that rule; and although it might be proveable, juramento, being something of the nature of a pactum liberatorium, yet I cannot hold a proof prout de jure to have been admissible.

LORD GILLIES.—I concur, and have but little to add to what has just been stated. I think M'Lean's conduct rendered him liable to a strong personal objection. There was plainly a verbal agreement averred by Richardson, and the remit of the Lord Ordinary to the jury was virtually a judgment, allowing proof of a verbal agreement, and of course implying, that parole was admissible, so that it was unpardonable on the part of M'Lean not to have objected then. But, from the case of Clarke, it would appear that he was not excluded from taking his objection at the trial; and I conceive that, when stated, it must be sustained. There is no case in which the Court can allow an agreement regarding or affecting heritage to be proved by parole.

LORD M'KENZIE.—I arrive at the same conclusion, and hold that a proof prout de jure was inadmissible. There are two views which may be taken of the case, and both lead to the same result. In the first place, if the issue is to be read without reference to any thing else in process, my opinion is clear that the agreement was one relating to heritage, and not proveable prout de jure. In the second place, instead of taking up the issue, per se, as an isolated thing, it may be viewed as in reference to the process, and as a special issue for determining the matter of fact whether a certain agreement was made. I rather think this is the more correct view, and it is not an issue whether a legal and valid agreement was made, but merely whether a certain consent was, de facto, given. On referring to the process, it is plain, however, that it was not a verbal consent, which could competently be proved. The utmost which is there averred is, that there was an agreement, followed by rei interventus, and such rei interventus as to prevent resiling. But that is not enough to justify the admission of parole proof. The rei interventus becomes important only after the preceding agreement is proved; and I think the agreement itself could only be proved by writ or oath, and not by witnesses. It would appear to me to be a highly dangerous innovation, if a parole proof, in place of being confined to acts of rei interventus, were allowed also to extend to the establishing of a preceding agreement, though that agreement affected heritage, and was thereby made as effectual as if it had been reduced to writing from the first.

LORD PRESIDENT.—The very important question now before the Court has been made the subject of a much more complete and satisfactory discussion, under the bill of exceptions, than it was, or could be, at the trial before the jury. It is much to be desired that some arrangement could be made for disposing of questions as to the competency of evidence, as far as possible, before the day of trial comes on, because these questions could thus be examined and discussed with a degree of deliberation, which is precluded in the case of a trial before a jury. Even after having heard the arguments at the bar, and the opinions of your Lordships, I still feel that there is a want of any clear and strong ground for rejecting parole proof; such ground as a judge should always require before he debars a party from the use of any evidence. I feel that the question is attended with much doubt and difficulty. I am satisfied, however, from the case of Clarke, that M'Lean is not too late with his objection, however much he may have erred in not taking it sooner. If I had thought, at the trial, that this was an agreement properly affecting heritage, I should have had more inclination to reject the testimony tendered. But I did not view the agreement in this light. There was no encroachment on M'Lean's property; he sustained no loss of property, and no real damage; every inhabitant of the burgh of Annan might have objected to an encroachment on the street, as much as he could. He had just a personal right or privilege of objecting, which he was entitled to waive. But even as to heritage, the general rule of requiring writing sustains some exceptions. Lord Balgray has mentioned one of these in the case of straightening marches, which may infer the actual transfer of parcels of heritage, hinc inde; and I observe that there are several cases quoted by Lord Hailes, in which a mandate to purchase heritage was allowed to be proved by parole. Still I feel that there are serious doubts attending the admissibility of parole evidence in this case, and as the question is of great importance, it is well that it has now received the deliberate judgment of the Court.

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Their Lordships having intimated that the bill of exceptions should be sustained, the verdict set aside, and a new trial granted,

The Dean of Faculty, for Richardson, moved, that this should only be done upon condition of M'Lean's paying the whole expenses of the trial, as they had been truly occasioned by his delaying to object to the competency of parole proof at the proper time.

Keay, for M'Lean, answered, that he was not bound to anticipate that incompetent evidence was to be tendered, and his objection was stated so soon as the first witness was proposed; and that it was still more faulty, on the part of Richardson, to go before a jury with incompetent evidence, than, on the part of M'Lean, to delay objection till the moment when such evidence was tendered to the jury.

The Court, after taking time to consider as to the expenses, pronounced this interlocutor:—"Sustain the bill of exceptions, set aside the verdict, and grant a new trial in this case; but find neither party entitled to expenses."

W. STEWART, W.S.—R. WELSH, S.S.C.—Agents.

No. 353.

DUNCAN CAMPBELL, Pursuer.—*Robertson*—G. G. Bell.
ALEXANDER CAMPBELL and Others, Defenders.—*M'Neill*—*Milne*.

Process—Jury Trial.—In an action by one partner of a company against the others for relief from the penalties imposed for smuggling, under a conviction in Exchequer, on the ground that the smuggling had been carried on by the defenders in ignorance of the pursuer, the conviction was produced in evidence by the defenders at a jury trial, but no plea was stated at the trial, nor exception taken that it ought to be received as probatio probata of the knowledge—held incompetent to found on such plea in a motion for a new trial.

July 1, 1834.

2D DIVISION.
R.

MOTION by the defenders for a rule to show cause why a new trial should not be allowed in the cause mentioned ante, p. 573, (which see,) on the ground that the conviction in Exchequer, produced in evidence, which was against the pursuer as well as the defenders, was probatio probata of the pursuer's knowledge of the illicit distillation, and consequently, that the verdict was contrary to evidence. To this it was objected in limine, that the ground on which the motion was made, resolved into a plea in law which should have been taken at the trial, and stated by way of exception, and not by a motion for a new trial.

THE COURT were agreed that no exception having been taken at the trial, it was incompetent to admit the plea in this shape.

Motion accordingly refused.

C. M'DOWALL, W.S.—MACLEAN and GIFFEN, W.S.—H. MACQUEEN, W.S.—
WM. MENZIES, W.S.—Agents.

REV. H. FRASER, Pursuer.—*Robertson*.
HIS CREDITORS, Defenders.—*D. F. Hope*.

No. 354.
July 3, 1834.
Fraser v.
His Creditors.
1ST DIVISION.
Burden v.
Burden,

Cessio.—Where a party was found entitled to the benefit of the cessio, but parties could not agree as to the individual who should be named trustee, the Court remitted to the sheriff of the county where the pursuer lived, to name a trustee.

MACLEAN and GIVVEN, W.S. Agents.

CHARLES C. G. BURDEN, Petitioner.—*Whigham*.
MRS BURDEN and MRS CLEGHORN, Respondents.—*Patton*.

No. 355.

Competition—Service—Sequestration of Land Estate.—Where a child was in possession of the status of legitimacy, at the death of the parent—held, that a party, with a competing brief, who claimed the estate of the deceased, on the allegation of the child being a bastard, was not entitled to obtain a sequestration of the estate.

IN 1818, Anne M'Donald obtained from the commissaries a decree of July 3, 1834. declarator of marriage against the late Robert Burden of Feddal. Her daughter, now Mrs Cleghorn, was by the same decree declared legitimate. In 1824, Mrs Burden obtained a decree against Burden for £100 per annum, in name of aliment, due to her as his wife. Burden died in March, 1834, without having brought either of these decrees under review. An action of reduction of the declarator of marriage was raised in name of Charles C. G. Burden, a minor, nephew of the deceased, and suing along with a factor loco tutoris, who alleged that the decree had passed in absence, and was unfounded on the merits. A petition was also presented by him, stating that both he and Mrs Cleghorn had taken out brieves to serve themselves heirs of the deceased; that these had been advocated; and craving the Court, in respect of the competition for the succession, to sequester the estate of Feddal.

1ST DIVISION.
D.

Mrs Cleghorn and her mother alleged that the decree of declarator was passed after much litigation; they pleaded, that it was unchallengeable on the merits; that, in point of form, it was not liable to be opened up after being more than a year final; that the actings of the deceased, both in paying aliment and occasionally living with them, had homologated the decree, which he had lived for sixteen years without attempting to reduce; and that as they were respectively in actual possession of the status of marriage and legitimacy, at the time of the death of the deceased,

No. 355. they could not be prevented from enjoying the rights inseparable from such status, merely because another party chose to attempt a challenge.¹
 July 3, 1834.
Mackintosh v. Fraser.

LORD PRESIDENT.—This is an attempt to sequester the estate of a deceased, in the face of a declarator of marriage of nearly twenty years standing. It would be a strong measure, on the part of the Court, to place the estate of a parent out of the reach of the child; and it would require something very different from a mere inchoate challenge of the child's right, to warrant the Court in adopting such a measure.

LORD GILLIES.—It is true that the respondent, Mrs Cleghorn, is not yet in the actual possession of the estate of her deceased father, but she is in the actual possession of the status of legitimacy. That is enough for the Court, and there are no termini habiles for sequestration.

LORDS BALGRAY and MACKENZIE concurred.

THE COURT refused the petition, with expenses.

AINSLIE and MACALLAN, W.S.—C. MACDONALD, W.S.—Agents.

No. 356.

LACHLAN MACKINTOSH, Pursuer.—*Skene.*

AFFLECK FRASER, Defender.—*Robertson.*

Jurisdiction—Reparation—Proof.—An action of damages was raised in the Court of Session, against a party, alleging that he had usurped the office of Chancellor of a Jury, at a trial in Circuit Court of Justiciary, that he maliciously took the opportunity of his office of juryman to injure the pursuer and screen the party accused, controlled the rest of the jury, and deprived them of the right of due deliberation; that he had maliciously returned a verdict as unanimous, which was not unanimous, and had thereby occasioned the pursuer, as private prosecutor, to be subjected in expenses; held, that it was incompetent for the Court of Session to enquire whether the verdict was illegally or irregularly returned or recorded as alleged and the action therefore dismissed.

July 3, 1834.

1st Division.
 Ld. Corehouse.
 S.

LACHLAN MACKINTOSH of Raigmore raised an action of damages against Affleck Fraser, of Culduthel, alleging that he had lately raised criminal letters against Cameron for assault; that the trial came on at the Inverness Circuit Court, in April, 1832; that a jury were impanelled, of which Fraser was one; that evidence was led by both parties, &c.; "that the jury then fell to consider their verdict; that the defender, the said Affleck Fraser of Culduthel, having conceived hatred, malice, and ill-will against the pursuer, the said Lachlan Mackintosh, resolved to take the opportunity which his situation then, as a juryman, afforded, of

¹ 3 Erek. 8. 58; M'Kay, March 9, 1796 (5239); Home, June 24, 1828 (2225); Duke of Hamilton, Nov. 28, 1761 (3968); Clouston, Jan. 15, 1825 (ante, II. 472); M'Kay, Feb. 13, 1824 (ante, II. 711); Laing, &c. March 6, 1834 (an

carrying his malicious and vindictive feelings into operation ; that, with **No. 356.**
 this view, the said Affleck Fraser proceeded to control the rest of the
 jurymen in their deliberations as to the verdict which was to be returned, July 3, 1834
 Mackintosh
 Fraser.
 and the terms in which it should be declared to the Court; that, while
 the jury were, for this purpose, consulting together, a considerable difference of opinion was expressed in regard to the verdict, many of the jury stating, that they conceived the charge libelled in the said criminal letters to have been fully made out, and that the verdict should be a verdict of ' guilty,' whilst some others of the jurymen stated, that whilst they coincided in this view, they had doubts whether the special defence pleaded by the panel, of verbal provocation, and the evidence adduced in support of it, might not amount to a justification of his conduct, so as to warrant a verdict of not proven, or not guilty; that, as a difference of opinion thus existed, and was declared by the opinions of such of the said jurymen as spoke, it was of much importance for the ends of justice, that the jury should retire, in order deliberately to make up and return such a verdict as would truly express the opinions of the jury, and a wish was accordingly notified by a large majority, to retire for this purpose; that the said Affleck Fraser, in prosecution of his aforesaid malicious and vindictive purpose, though aware of the general wish on the part of the jury to retire, as above stated, resolved to prevent that course being adopted, and, with this view, at once proceeded to take and assume to himself the privilege of chancellor of the jury, and, as such, to announce a verdict to the Court, though no opinions had been expressed, or votes taken to authorize him to act as chancellor; that the said Affleck Fraser did accordingly, and before it was possible for any of the jurymen to leave the jury-box in order to retire, report to the Court, in his self-elected capacity of chancellor, that the jury had found the panel ' Not Guilty,' and which verdict was accordingly immediately thereafter entered on the record of Court; that in thus preventing the jury from exercising their privilege, in conformity to their known wish, to retire for the purpose of deliberately considering and making up their verdict, as well as in declaring himself to the Court to be chancellor, without being so chosen by the jury, and in thereupon stating what was the verdict of the jury before the opinions of the whole jury had been ascertained, and when a wish had been expressed by several to convict, the said Affleck Fraser acted most illegally, and with the malicious design of injuring the pursuer, as hereafter more particularly libelled;" that by 6th Geo. IV., cap. 22, sec. 20, it was imperative on Fraser to have announced the fact that the jury were not unanimous, but that he maliciously concealed the fact, and deceived the Court into a belief that it was unanimous, and the verdict was so made to enter the record of the Court; that Cameron moved for expenses, on the ground that the verdict was unanimous, and expenses were awarded against the pursuer, amounting to £302, 19s. 3d.; " that

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the whole of the foresaid proceedings of the said Affleck Fraser, before detailed, were highly illegal, unjustifiable, and unwarrantable, and were dictated and flowed from malice, hatred, and ill-will, conceived by him towards the pursuer, and were adopted by the said Affleck Fraser, wilfully and maliciously, and with the object and intention of injuring and hurting the feelings and character of the pursuer, and preventing him from obtaining reparation and redress for the gross assault and injury committed upon him by the said George Cameron, as detailed in the said criminal letters, and vindicating his character from the injurious consequences thereof; that the said proceedings were adopted by the said defender, for the farther purpose of screening and protecting the said George Cameron from the punishment which he ought to have suffered for the said crime; that the said proceedings were adopted by the said defender, with the farther object of screening and protecting the said George Cameron from being found liable in the expenses incurred by the pursuer in and connected with the foresaid trial, and depriving the pursuer thereof; that the said proceedings were adopted by the said defender with the farther object of procuring the pursuer found liable to the said George Cameron in the expenses incurred by him, the said George Cameron, in the said trial; that, by the foresaid illegal, unjustifiable, unwarrantable, and malicious proceedings of the said Affleck Fraser, the feelings and character of the pursuer have been much injured, and he has been prevented from obtaining reparation and redress." The pursuer concluded for reparation, by payment of £5000, of solatium, and by paying the expenses of both sides of the criminal trial.

Fraser pleaded in defence that he had acted conscientiously and regularly in the discharge of his duty as a jurymen; but that the action was irrelevant, *ex facie*, as the acts of a jurymen, sitting in judgment in the jury-box, in the Court of Justiciary, could not be made the subject of an action of damages, even though they were averred to have been maliciously done. It was impossible to enquire into the opinions or deliberations which had been held by the jury, whose privacy was absolutely sacred, and could not be invaded without the greatest injury to the administration of jury-trial.¹ Separately, it was incompetent to make any such enquiry in the Civil Court.

The Lord Ordinary, "in respect the verdict in the criminal action, mentioned in the summons, was returned in the Circuit Court of Justiciary, and recorded by the order of that Court, finds, that it is incompetent in this Court to enquire whether it was illegally or irregularly returned or recorded, in consequence of the proceedings of any Jurymen, after he had been impanelled and sworn as one of the Jury, and which took

¹ Stewart, 5 Murr. Rep. 103. Alton's Crim. Pract. 208.

place in the course of the trial; therefore, dismisses the action and decerns, **No. 356.**
and finds the defender entitled to expenses."

The pursuer reclaimed.

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Robertson v.
Scott.

LORD BALGRAY.—This is a case in which there cannot be two opinions. The Court must adhere.

The other Judges concurred, and

THE COURT adhered.

GARRIE and MORTON, W.S.—H. FRASER, W.S.—Agents.

MATTHEW ROBERTSON, Pursuer.—*J. Anderson.* **No. 357.**
WILLIAM SCOTT and OTHERS, Defenders.—*Robertson—Pyper.*

Bankruptcy—Res Judicata—Pactum Illicitum.—A renunciation of the lease of a coal-pit was executed by the trustee and three of the commissioners on a bankrupt estate, with concurrence of, and in favour of the landlord, who was also a commissioner, and who let the coal-pit to a third party; and the trustee was afterwards discharged, and the sequestration closed: held that, after a lapse of above fourteen years, a creditor was not entitled to reduce the trustee's discharge and the renunciation of the lease, either upon vague allegations of irregularity, or upon the plea that the renunciation of the lease was in favour of one of the commissioners.

In April, 1812, the estates of William Scott of Heatheryknow were July 3, 1834.
sequestered, and William Scott of Adderston was elected trustee. The
bankrupt and his brother, John Scott, were joint lessees, under a nine-^{1ST DIVISION.}
teen-years' lease, commencing in 1808, of a coal-pit, in the lands of ^{Ld. Moncreiff.}
Commonhead, of which Gavin Mason was proprietor. Mason was a ^{B.}
creditor, and was chosen one of the commissioners, of whom four were
appointed. The bankrupt estate was duly conveyed to the trustee; and
the examinations of the bankrupt were regularly held. In October,
1813, a deed was executed, by which the lease was renounced in favour
of Mason, who, at the same time, granted a new lease of the same coals
to the late Alexander Waddel of Stonefield, who was working the ad-
joining coal. The parties to this transaction were the trustee, with con-
sent of the commissioners; the bankrupt and his brother; and Mason and
Waddel. At the same time, an assignation of a coal-lease of Nether-
house was executed by the bankrupt, the trustee, and commissioners, in
favour of Waddel.

In January, 1815, the trustee submitted a report to a general meeting
of creditors, which bore, that after realizing the estate, paying preferable
debts, and having his accounts approved of by the commissioners, and by
general meetings, the only subject remaining was a parcel of old debts
which would not bear the expense of being brought to a sale: that the

No. 357. bankrupt had complied with the requisites of the statute; and that the estate was already in debt, and was likely to be more deeply involved; unless speedily wound up. The meeting unanimously instructed the trustee to apply to the Court for his own exoneration and discharge, and for having the process of sequestration closed. The trustee presented a petition for his exoneration and discharge, and produced the report and minutes on which it proceeded. The petition was duly intimated, and remitted to the Lord Ordinary, who, in May 1815, remitted to Mr Rose, depute-clerk of Session, to report. Rose reported that, on examining the petition and relative documents, the facts of the petition were correctly stated. The petition and report being then brought before the Court, their Lordships discharged the petitioner, and ordained his bond of caution to be delivered up. The discharge was extracted. In this procedure the orders of the Court and the Lord Ordinary had been regular, and due notice given.

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In 1829, Matthew Robertson, alleging himself to be the assignee of several creditors, some of whom were the near relations of the bankrupt, raised a reduction of the discharge of the trustee, and of the renunciation of the coal-lease of Commonhead.

Parties were at issue whether the transaction was beneficial or hurtful to the estate; whether it was fairly carried through; whether the defender, Waddel, had made large disbursements on the faith of it; and also whether the pursuer had adequately instructed his title to pursue. It was pleaded by the pursuer, that the transaction was funditus null, ab initio, in respect that Mason, in whose favour the renunciation had been executed, was one of the commissioners, and was therefore disqualified from accepting a renunciation on the part of the bankrupt estate. It was not too late to take the objection, as the bankrupt had never been discharged, and the sequestration was still a pending process. The pursuer also founded on alleged irregularities in the conduct of the sequestration, as invalidating the discharge of the trustee.

The trustee, and the representatives of Waddel, pleaded in defence, that this was not the common case of a commissioner becoming auctor in rem suam, because Mason was landlord of the coal-pit; and however beneficial or necessary it might be to the bankrupt-estate to renounce the lease, this could not have been done without the concurrence of Mason. But, separately, as the trustee had been allowed to sue out his discharge, under which all his actings had been approved and confirmed by the creditors and the Court; and after a lapse of fifteen years, in which all concerned, including Waddel, an onerous third party, had acted on the faith of the transaction now brought under challenge, it was too late on the part of any of the creditors, or their assignee, to attempt a reduction. The proceedings under the sequestration had all been regular; and no sufficiently specific allegation was made to the contrary: but even had

such been made, it would, for the reasons above stated, have been too late. No. 357.

The Lord Ordinary "sustained the defences, assoilzied, &c., and found expenses due." *

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* "NOTE.—This is an attempt to open up the proceedings in a sequestration, fourteen years after they were finally closed, and the trustee and commissioners discharged, by decree of this Court; and to do so to the effect of reducing the right of a third party who contracted onerously, being no creditor and no party to the sequestration, and who had been in undisturbed possession of the heritable subject in question during sixteen years. It would require a very clear and unexceptionable title, and very specific and relevant statements to support such a reduction.

"The preliminary defences were reserved; and the Lord Ordinary is of opinion, that the title of the pursuer is of the most doubtful character. Nearly all the parties in whose right he is said to stand, are the near relations of the bankrupt. Both the bankrupt and his brother, John Scott, were parties to the deed challenged. Many of the persons who sign the deed of assignation in favour of the pursuer, do so merely as mandatories for others. But no mandates have been produced; and though the pursuer asserts that they were duly authorized, that plainly is not enough in such a case, where written mandates were essential; and, if they existed, should have been in the pursuer's possession as part of his title, and ought to have been produced before closing the record.

"But, independently of the objections to the title, the Lord Ordinary is of opinion, that no relevant grounds to sustain the reduction have been condescended on. It seems to be very clear, that, before the pursuer can succeed in the reduction of the deed of renunciation challenged, he must reduce the decree of the Court by which the trustee and commissioners were discharged, and all their acts approved of and confirmed. To effect this, he makes general averments, that the statute was not observed; that the meeting of the creditors was not duly advertised; and that the trustee had made an erroneous or false report. It would require a very specific statement, and that made within some reasonable time, to give even a probable relevancy or competency to such averments. The proceedings in an application to the Court for discharge and exoneration in a sequestration, are of the most public nature. All persons who are creditors on the estate are bound to attend to them; and there is no averment here that the orders of the Court and the Lord Ordinary were not regular, or that the notices were not duly given. But the decree of the Court is res judicata on the very points, that the previous meetings of the creditors had been duly held according to the statute; that the provisions of the statute generally had been observed, and that the conduct of the trustee and commissioners had been correct. And it is not a decree in absence, all the creditors being presumed to be present. Neither does it pass ex parte; for the facts stated are strictly enquired into under the orders of the Lord Ordinary, and specially reported on by him to the Court. It seems, therefore, impossible to imagine a stronger case for the application of the principle, that the objections taken to the regularity and correctness of the proceedings of the trustee, commissioners or creditors, were competent and omitted—competent to be stated by the very parties whom the pursuer says he represents, and omitted to be stated before decree was pronounced, whereby the subject of discussion was finally closed. See Buchanan against Dunlop, &c., December 8, 1829.

"But farther, in the present case, there are no specific averments on these points. When the pursuer is told distinctly that the meeting of the creditors was regularly advertised in the London and Edinburgh Gazettes, he contents himself with denying

No. 357. Robertson reclaimed.

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LORD PRESIDENT.—The subject of this transaction was the lease of a coal-pit, the working of which was necessarily attended with some hazard and expense. The pursuer cannot satisfy the Court that the creditors were bound to have gone on with the lease, and were disabled from getting rid of it by renunciation. After lying by for above fourteen years, there would require to be a great deal more than I am able to discover in the merits of this case, to warrant the Court in allowing the pursuer to open up the proceedings.

this, and still leaves his own averment upon the vague, loose negative, that the meeting was not duly advertised in terms of the statute, without condescending to state in what the alleged defects lay. When he is told that the meeting was fully attended, he meets this also by a mere general denial; and when the resolutions of the creditors are quoted, showing that the creditors did perfectly well understand the subject on which they were deciding, his case is brought to consist in mere general averments of collusion and misrepresentation. The Lord Ordinary, in short, cannot think that, upon such a condescendence, it would be at all justifiable to open up the decree of the Court after so long a period, even though the grounds of challenge were in themselves otherwise competent.

“ With regard to the deed of renunciation principally challenged, the source of the action may probably be found in the supposed discovery, that, because Mr Mason, the landlord, was also one of the commissioners, it was incompetent to transact with him. But it is evident that the competency generally of a commissioner purchasing part of the bankrupt estate is not involved in this proceeding. For, as Mr Mason, who happened to be a commissioner, was the landlord of the property, it is evident that, if the lease was to be renounced at all, it could only be so by transaction with him; and as there were the trustee and three other commissioners to judge of the matter, that surely could not render the proceeding impossible if it was otherwise right and expedient. The lease, accordingly, being considered to be of no value, and a very hazardous right to be held by the trustee, the trustee and the three commissioners having no motive to act otherwise than for the interest of the estate, judged it to be of importance that the estate should be relieved of the obligations under it; and, therefore, with the express concurrence of the bankrupt, they made the transaction with Mr Mason, and with the third party, Mr Waddell; and all their proceedings were subsequently ratified and approved of by the creditors. The pursuer says, indeed, that the lease was of value, and should have been sold by public roup. But is that an averment to be now entered into, in the face of the resolutions of the creditors never complained of, the decree of the Court, and sixteen years of undisturbed possession by a third party? The Lord Ordinary apprehends that the statement is not relevant. The truth of the case could not now be fairly reached. But if such statements were held to be sufficient to open up a sequestration, and set aside rights constituted to third parties under the powers of the trustee and commissioners, the most beneficial and necessary arrangements, entered into with the concurrence of all parties at the time, might be made the subject of endless trial and discussion at any distance of time. The Lord Ordinary, therefore, thinks that there is no relevancy in the case as stated by the pursuer, and that it would be a most dangerous precedent, upon such general averments of unfairness and collusion, to force a trustee and commissioners, and a third party transacting with them, into an expensive investigation of matters which were so long ago closed by open delivery and possession, and by decree of this Court.”

LORD BALGRAY.—After the proceedings in a sequestration have been carried the length of this one, and a discharge has been given to the trustee, I should be very sorry to see them all examined de novo. I cannot sanction an attempt to bring these proceedings under review in this manner.

LORDS GILLIES and MACKENZIE concurred.

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Houston's Ex-
ecutors v.
Speirs' Trus-
tees.

THE COURT accordingly adhered.

J. M'GILL, S.S.C.—J. STUART, S.S.C.—D. CHRISTIE, S.S.C.—Agents.

HOUSTON'S EXECUTRIX, Pursuer.—*Sol.-Gen. Cockburn—Penney.*

No. 358.

SPEIRS' TRUSTEES, Defenders.—*Rutherford—Speirs.*

Cautioner.—Letters which held to import a cautionary obligation for a current cash credit, and not merely for a single set of transactions to the extent of the sum mentioned in the guarantee.

THE Honourable Simon Fraser and Company, merchants in London, July 3, 1834. of which the partners were the Honourable Simon Fraser and the late James Henry Houston, having, in 1805, agreed to accommodate Walter Logan, merchant in Glasgow, with a cash credit, to the extent of £2000, the late Mr Speirs of Elderslie, who had consented to be his cautioner, addressed to Fraser and Co. a letter in these terms:—"Gentlemen, understanding that you have agreed to accommodate Mr Walter Logan of Glasgow with a credit upon you to the extent of £2000, I hereby guarantee his transactions with you to this extent."

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Ld. Medwyn.
F.

Of date July 13, 1808, Speirs addressed to "the Honourable Simon Fraser, James Henry Houston, Esq., merchants in London, under the firm of the Honourable Simon Fraser and Company," another letter in these terms:—"Sirs, I hereby guarantee the drafts of Walter Logan, merchant in Glasgow, upon you, to the extent of £2000."

On the credit of this letter, Logan made drafts on Fraser and Co., and continued to operate on it as a current cash credit, the bills being drawn on Fraser and Co. till the beginning of 1810, when a new arrangement was made by that house. They formed a banking connexion with the house of Sir John Perring, Godfrey, Shaw, Barbour and Co., changed their own firm from the Honourable Simon Fraser and Co. to that of the Honourable Simon Fraser, Houston, and Co., and instructed their correspondents no longer to draw directly on themselves, but on the banking-house, stating, in the body of the drafts, that these were for value in account with Fraser, Houston, and Co. Thereafter, accordingly, Logan made his drafts on the banking-house, and in the beginning of November, 1810, being in need of further accommodation, he obtained from Speirs and Archibald M'Nab and Co. of Glasgow, the following letter of guarantee, addressed to Fraser, Houston, and Co.:—"Gentlemen, we

No. 358. guarantee to you the drafts of Walter Logan, merchant in Glasgow, upon your banking-house in London, to the extent of £2500."

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ecutors v.
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tees.

On the 24th December of the same year, Logan, still requiring further assistance, obtained from Speirs an additional letter of guarantee, addressed to Fraser, Houston, and Co., in these terms :—" Mr Logan has represented to me, that he has been so much disappointed in the funds he trusted to in this quarter, that he is under the necessity of requesting farther accommodation. He observes, that, in these times, it is difficult to calculate on what may be needed, which is the cause of troubling you again. However, his engagements are now not much, and therefore I have to solicit the favour in his behalf of your banking-house honouring his drafts on them, and I oblige myself to guarantee the same. I do not apprehend he will require more than from £1500 to £2000, in addition to the operations already made by him."

These letters were transmitted to Fraser, Houston, and Co., who, on receiving that last mentioned, wrote to Logan that they consented to allow him " the additional credit stated, say from £1500 to £2000."

On the credit of these letters of guarantee, Logan's drafts were honoured to a considerable amount, and new drafts were taken, as under a continuous cash credit. In February, 1811, Logan became bankrupt, being indebted to Fraser, Houston, and Co., on his drafts, in the sum of £9129. Speirs on this paid £3000 to account, and Logan's estates ultimately yielded £3072, but Archibald M'Nab and Co. having become insolvent, and Speirs having refused to pay the balance, Mrs Houston, as executrix of James Henry Houston, and in right of the debt to the house of Fraser, Houston, and Co., raised the present action against him, (carried on after his death against the present defenders, his trustees) founding on the letters of October, 1808, and of November and December, 1810. Besides the pleas determined in another cause between the parties, (see ante, III. 180; IV. 566; III. W. & S. App. 392), the decision in which settled, *inter alia*, that no claim could lie under the letter of October, 1808, on account of drafts made, not on Fraser and Co., but on the banking-house—Speirs' trustees contended, that the letters of November and December, 1810, did not import a credit for a continuous course of dealing as under a cash credit, but only for one set of drafts to the extent guaranteed, and that when this had been given, and these drafts retired, the guarantee was extinguished; while Houston's executrix, on the other hand, maintained that such letters in mercantile dealing, imported a continuous credit; and further, that the last letter of December was unlimited in its extent.

The Lord Ordinary pronounced this interlocutor, adding the subject-matter note : *—" Finds, that following out the principles laid down by the

* " It seems impossible to doubt, even without such an authority, as in the recent case of Sir William Forbes and Co. against G.

House of Lords in the case with the Banton Coal Company, (22d May, No. 358. 1829,) as to the effect of a letter of guarantee, similar to those pleaded on July 4, 1834. in the present case, the pursuers have no claim under the letter dated Cowan v. Campbell. 13th July, 1808: Finds, that, under the letter, dated 9th and 13th November, 1810, the pursuers will be entitled to recover from the defender, with relief from his co-cautioners, whatever sums have been drawn by Mr Logan on the banking-house of Fraser, Houston, and Co., in London, and which have not been repaid by counter remittances, but not exceeding the sum of £2500: Finds, that the letter of 24th December, 1810, is a limited guarantee to the extent of £2000, and that the pursuers are entitled to recover the balance which may remain due on the drafts by Mr Logan, in virtue of said letter, to the extent of £2000: Appoints the pursuers to put in a state of the sums claimed by them, in terms of these findings."

Speirs' trustees reclaimed as to the findings in regard to the letters of November and December, 1820.

THE COURT adhered.

JOHN COWAN, S.S.C.—KEE and DICKSON, W.S.—Agents.

JOHN COWAN, Pursuer.—*Whigham*.
PETER CAMPBELL, Defender.—*Cunninghame*.

No. 359.

Expenses.—Where one defender was subjected in one shilling damages, by the Jury, and other three defenders were assoilzied, the Court, of consent, modified the pursuer's account of expenses, as against the first defender, to one-half, in respect that a part of the record, and of the proof adduced, applied to the defenders who were assoilzied, and not to the defender who was subjected.

SEQUEL of the case reported ante, XI. 999, and XII. 221, which see. July 4, 1834. The Court had found Campbell liable in expenses, and the auditor, at 1st DIVISION. taxing, reserved for the consideration of the Court, how far the account should be subject to modification, as there were other three defenders, who maintained distinct pleas from Campbell, and as to whom a different

4th June, 1830, that these are standing guarantees to support a continuous course of dealing, and that they were good till recalled. When such letters of guarantee are given by the granter to the person to be benefited, and by him put into the hands of a banker, and operated upon, the acceptance of them need not be intimated to the cautioner. If Fraser, Houston, and Co. had intended to hold the letter of December, 1810, as an indefinite guarantee to any extent, as now contended for, the Lord Ordinary thinks they were bound to have said so to the cautioner, to ascertain if such was his meaning, since such is not the reasonable interpretation of the letter; but they not only do not do this, but they wrote to Mr Logan, showing they understood it to be a limited guarantee, which is a very good proof of what its construction would be among mercantile men."

No. 359. proof was adduced at the trial. The others had been assoilzied, while Campbell was subjected in one shilling damages. The Court, of consent, modified the taxed account against Campbell to one-half. Their Lordships observed, that as a considerable part of the pursuer's account was incurred in making up a record, and leading a proof, of which only a part applied to Campbell, it would be unjust to subject him in the whole cost of such account.

July 4, 1834.
M'Millan v.
Kennedy.

W. MARTIN, S.S.C.—P. CAMPBELL, S.S.C.—Agents.

No. 360.

NEIL M'MILLAN, Objector.—*Rutherford*—*W. Bell*.
JOHN KENNEDY, Respondent.—*Shene*—*Sommerville*.

Agent and Client—Process.—A party, who was charged in virtue of a decree in a process of suspension and liberation for expenses, and against whom a claim of damages existed, obtained a discharge in general terms from the party in whose name the charge was given, containing a disclamation of the suspension and charge; and the agent of the latter, after arresting in the hands of the party charged, and obtaining decree against his client, raised a multiplepoinding in name of the party charged; held, 1. That the multiplepoinding was competent; and, 2. That the discharge was not effectual against the claim of the agent.

July 4, 1834.
2d Division.
Ld Medwyn.
F.

GEORGE BINNIE, mariner in Greenock, having been incarcerated at the instance of the objector M'Millan, grocer there, brought a suspension and liberation, on the ground of the illegality of the procedure under which he was imprisoned. In this process the letters were suspended simpliciter, and M'Millan found liable to Binnie in expenses, taxed at £57, 13s. 7d. The respondent Kennedy, W.S., acted as agent for Binnie, and on his applying to the opposite agent in Edinburgh, for payment of the expenses as disbursed by him, the latter returned this answer:—
“As I have no doubt the amount of your account will be remitted me from Greenock, I will be obliged by your delaying extracting the decree for a few days.”

The expenses not having been paid, Kennedy extracted the decree, and after a formal demand for payment had been made by the country agents on M'Millan, gave him a charge of horning—the decree and horning which was subscribed by Kennedy himself as clerk to the signet, proceeding of course in name of Binnie. The charge of horning was given on the 30th August, 1832, and on the 14th September, M'Millan's country agent having obtained a meeting in a spirit shop with Binnie, who still maintained a claim of damages for the imprisonment against M'Millan, procured from him, in consideration of a sum of money, (said to have been £17,) a discharge in these terms:—“I, George Binnie, mariner in Greenock, considering that, in an action of suspension and liberation, alleged to have been raised, and pursued, at my instance against Niel M'Millan, grocer in *Carted*

Lords of Council and Session, a decret, as alleged, was obtained at my instance for the payment of a certain sum of expenses, over and above the dues of extract; and farther considering, that the said Niel M'Millan, as alleged, has been charged at my instance upon the letters of horning, dated the 5th July, and signeted 29th August last; and now seeing that the said Niel M'Millan has made payment to me of a certain sum of money, the receipt of which is hereby acknowledged, and all objections to the contrary for ever renounced and discharged; therefore wit ye me, the said George Binnie, to have disclaimed, as I do hereby disclaim, the fore-said proceedings and charge of payment at my instance, and also to have discharged, as I hereby discharge, exoner, and acquit, the said Niel M'Millan, his heirs, executors, and successors, in full of all claims, clags, debts, dues, and demands, and of and from all action and execution competent that has followed or may follow thereon now and for ever."

No. 360.
July 4, 1834.
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Kennedy thereupon raised an action against Binnie, (who was confessedly insolvent,) on the dependence of which he arrested in M'Millan's hands the amount of expenses as still due by him to Binnie, and having obtained decree in absence in his action against that party, he raised, in name of M'Millan, a summons of multiplepoinding as to the alleged fund of expenses arrested in his hands.

To this summons M'Millan objected on the ground, inter alia, that the decree and diligence for expenses being in Binnie's own name, and he not having been interpellated from making payment to him, he was in bona fide to enter into the transaction above mentioned, and that having obtained a discharge from Binnie, while fully entitled to grant the same, no debt was now due by him to form a fund in medio.

To this it was answered—

That M'Millan was perfectly aware that the expenses had not been paid, and so could not be in bona fide; but, at all events, that the discharge did not extinguish the claim for expenses, but, on the contrary, by the disclaimer on the part of Binnie, of the proceedings in the suspensions, clearly excluded them from the settlement then made, so that they were still due and undischarged.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note:—"In respect that the discharge produced does not establish the

* * The objector pleads that the agent not having taken decree in his own name, nor interpellated him from paying the expenses found due by him to Binnie, but, on the contrary, a charge having been given to him in Binnie's name to pay these expenses to Binnie, upon a horning subscribed by the agent himself, he was fully warranted to settle his claim with Binnie, which he did on 14th September, 1832, and, in evidence of this settlement, a discharge of that date is produced. The Lord Ordinary knows of no case yet decided where a formal discharge obeying a charge to pay, and where the cause is entirely out of Court, has been disregarded, and the agent's claim sustained. In Hamilton, 17th June, 1813, the action had not proceeded

- No. 360. objector's averment that the debt due by him to Binnie has been paid, repels the objections to the competency of this action, and sustains the same; finds expenses due, allows an account thereof to be given in, and remits to the auditor to tax the same and to report; and, farther, appoints claims upon the fund in medio to be lodged in eight days from this date." M'Millan reclaimed; but the Court adhered.

July 4, 1834.
Johnston v.
Scott.

M'LEAN and GIFFEN, W.S.—J. KENNEDY, C.S.—Agents.

- No. 361. JOHN JOHNSTON and OTHERS, Pursuers.—*Cunninghame*.
JOHN SCOTT, Defender.—*Marshall*.

July 4, 1834. *Process—Jury Court*.—The Lord Ordinary having approved of issues to try this cause before a Jury, the defender reclaimed, not being satisfied with the terms thereof.

2D DIVISION.
L. Medwyn.
R.

The Court directed the parties to be heard before the presiding Judge at chambers, as the proper mode of settling the disputed terms of issues.

WM. PATRICK, W.S.—A. HILL, W.S.—Agents.

so far as to show whether the agent meant to take decree in his own name or not; and although there was a formal discharge, the process was still in Court, and the discharge, as made at that stage of the proceedings in mala fide, was disregarded. It does not appear from the report that there was a discharge in any of the other cases. If there had been a valid discharge in the present case, the Lord Ordinary is inclined to think that, instead of proceeding against the objector by raising a multiplepoinding in his name, on the narrative that he had a sum of money in his hands belonging to Binnie, which he was ready to pay to the creditor best entitled to it, it would have been the proper course to proceed by reduction or forthcoming, or rather perhaps by reduction, with a conclusion for payment. But the discharge produced, whatever it may have been intended to do, does not discharge the sum of expenses, for it makes Binnie disclaim the proceedings, and, by necessary consequence, renounce all claim to them. They are not expressly included, and after the disclamation, the discharge cannot be supposed by implication to include them. Supposing, then, that the objector has not obeyed the charge to pay, and that the money is still due to Binnie, a multiplepoinding was not an incompetent form of process, where there might be other claimants, as the objector had declared himself insolvent, (Ans. 13). As all the pleadings hitherto have been on the competency of the process, it is necessary now to order claims to be lodged. If no other claimant appears, the answers may be held as the claim for Mr Kennedy, and decree pronounced, so as to save farther expense."

SIR GEORGE WARRENDER, Pursuer.—*D. F. Hope—Anderson.*

No. 362.

LADY WARRENDER, Defender.—*Sol.-Gen. Cockburn—Keay.*

July 5, 1834.

Warrender v.

Warrender.

Process.—1. If either party refuses to close the record upon summons and defences, the Court must allow a record to be made up by condescendence and answers in common form. 2. The provision of the judicature act, regarding a party's right to make up a record in ordinary actions in the Court of Session, having been expressly repeated in the relative Act of Sederunt, which was passed to regulate the forms of process before the Commissaries—held, that either party had a right to insist on making up a record in an action of divorce which was raised in the Court of Session subsequent to the transference of the jurisdiction of the Commissaries.

SIR GEORGE WARRENDER, pursuer of the action of divorce, reported July 5, 1834. ante, p. 847, stated that he was willing to close the record upon the summons and defences, as he could add nothing more in a condescendence; and he contended that, as Lady Warrender had had the last word, and had lodged both defences and additional defences, she should not be allowed to insist for condescendence and answers, but should be compelled to close the record without farther pleadings. He pleaded, that, by the Judicature Act (§ 8), it was not imperative on the Court to allow a record to be made up at the request of either party, if such request was capriciously or injuriously made: but even if the section had been imperative, it only applied to such processes as were then ordinary actions in the Court of Session. It was provided in regard to extraordinary actions, that the same form of process did not require to be applied. Much more must it be held that there was no necessity for applying it to actions, such as those of divorce, &c., which were not then competent before the Court: and in a recent case,¹ it had been held, as to furnishing an opposite party with a list of witnesses, that the forms of process in consistorial actions were not the same as in actions originally proper to the Court of Session. But if it were thus discretionary with the Court, whether a record should be made up or not, the parties should be compelled, in the circumstances of this case, to close upon the summons and defences. He therefore moved the Lord Ordinary to ordain this, the more especially because he had a right not only to prevent unnecessary delay, but also to curtail the expenses of a process in which he had to pay both sides.

1st Division.
Ld. Fullerton.

The defender pleaded, that it was imperative on the Court to allow a record to be made up, if either party demanded it. The universal practice of the Outer House had so interpreted the 8th section of the Judicature Act. It was ordered by the 39th section of the statute, that the

¹ *Hutcheson* (ante, p. 643).

No. 362. same forms should, as far as possible, be introduced by Act of Sederunt, into the Commissary Court; and accordingly an Act of Sederunt had been framed, which (§ 7) verbatim enacted for that Court the same forms as those prescribed in the Judicature Act, § 8. And, since the consistorial processes were transferred to the Court of Session, the same forms, as to this point, had been applied to them as to other ordinary actions.

July 5, 1834.
Warrender v.
Watt & Co.

Lord Fullerton reported the question.

LORD PRESIDENT.—Even if it were discretionary with the Court, I should not incline, in a case like this, to compel the defender to close the record upon the summons and defences. Preliminary defences were pleaded; and it is quite possible, from that circumstance alone, that the defender made a more abridged statement on the merits than she may wish to place on record. But I do not conceive the matter to be discretionary, as I recollect having advised with the other Judges as to the effect of this part of the statute, and they held that it was imperative to allow a record to be made up whenever either party demanded it.

LORD BALGRAY.—This is just one of the last cases in which I would allow a party to be cut short in putting any statement or explanation upon the record, which was conceived to be available for the defence.

LORD MACKENZIE.—I think the party is entitled to insist on making up a record, and that the Court have no discretionary power. As to the 8th section of the judicature act, its meaning, if it was ever doubtful, is fixed by the invariable practice which has followed upon it. Any party may insist on making up a record, who does not agree to close upon the summons and defences. It is true, that the jurisdiction of the commissaries was not transferred to this Court, at the date of that act; but we passed an Act of Sederunt under the authority of the statute, in order to regulate the forms in the Commissary Court, and in that Act of Sederunt, the provision of the judicature act was verbatim et literatim repeated. I see no reason to doubt that the commissaries would interpret that enactment, in the Act of Sederunt, just as this Court interpreted the same enactment in the statute, and I must proceed on the footing that they did so. And now that these actions have been transferred to this Court, I cannot hold that we are entitled to subject them to a form of process which is neither sanctioned by the statute, nor by the Act of Sederunt, nor by the practice which followed respectively upon each. An Act of Parliament would be required to introduce any alteration on this matter now, and perhaps there may be some reasons for such an act; but it is enough for this question that the Court cannot grant the pursuer's motion without it.

LORD GILLIES.—I am of the same opinion. A statute was passed to regulate the forms of process in this Court; and its enactment has been interpreted by uniform practice. An Act of Sederunt was then passed, by direction of the statute, for the regulation of the forms in the Commissary Court. That Act of Sederunt repeated expressly the enactment of the statute, and applied it to the Commissary Court, so that the question now comes to be the same as if the statute had originally and directly applied, quoad hoc, to a process of divorce, as much as to any of the ordinary processes of the Court of Session.

THE COURT found that the Lord Ordinary must allow a rec

up in common form; and his Lordship appointed condescendence and answers accordingly. No. 362.

J. MURRAY, S.S.C.—E. MACLEAN, W.S.—Agents.

July 5, 1834.
Fraser v. Scott.

J. J. FRASER, W.S., Suspender.—*D. F. Hope—Buchanan.* No. 363.
LT.-COL. GORDON and OTHERS, Respondents.—*Keay—Cunninghame—Russell.*

Arbitration—Interdict—Process.—1. A party in a submission to two accountants, regarding a complicated accounting, having raised a declarator to have the proceedings decreed to be null, and the arbiters incapable of pronouncing decree, in respect of their having required the parties to sign an obligation for their remuneration, at the same time presented a bill of suspension and interdict to have the arbiters prohibited from in the meanwhile taking any further steps in the submission. The Court refused the bill, reserving all competent pleas in the declarator as in a reduction. 2. Agent fined for lodging documents without formal leave of the Court.

THE suspender, Fraser, W.S., and the respondent, Colonel Gordon, July 5, 1834. entered into a submission to Messrs Wright and Cockburn, accountants 2D DIVISION.
in Edinburgh, of divers processes, involving an extensive and complicated accounting. After considerable investigation on the part of the Bill-Chamber.
arbiters, and when they were prepared to issue notes, they required of Lt. Moncreiff.
the parties, that before these notes should be given forth, they should sign an obligation, binding themselves jointly and severally "to make payment to the clerk to the submission, of the joint expenses of the submission and judicial references, and of the decree or decrees arbitral, or award, interim or final, which may follow thereon, including a reasonable and proper remuneration to the arbiters and judicial referees, not only for their professional services as accountants, but for the time and trouble already bestowed, or to be yet bestowed by them in the whole matters falling under the submission and judicial reference; and also a fee to any oversman who may be appointed in case of the arbiters and judicial referees differing in opinion, and fees to counsel who may be consulted by the arbiters and judicial referees, in case of difficulty, in terms of the submission; reserving to the parties severally such claim of relief as may be found due from the one party to the other for the whole, or a part of the said expenses, as the same may be determined in the course of the submission, or judicial references, or otherwise."

The parties accordingly subscribed a letter to this effect, and thereupon the notes were issued. These were unfavourable to Fraser, who raised an action to have it declared that the proceeding above mentioned on the part of the arbiters, was illegal, that it disqualified them from acting, and rendered their whole proceedings invalid, and to have them prohibited from issuing any decret-arbitral, or taking further steps in

No. 363. the submission; and he, at the same time, presented a bill of suspension and interdict to have them interdicted from proceeding therein. In answer, it was stated by Gordon and the arbiters, that the obligation required to be subscribed, was only in implement of an agreement to remunerate the arbiters made previous to their accepting the submission, and without which, as professional men, whose time and labour were of much value, they never would have involved themselves in the business; and it was further pleaded, that the question of law raised would be fully tried in the declarator, and that it was quite unnecessary, and might be injurious to stay proceedings under the submission in the meantime.

July 5, 1834.
Fraser v. Scott.

The Lord Ordinary refused the bill, "but reserving to the complainer all pleas competent to him in the action of declarator already raised, or in any reduction or other process, in the event of a decree-arbitral being pronounced, and to all the other parties their answers to any such pleas, as accords."

His Lordship added the subjoined note.*

Fraser reclaimed, and thereafter transmitted a note to the Lord Justice-Clerk, praying for leave to print and box certain documents. No principal copy of this note, however, was lodged with the clerk, and though moved, and the prayer granted by the Court, no interlocutor was of

* "The Lord Ordinary refuses the bill and the interdict demanded, on the simple principle, that to grant any interdict would be to prejudge the case still to be tried in the declarator or otherwise,—and to pass the bill without granting the interdict would be useless, and create unnecessary expense, seeing that nothing has yet been done which can be the subject of suspension; whereas, on the other side, the complainer can suffer nothing, if it should ultimately be found that the proceedings of the arbiters are illegal or ineffectual. But it is also important, that no caution is offered.

"The Lord Ordinary will in no manner prejudge the question, as to the effect of the minute required by the arbiters to be signed at the particular time when this took place. He will only observe, 1st, That much will depend on the fact averred, that, before the arbiters accepted of the submission, they verbally required, and the parties verbally agreed, that such an obligation should be granted. 2d, That, if that fact were not established, there is a material difference between what may be agreed on between the parties, and what may be legally demanded by the arbiters in the middle of an arbitration; and, 3d, That, if the proceeding were held to be illegal, it would be difficult to hold that the proceedings were validated by the party having complied with the demand, or not having objected to it.

"There can be no doubt, that the arbiters in such a case were entitled to expect fair remuneration, and also, to stipulate for it before accepting of the submission. The object in the present case evidently was, to have Colonel Gordon, as well as the complainer, bound, at all events. But still, if the case were to stand, that no such stipulation was made till after the submission was accepted and proceeded in, in the way stated in the bill, it would be matter for important consideration, how far it was in point of law competent for the arbiters to demand such an obligation before proceeding farther, and what should be the effect of their having asked and obtained it under such circumstances."

course written. Fraser, however, lodged the documents, but, on the No. 363. reclaiming note being put out for advising, these were moved to be ordered to be withdrawn, as lodged without regular authority. The Court ^{July 5, 1834.} Thomson v. Black. ordered the documents to be withdrawn, and fined Fraser £5 for lodging them; and, on the merits, they refused his reclaiming note.

J. J. FRASER, W.S.—J. BENNETT, W.S.—J. NAIRNE, W.S.—Agents.

ANDREW THOMSON and SPOUSE, Pursuers.—*D. F. Hope.*
GAVIN BLACK, Defender.—*Robertson.—J. Anderson.*

No. 364.

Process—Mandatory—Expenses.—A litigant having betaken himself to hiding to avoid diligence, and a discussion having taken place as to the sufficiency of a proposed mandatory, and the party having thereafter produced evidence that he was still in the country—held that his opponent, who had required a mandatory, ought not to be subjected to the expense of the discussion.

THE pursuers, Andrew Thomson and spouse, raised an action of revo- ^{July 5, 1834.} cation, reduction, and extinction of a trust which they had granted in favour of the defender, Gavin Black. Appearance was made for Gavin ^{2^d DIVISION.} Black in this action, and in two relative processes of multiplepointing, which he had raised in name of tenants on the pursuers' property, but having betaken himself to hidings to avoid diligence, the pursuers believing that he had absconded to America, stated to the Lord Ordinary that he had gone abroad, and craved that a mandatory should be ordained to be sisted. On this a factory was produced from him to one Steel, whom, with two minor sons he had assumed into the trust, and against whom a supplementary action had been raised; but the sufficiency of Steel having been objected to, the Lord Ordinary allowed the pursuers to put in a minute of what they averred on this head. In the answer lodged in name of Black, &c., it was stated in general terms that Black was not forth of Scotland, though the place of his residence was declined to be specified. The Lord Ordinary thereupon pronounced this interlocutor:—“ In respect it is averred, that Gavin Black is resident within this kingdom, but declines to specify his place of residence, alleging that his doing so would expose him to the diligence of his creditors, ordains him, against the first sederunt day in May next, to produce in process a certificate under the hand of a minister of a parish, or of a magistrate, that he is resident within Scotland, specifying the place where, and the time when, he shall have compeared before such minister or magistrate.”

Thereafter Black compeared before the minister of the barony parish of Glasgow, and lodged in process a certificate that he had done so, whereupon the Lord Ordinary pronounced as follows:—“ In respect of the certificate produced in terms of the interlocutor of 11th March last, by which it appears that Gavin Black is not furth of the kingdom, repels the

No. 364.
 July 5, 1834.
 Smith, Pet.

objections to the process proceeding in his name; finds the objectors liable to him in expenses; reserving the claims of relief between the several objectors, and remits the account of said expenses, when lodged, to the auditor to tax and to report."

Similar interlocutors having been pronounced in the processes of multiplepinding, the several parties found liable in expenses, reclaimed against the interlocutors as to that matter.

LORD MEADOWBANK.—These people could not have discovered where Black was, and it is not alleged that they could. Instead of subjecting them in, I would be for giving them, expenses.

LORD JUSTICE-CLERK.—The denial of the statement, that he had left the country, is very faint. The utmost length I could go would be to find neither party entitled to expenses, but to find these parties liable, is impossible.

LORD CRINGLETIE.—I thought the expenses should have been given the other way.

LORD GLENLEE.—I would just recal hoc statu, and reserve the question of these expenses till the issue of the cause.

The other judges concurring in this suggestion—

THE COURT recalled the interlocutor of the Lord Ordinary in hoc statu, and remitted to proceed, reserving the question of expenses till the issue of the cause.

WOTHERSPOON and MACK, W.S.—J. M'GILL,—Agents.

No. 365.

SMITH, Petitioner.—*Penney.*

Poor's Roll.—Where the minister and elders refuse to give a certificate to a party applying for the benefit of the poor's roll, the Court will cite them to give evidence as to the applicant's circumstances, at the bar. Observed, It is entirely out of the sphere of the kirk-session to take into their consideration the merits of the action, in reference to which the applicant requires the benefit of the poor's roll.

July 8, 1834.
 1st Division.

SMITH applied for the benefit of the poor's roll. The minister and kirk-session of his parish, refused, after repeated applications, to grant him any certificate. The minister had got the advice of a lawyer in the country, who informed him that he was to take into consideration not merely the poverty of the party, but also the merits of the claim which he was making in Court. When the refusal of the certificate was notified to the Court, their Lordships granted warrant, as in the case of Glass,¹ to cite the ministers and elders. These gentlemen having appeared at the bar, the Lord President repeated to them the explanation of this branch of

¹ March 7, 1833 (ante, IX. 845).

their duties, which his Lordship had addressed on the former occasion to the Rev. Mr Brewster, accompanying it, in this instance, with the admission that the merits of the applicant's action were entirely out of the sphere of the minister and kirk-session, who had nothing to do with them.

No. 365.

July 8, 1834.

Mansfield v.
Maxwell & Co.

It was now intimated that the minister and elders were ready to sign a certificate in common form ; and this was done accordingly.

THOMAS MANSFIELD (Anderson and Gavin's Trustee), Pursuer—
Skene—Cunninghame.

No. 366.

MAXWELL and Co., Defenders.—*D. F. Hope—Neaves.*

RENNIE'S TRUSTEE, Defender.—*D. F. Hope—Whigham.*

Process—Proof.—1. On an issue whether the defenders in taking delivery of wheat bought by a merchant, acted as corn-factors, in the ordinary course of business,—diligence granted to recover all letters between the merchant and the corn-factors, relative to the purchase or sale of grain ; and all accounts between them. 2. The Lord Ordinary having restricted a motion for a diligence to certain writs, and, after issues were signed, a motion for a diligence of larger extent being made in Court, their Lordships appointed the record to be printed, in order that they might dispose of the motion, in the same circumstances as those in which the Lord Ordinary had decided on it.

THE trustee on the sequestrated estates of Anderson and Gavin, raised July 8, 1834. an action against Maxwell and Co., corn-factors in Leith, and Rennie's trustee, in which the following issues were taken :—“ Whether on or about the 22d day of July, 1829, the said Anderson and Gavin, sold to the said John Rennie 500 quarters of wheat, or about that quantity ; and whether it was understood, and agreed that the property of the said wheat should not be transferred, and the sale completed, until the price was paid ; and whether, between the 3d, and 7th days of August, 1829, and before the said price was paid, a part of the said wheat, amounting to about 444 quarters, was delivered to the said Maxwell and Co., as agents of the said John Rennie ; and whether, at the period last aforesaid, the said John Rennie was insolvent ; and whether the said Maxwell and Co., wrongfully retain the said wheat, and are indebted, and resting owing the pursuer, as trustee foresaid, in the sum of £1598, 8s., or any part thereof, with interest thereon, as the price of the said wheat delivered as aforesaid ?

1st DIVISION.
Ld. Corehouse.

“ Whether the said Maxwell and Co., knowing the terms and conditions of the said agreement,—and that the said price was not paid, or knowing that the said John Rennie was insolvent, took delivery of the said wheat, and wrongfully retain the same, and are indebted, and resting owing to the pursuer, as trustee foresaid, in the said sum of £1598, 8s.,

No. 366. or any part thereof, with interest thereon, as the price of the said wheat, delivered as aforesaid?

July 8, 1834.
Mansfield v.
Maxwell & Co.

“ OR,

“ Whether, in taking delivery of the said wheat, the said Maxwell and Co., acted as corn-factors, in the ordinary course of business, having received the said wheat as a consignment, and having made an advance to the said John Rennie, of the sum of £2000, or any part thereof, on the faith of such consignment?”

The pursuer moved “ for a diligence and remit, for the examination of havers, and the recovery of all letters to the said Maxwell and Co. from the said John Rennie, and of all letters or copies of letters, from the said Maxwell and Co. to the said John Rennie, relative to the purchase for sale of grain, and also of all accounts, or copies of accounts, between the said John Rennie and Maxwell and Co.”

The defenders objected to this diligence, as being of too sweeping a kind, and going back upon transactions between Rennie and them, which were said to have been very extensive; and contended that it ought to be limited to such letters and accounts as related to the particular transaction in question. The pursuer answered, that as one of the issues put the question whether Maxwell and Co. “ acted as corn-factors, in the ordinary course of business,” it was necessary to have the diligence in order to put this matter to the test.

The Lord Ordinary granted a diligence of a more restricted sort than was asked; and after this was done, the issues were signed. The pursuer then gave notice of motion for a diligence in the terms above quoted, to which it was objected, that as the Lord Ordinary had limited the diligence, after considering the whole of the record, which was not before the Inner House, their Lordships could not review the Lord Ordinary's judgment without seeing the record.

THE COURT appointed the record to be printed, and, on considering it, granted diligence as craved.*

J. J. DARLING, W.S.—M. and M. SMILLIE, S.S.C.—T. JOHNSTONE, S.S.C.—Agents.

* An objection was stated by the defenders, but not pressed to a judgment, that, as the Lord Ordinary had pronounced an interlocutor limiting the diligence, the pursuer should have come before the Court by reclaiming note, and not by motion. The pursuer answered, that, after the issues were signed, the course to be taken was to move the Court for any diligence required.

JOHN ROBERTSON, Advocate.—*M^cKenzie*.
J. D. BRYCE and A. BUCHANAN, Respondents.—*More*.

No. 367.

July 8, 1834.
Robertson v.
Bryce.

Process—Wakening.—Held incompetent to waken a petition for sequestration of the effects of a tenant, in a Sheriff court, by a summary petition of wakening.

ON 7th July, 1831, J. D. Bryce and A. Buchanan, both residing in Glasgow, presented a petition to the Sheriff of Lanarkshire, for sequestration of the effects of their tenant, John Robertson, engineer in Glasgow. Warrant of sequestration was granted and executed; a copy of the petition was served, and a certificate of no answers was returned. After the lapse of more than a year from this last step, a new petition of wakening was presented, on 27th August, 1832, to which answers were ordained to be lodged within forty-eight hours. Robertson lodged answers, pleading that a summary petition of wakening was incompetent, and that a summons of wakening was necessary. The Sheriff, in reference to the practice of the Lanarkshire courts, repelled this objection to the form of the wakening, conjoined the petition of wakening with the original process, and held it as wakened. He gave Robertson leave to advocate, and this having been done, the Lord Ordinary reported the question, upon minutes of debate.

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Pleaded by the Advocate—

By the Sheriff court Act of Sederunt, 12th November, 1825, cap. 15, it was enacted, that “when a process is allowed to lie over for a year and day, the party desirous to waken and insist in it, must raise a summons of wakening in the usual form.” This enactment applied generally to all processes. Although the original process might be of a summary nature, yet, if it was allowed to fall asleep, all reason for summary proceeding ceased, and it required to be wakened on the ordinary induciæ of a wakening in any other process. In the recent case of Langmuir, on 15th June, 1832, Lord Moncreiff had passed a bill of suspension and liberation, on the ground that it was incompetent to waken a summary process by a petition; and though the case was settled out of Court, the grounds of his Lordship’s opinion remained upon record.* In regard to

* His Lordship’s note stated “the ground on which the Lord Ordinary finds it his duty to pass the bill is, that he is strongly inclined to think that the process was not legally wakened when the matured judgment was pronounced. He has particularly considered the petition by which that object was attempted to be accomplished, and it contains no conclusions by which it could properly stand as a substantive application for the contempt or breach of sequestration,—praying merely to waken the process, and justice ‘administered therein until the end and conclusion there-

No. 367. the practice of any Sheriff court, however respectable, it could not affect the general law of the country, especially when other Sheriff courts, as appeared from the note of Lord Moncreiff, had an opposite and better practice.¹

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Pleaded by the Respondents—

It was the practice in the Sheriff court of Lanarkshire, to allow petitions for sequestration to be wakened by summary petition; and this could not be shaken without affecting the past proceedings of that court to a very serious extent. But the practice was well founded in principle, as the wakening of any process was essentially an accessory of the original process, and wherever the first process could be summarily instituted by petition, it could also be summarily wakened by petition. The 15th chapter of the Sheriff-court Act of Sederunt, was a portion of the first part of the Act of Sederunt, and referred only to ordinary actions; the second part, being that which alone related to summary applications. In the second part it was provided, that "in all cases which require extraordinary despatch, &c., application by summary petition may be made," &c.; and these words were broad enough to include both the original institution, and the subsequent wakening of a process of sequestration; especially as a wakening was rather a step in the principal process, than a substantive process in itself.²

LORD BALGRAY.—I coincide in opinion with Lord Moncreiff. If the practice of the Sheriff court of Lanarkshire be what has been stated, the sooner we correct that practice the better.

LORD MACKENZIE.—None of the reasons for allowing peculiar despatch at the

of.³ But the Lord Ordinary thinks it was not competent to waken the process of sequestration or application for breach of it by a summary petition, and that a summons of wakening was necessary. It may seem at first view plausible to say, that as the process originated by summary petition, it may be wakened in the same way. But this is fallacious. A summons of wakening is a substantive process of its own nature; and if the pursuer of a summary process will let it fall asleep, there is no reason why he should have any privilege in wakening it; and there can be no competent form of doing so, but the known and recognised form of a summons of wakening. The respondent says, that it is the practice in Glasgow to waken summary actions by summary petitions, where there is consent, and no objection. There may be a practice of taking the easiest course; but otherwise, if the fact be as stated, the Lord Ordinary would consider it as a local error. He thinks the principle against it; and having enquired at the Sheriff-clerk's office in Edinburgh, he is assured that the uniform practice is to require a summons of wakening. He thinks the point of some importance. If the process was not properly wakened, the warrant of imprisonment cannot stand."

¹ 4 St. 34. 4; 4 Ersk. 1. 62; 1 Dallas, 146; 3 Jurid. St. 260; A. S. (Bill Chamber) July 8, 1831, § 5; Boyd's Jud. Proc. 185; Drumm. Sher. Proc. 127.

² Beveridge, 594.

raising of a summary process, applies to the step of wakening it after it has fallen asleep. At first it may be necessary to lay a nexus on the property of the respondent by some immediate ex parte proceeding, before the respondent ever appears in Court; and independently of this, there are many processes which, from their own nature, require unusual despatch. But no reason of this kind can apply when a process has been allowed to lie over, without any step, for more than a year, and thus has fallen asleep. Therefore I do not see on what ground the wakening of a petition, which was originally summary, is to be made in a more summary form than the wakening of an ordinary action. Every wakening proceeds upon short induciæ, and I think there should just be an ordinary summons of wakening brought. It may deserve consideration whether an Act of Sederunt should not be passed, to enact that a simple notice to the clerk of Court should be sufficient to waken any process; but, in the meantime, the regular mode of wakening has not been adopted, and the objection of the advocator should be sustained.

LORD PRESIDENT.—I concur. After a process has been suffered to fall asleep, the reasons which originally permitted extraordinary despatch, no longer apply to the step of wakening it.

LORD GILLIES concurred.

THE COURT found “the mode of wakening here adopted, incompetent,” and remitted to the Lord Ordinary to proceed accordingly.

BOWIE and CAMPBELL, W.S.—CAMPBELL and MACDOWALL, W.S.—Agents.

ANDREW COVENTRY, Pursuer.—*D. F. Hope—Rutherford—Anderson.* No. 368.
Rev. GEORGE COVENTRY, Defender.—*Skene—Marshall.*

Relief—Warrandice—Implied Revocation.—A father disposed an estate to a younger son, by a mortis causa deed of settlement, containing a clause of absolute warrandice; and an assignation to the rents with warrandice, from all facts done or to be done: and he bound himself to free the estate of £800, (being the only debt then affecting it,) and of all cess, stipend, &c., up to the term of entry, being the first term after his death; on the same day he disposed a larger estate, with his whole remaining heritable and moveable succession, to his eldest son, under burden of paying all his debts: and he reserved in both dispositions power of revocation by written deed; above twenty years afterwards he borrowed £10,000, and disposed both estates in security, and soon after died without executing any written deed of revocation: held, that the eldest son was liable to relieve the younger and his estate of the loan of £10,000, and of all his father's debts, although he alleged that the effect of the settlement, as at its date, was to give him a large preference over his younger brother, and that the effect of it, thus construed, in reference to the loan of £10,000, would be to deprive him of all benefit by the succession.

THE late Dr Andrew Coventry possessed the estate of Shanwell, and the smaller estate of Pittiloch, besides other parcels of heritage. He had three children, of whom the eldest, George, was born of a first marriage; and the two younger, Andrew Coventry and Miss Coventry, were born of a second marriage. On 27th June, 1807, he executed two deeds of settlement. By one of these he disposed his lands of Pittiloch to

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Andrew, and failing him, to George, but under the burden of £1000 of provision to Miss Coventry, which was to be increased to £2000 if George succeeded. The deed contained this clause:—"I bind and oblige myself, my heirs and successors, to warrant the said lands and others before disposed, with this present right and disposition thereof, and infestments to follow hereupon, to my said disponees, in the order foresaid, at all hands and against all mortals, as law will, excepting always from this warrandice any legal claim which Mrs Martha Cunningham, otherwise Coventry, my wife, may have upon the said lands or rents thereof, either in name of terce, or in virtue of any deed which I may hereafter execute in her favour, and excepting also the current tack or lease of the said lands, and the astringion and thirlage of the same, to any mill to which the same may be liable, but without prejudice to my said disponees, to challenge and impugn the said lease and astringions, upon any grounds in law, not inferring warrandice against me and my foresaids. And in respect that the said lands and others at present stand affected with an heritable debt of £800 sterling, contained in an heritable bond, granted by me to Mrs Mary Turnbull, and that it is my intention to free and relieve my said youngest son of that debt; therefore, in case the same shall not be paid by me in my own lifetime, I hereby bind and oblige myself, my heirs and executors, succeeding to me in my other heritable and moveable estate, to free and relieve the said Andrew Coventry and his foresaids, and the said lands, of the foresaid debt of £800 sterling, contained in the said heritable bond." There followed assignation to the writs, with the same warrandice as that in respect of the lands; and assignation to the rents, from the first term after the granter's decease, which was declared the term of entry, and this was given with warrandice "from all facts and deeds done or to be done by us, prejudicial hereunto, allenarly: And farther, I bind and oblige myself and my foresaids, to free and relieve my said disponees of all feu-duties, cess, minister's stipends, schoolmaster's salaries, and other public and parochial burdens, payable for, or furth of the said lands and teinds, at and preceding the said term of their entry thereto, they being always bound to free and relieve me and my foresaids of the same in all time thereafter,—reserving always full power to me, at any time in my life, to alter or revoke these presents, either in whole or in part, and to sell, burden, or otherwise dispose of the lands and others hereby conveyed, or any part thereof, at pleasure: But declaring, that this deed, in so far as the same shall not be revoked or altered by a writing under my hand, shall have the effect of a delivered evident, though found in my repositories, or in the custody of any other person, undelivered at the time of my death, with the delivery whereof I hereby dispense."

The other and relative deed of settlement was conceived in favour of George Coventry. After narrating the execution of the deed by Pittilloch to Andrew, the deed proceeded:—"And seeh

intention that my said eldest son, and failing him by decease before majority, my said second son shall succeed to me in my lands of Shanwell and Dalquiech, and all my other heritable and moveable property, under the burdens and provisions after mentioned: Therefore, and for the love and affection which I bear to my said children, I do hereby, with and under the exceptions, burdens, provisions and reservations after mentioned, dispoise, assign and make over, to and in favour of the said George Coventry, my eldest son; and failing him by decease before majority, without leaving heirs of his body, to the said Andrew Coventry, my second son, and his heirs and assignees whomsoever, all and sundry lands, houses, heritages, &c., that presently belong, or shall pertain and belong to me at the time of my decease: And also, all and sundry moveable goods and gear, &c., which shall pertain and belong to me at the time foresaid, &c., excepting always from this present disposition my town and lands of Pittilloch, &c.: As also, excepting the just and equal half of all my household furniture," &c. which he disposed to Mrs Coventry and her two children. One-half of his library was also excepted from the conveyance to George, and given to Andrew; and he appointed George, whom failing, Andrew to be sole executor. The following clause then occurred:—"But declaring always, that these presents are granted by me, and to be accepted by my said dispoisees, in the order foresaid, with and under the burdens, conditions, and provisions after specified, viz.: In the first place, with and under the burden of the payment of all the just and lawful debts that may be resting and owing by me at the time of my decease, and of my funeral charges. In the second place, under the burden of such liferent annuity or other provision as the said Mrs Martha Cunningham, my wife, may be entitled to out of my said lands of Shanwell and Dalquiech, or any other part of my heritable or moveable estate, hereby conveyed, either in name of terce and jus relictæ, or in virtue of any deed that may hereafter be executed by me in her favours." He farther declared, that if Andrew succeeded to Shanwell, he was to pay an additional £1000 to Miss Coventry; and after appointing tutors and curators to all the children, he reserved full power, at any time of life, "to alter or revoke, in whole or in part, and to sell, burden, or otherwise dispose of the whole subjects, heritable and moveable, hereby conveyed, or any part thereof, at pleasure: but declaring that this deed, in so far as the same shall not be revoked or altered by a writing under my hand, shall have the effect of a delivered evident, though found in my repositories, or in the custody of any other person undelivered at the time of my death, with the delivery whereof I hereby dispense."

In July, 1830, Dr Coventry borrowed the sum of £10,000, and granted a disposition, both of the lands of Shanwell and Pittilloch, in security to the creditor. The debt of £800, affecting Pittilloch, was paid out of this loan. Dr Coventry died in December following, without having executed any written revocation or alteration of his deeds of settlement.

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Andrew, after being infeft in Pittiloch, raised an action against George, as the general disponee and representative of his father, and as having been specially bound by the condition of his succession, which he had taken up, to free and relieve him and the lands of Pittiloch of all liability for the loan of £10,000, or for any other debt of his father. In defence, George stated, that, at the date of the deeds of settlement, the effect of them was to give him a free succession of about £12,000, and to Andrew a free succession of about £5000; that, if the whole debt of £10,000 was laid on him, it would render the succession a loss to him, which could not be his father's intention; and that the rule of law must therefore apply, by which a cumulo debt, burdening separate heritable estates that are destined to different disponees, is laid proportionally upon each estate, according to its respective value, when the succession splits.

The Lord Ordinary ordered Cases.

Pleaded by the pursuer—

The two relative deeds must be viewed as one settlement, and not having been revoked, they must be held to be the last valid act of the deceased, who must be presumed to have known their meaning, and foreseen their consequences. By the first, the lands of Pittiloch were disposed to the pursuer, under the burden only of £1000 to his sister. The disposition was granted with absolute warrandice, which must receive full effect though the deed was gratuitous.¹ Nothing was excepted from the warrandice but the current leases of the lands, and any provision that might be made by Dr Coventry in favour of his wife, or that might arise to her in name of terce. These special exceptions proved the warrandice to be, *ex proposito*, absolute and unqualified, *quoad ultra*. And it was immediately followed up by an obligation upon the heirs and executors succeeding in the heritable and moveable estate, to free and relieve the lands of Pittiloch of the heritable debt of £800, which was the only debt then affecting it: thus evincing the clearest intention to dispoise the lands, free of all debts, to the pursuer.² Besides, his father assigned to him the rents, from and after the first term after his death, and gave warrandice from all facts done or to be done: and he even bound himself to free the lands of all their natural burdens of stipend, cess, &c., up to that term. His intention to dispoise Pittiloch, free, to the pursuer, was farther manifest from the provisions made in the relative deed conveying Shanwell and the remainder of his succession, heritable and moveable, to the defender, as heir and executor. It expressly burdened him with the payment of all just and lawful debts, without exception; so that the burden laid on him corresponded to the relief warranted to the pursuer.

¹ 2 Ersk. 3-27.

² Campbell, March 11, 1830 (*ante*, VIII. 713); Waddell, May 279.

The result of the whole settlement was, that, while the pursuer could claim no more than Pittiloch, however large might have been the estate left by his father, he was not bound to take less, even if his father's general estate was not so lucrative a succession as had been at one time anticipated. No. 366.
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The reserved power of revocation, which existed in both deeds, did not affect their construction, except to exclude all implied revocation:¹ and the power had never been exercised.

Pleaded by the defender—

The interpretation of any settlement always involved a *questio voluntatis*; and it was therefore relevant to aver, that, while the deeds of settlement, at their date, gave a large preference to the defender, as eldest son, the construction contended for by the pursuer, would have the effect of cutting off the defender entirely. This would be accomplished not in consequence of any alteration of the settlement, but of an act of borrowing money to pay off debt, in performing which, at a distance of more than twenty years, it was probable that Dr Coventry had no reference to his settlement, and still less a purpose of entirely inverting it, and disinheriting the defender. But while such could not be supposed to have been his true meaning, the construction contended for by the defender was accordant both with his father's evident intention, and with the rule of law which was founded on the implied *voluntas* of a testator. By that rule, where a cumulo debt is laid on two estates which are destined to different heirs, a portion of the debt, corresponding to the value of each estate, is laid upon it, in a question *inter heredes*, after the succession has opened. It was therefore both the natural and legal presumption that Dr Coventry intended the cumulo debt of £10,000, to be so divided, unless it could be shown that a strict and express provision was made to the contrary. The general obligation laid on the defender to pay all his father's debts, could not have such effect, especially as it was coupled with the obligation to free Pittiloch of one special debt of £800. It had been decided that, in destining moveables to an executor, a general obligation to pay all the debts, did not render him liable to relieve the heir of debts affecting heritage;² nor did a counter obligation compel an heir to free the executor.³ And among different classes of heirs taking up several estates, the heir of line was not liable to relieve the heir-male of his proportion of a cumulo debt over the estates falling to

¹ Elliot, Feb. 4, 1823 (*ante*, II. 180).

² Fraser, Nov. 13, 1804 (*Dict. App. Keir and Exec. No. 3*).

³ Russell, Jan. 23, 1745 (5211); Campbells, July, 1747 (5213); Forbes, Nov. 14, 1766, 1 Hailes, 138; Rose, Jan. 17, 1786, 2 Hailes, 1010 (*as reversed*); Moncreiff, June 29, 1825, 1 W. and S. 672.

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each heir. But every heir or executor was liable for all the debts, at least to the amount of the succession, in any question with a creditor; and the obligation laid on the defender did not amount to more than this, while in a question inter heredes the right of rateable relief remained.

Neither did the clause of warrandice in the disposition to the pursuer alter this. That clause occurred in a gratuitous mortis causa deed, which was expressly made revocable at pleasure. Dr Coventry could have laid as much of the £10,000, upon Pittilloch, without relief, as he chose; and the act of directly burdening Pittilloch was in itself an exercise of the power of revocation of the warrandice, pro tanto, to the effect of letting in the right of rateable relief.

The Lord Ordinary reported the Cases.*



* " NOTE.—As this case arises out of a family settlement, and is attended with considerable difficulty, the Lord Ordinary has reported it to the Court, expressing, though with considerable doubt, the view which he is inclined to take on a perusal of the pleadings.

" The case appears to have little resemblance to any of the precedents cited on either side. The main question depends on the clause of absolute warrandice inserted in the disposition to the pursuer of the lands of Pittilloch, a clause very unusual in gratuitous and mortis causa deeds, but conceived here in the most express and unqualified terms. That clause certainly imports that, with the exception of the encumbrances specially mentioned in the disposition, Dr Coventry and his general representatives were bound to relieve the pursuer, his disponent, of every other encumbrance on those lands. It is of no consequence that, besides the general clause of warrandice, there is a special clause of relief as to the debt of L.800, the only existing encumbrance at the time. Whether that special clause had been inserted or not, the pursuer's right of relief as to that obligation would have been equally strong; and it can be regarded in no light but as additional evidence of Dr Coventry's intention, that Pittilloch should descend to the pursuer under no burdens but those to which he was expressly subjected.

" The disposition of Pittilloch contains a power to revoke and alter, but it is thought that the imposition of a new burden on the lands did not infer a revocation or alteration of the clause of warrandice. It is a security in favour of the creditor, but it produces no change on the obligation of relief imposed on Dr Coventry and his heirs. Were it otherwise, the clause of absolute warrandice must be held to extend only to burdens existing at the date of the disposition, and not to those imposed afterwards, but no reason is assigned why it should be construed in that restricted sense—a sense which in no other case it bears. If Dr Coventry meant to exercise his power of revocation or alteration, he ought to have done so by an alteration in the settlement itself, not by imposing burdens on the lands, which the settlement contemplated, but as to which it conferred on the disponent a right of relief.

" It is asked if Dr Coventry did not intend that the pursuer should be burdened with any part of the loan of L.10,000, why he did not make a provision to that effect in the bond to the creditor? The obvious answer is, the creditor had no concern with Dr Coventry's settlement, or the provisions for his children, and any deduction of that nature in the bond would have been entirely misplaced. The L.10,000 had been applied in paying off all the other existing encumbrances.

LORD PRESIDENT.—It is a difficult matter to ascertain clearly what was the deliberate purpose and intention of the testator. The two relative deeds of settlement are to be construed as one; and I cannot disregard the statements made by the defender as to the relative value of the estates of Shanwell and Pittilloch then, and the effect which the pursuer's construction would have on the defender's succession now. The defender offers to prove that the combined effect of the deeds of settlement, as framed in 1807, gave to him, the eldest son, a free succession of about £12,000, and to the pursuer, the younger son, a free succession of about £5000. He also offers to prove, that if the pursuer's construction receives effect, the result of an operation of borrowing money, in 1830, will be to cut off the defender without a shilling, while it leaves the succession of the pursuer unaffected. These are averments which I must look at, not as sufficient to control the legal import of a regular deed, but as affording some assistance in discovering the intention of the testator; and I conceive it was his intention that the cumulo debt of £10,000 should be apportioned rateably on the estates descending to his two sons respectively. It is true, that if there be an express provision to the contrary, in a legal instrument, the Court have not the power to act upon any view of hardship, to the effect of defeating such provision; but I do not see that there is any such. The clause of absolute warrandice seems to be chiefly relied on, for that effect; but, considering its occurrence in a gratuitous mortis causa deed, which contained an express power of revocation at pleasure, I think it would be a rather violent construction of that clause to allow it to produce such an effect. It would rather appear to me to be a less strained construction of the clause, in the very peculiar position in which it occurs, to hold that it meant to warrant absolutely against all eviction by third parties, while it left the acts and deeds of the granter himself, so far as in contravention of the warrandice, to be an actual or implied exercise of the power of revocation pro tanto. On the whole, I am not prepared to find the defender liable in total relief, and I conceive the cumulo debt should affect, rateably, those several lands, on all of which the testator himself laid it.

LORD BALGRAY.—I never before saw an instance of a gratuitous mortis causa deed, with a clause of absolute warrandice, and I have found it an embarrassing part of the settlement. But that is a clause which has a well-defined legal import; and the other provisions of the settlement are clearly and distinctly expressed. I apprehend, therefore, that the Court must give effect to them, as the declared will of the testator, without enquiring as to hardship, or giving way to conjectures as to the probability of his not having foreseen the effect of his own deeds.

LORD GILLIES.—I conceive that a clause of absolute warrandice has a fixed and settled import, which we are not at liberty to modify, although it occurs in a

arrangement not finished at the time of Dr Coventry's death, it is probable, if he had survived, that he would have added an explanation to his settlement. Not having done so, it is thought that they must be construed exactly as they would have been before the loan was made.

Parties are not agreed as to the comparative amounts of the provisions to the pursuer and defender, to ascertain which further investigation would be necessary, but whatever it may be, that circumstance cannot be permitted to have any effect on the construction of the settlement."

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gratuitous deed. It must receive the same effect whether it occurs there or in a mutual contract, because it is the same obligation, whether it be onerously or gratuitously undertaken. In particular, I cannot conceive that such a clause, necessarily warranting against eviction by third parties, should not also comprehend within it the minor warrandice against the granter's own fact and deed. Had the granter, in the exercise of his reserved power, revoked the deed in favour of the pursuer, he would thereby have limited the scope of the clause of warrandice; but so long as he did not revoke, and allowed the warrandice to remain absolute, the Court must give full effect to it. I think the defender is liable to relieve the pursuer and his lands of Pittiloch, as craved in the leading conclusion of the libel.

LORD MACKENZIE.—I take the same view. It is a case of great hardship for the defender, assuming, as we must at present, that his averments as to the loss of succession are correct. I accordingly read the papers, with a desire to arrive at a conclusion, opposite to that of the Lord Ordinary, if possible; but I found that I could not get over the effect of the clause of absolute warrandice. It is true that there is a general power of revocation reserved, and Dr Coventry might have revoked the whole of the disposition to the pursuer, as he might have revoked the clause of warrandice; but, in point of fact, he did neither of these things. We must therefore give effect to the clause of warrandice, and we cannot be swayed by considerations of hardship to the party. The settlement of the deceased must receive its true effect, whether it involves hardship to part of his family or not. It is, unfortunately, by no means a thing of rare occurrence, that the affairs of a party, who has made a formal deed of settlement, and laid it aside for a number of years, undergo a great change, which altogether alters the effect which his deed will produce upon his succession, and that, without adverting to this, the testator dies, as to occasion much individual hardship. But although such an occurrence may excite regret, it cannot justify a judge in denying effect to the regular deed of the deceased. In this case, I concur in the observations of the Lord Ordinary, and in the conclusion at which his Lordship has arrived.

THE COURT accordingly adhered.

E. MACLEAN, W.S.—W. COOK, W.S.—Agents.

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MABERLY and Co., Pursuers.—*Sandford.*
 Defenders.—*Lumsden.*

Process—Jury Trial—Proof.—The Court refused to allow the opinion of English counsel, on the law of England, intended to be offered in evidence on a jury trial, to be taken by commission,

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AN issue having been ordered to be tried in this cause, the applied for a commission to examine English counsel as to certain points of the law of England.

LORD MEADOWBANK.—We cannot allow witnesses to be called

mission, unless they cannot appear before the jury. Here it is impossible to say that no English counsel could be procured to give evidence in person, and therefore we must refuse the application.

The other Judges concurring,

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THE COURT refused to grant commission.

JAMES WYLIE, Pursuer.—*Skene—Wilson.*

JOHN SMITH and JOHN HAMILTON, Defenders.—*D. F. Hope—Moir.*

No. 370.

Bankruptcy—Husband and Wife—Inhibition—Right in Security.—A woman raised action of declarator of marriage and of aliment, on which she executed inhibition, and obtained decree; pending the proceedings, her husband discharged a claim against his brother, for the value of certain shares of a property under a deed of settlement, which were declared to be real burdens; and he also executed a trust-conveyance to a third party for behoof of creditors, and his brother granted a similar deed to the same party, without declaring the value of the shares to be real burdens; and the wife having been in the meanwhile alimented by her father, for whose behoof she assigned her claim under the decree for aliment to her brother; held, in an action of reduction, by the brother, of the discharge (which of consent was waived as a bar to any just claim) and of the trust deeds, and a counter action of reduction of the decree for aliment as exorbitant, 1. That the brother as assignee of the wife was entitled to have discharge set aside ex capite inhibitionis, and the trust-deeds reduced, in so far as the value of the shares were not declared real burdens, and to insist against the trustee as an intromitter, as if the shares had been duly constituted real burdens; but, 2. In respect it was alleged the value of the shares had been paid, that the trustee was entitled to have that fact investigated before any decree could be pronounced against him.

THE late Andrew Crawford of Craighall, by disposition and deed of settlement, conveyed to John Hamilton, younger of Parkhead, his whole heritable and moveable estates, and, in particular, certain properties specially enumerated, but qualified by a declaration in these terms:—"Providing and declaring always, that these presents are granted under the burden, in the first place, of the payment of all my just and lawful debts, sick-bed and funeral charges: In the second place, under the burden of any legacies or donations which I may bequeath, by a writing under my hand, at any time during life, even on death-bed: In the third place, with, and under the burden that one-third part of the whole residue of my said whole means and estates, heritable and moveable, shall pertain to, and be enjoyed by, the said Mrs Jane Mitchell, in liferent, during all the days and years of her life, after my decease, in case she survive me: In the fourth place, that the value of the free residue of my said whole subjects, heritable and moveable, shall be ascertained by the survey and valuation of two neutral men, one to be chosen on the part of the said John Hamilton, the younger, and one on the part of his brothers, after-

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2D DIVISION.
Ld. Moncrieff
F.

No. 370. nion, to choose an umpire : And the value being so ascertained, I appoint
 July 8, 1834. and direct that the amount thereof shall be apportioned into four shares,
 Wylie v. Smith. of which two-fourths shall belong to the said John Hamilton, the younger,
 one-fourth to Hugh Hamilton, and one-fourth to James Hamilton, his
 brothers, sons of the said John Hamilton and Jane Mitchell, each of the
 said fourths being burdened with a corresponding proportion of the life-
 rent right of the said Jane Mitchell : Providing and declaring always,
 that it shall be in the power and option of the said John Hamilton, the
 younger, either to retain the said heritable subjects, burdened with the
 said life-rent to his mother, and to pay up the shares of his said brothers
 in money, under a corresponding deduction for their proportions of the
 right of their mother during her life, and payable to them at her decease,
 or to allot and convey to each of his said brothers a corresponding share
 of my said heritable property, as the same shall be ascertained and divided
 by, and at the sight of, the persons chosen as aforesaid to value the
 same, and, in that case, burdening each of the shares so conveyed to his
 brothers with the life-rent of the third part thereof to his mother, and to
 execute all deeds requisite for these purposes : Which burdens, provisions,
 and declarations, in favour of the said Mrs Jane Mitchell, Hugh
 Hamilton, and James Hamilton, are hereby declared to be real liens on
 my said heritable subjects, and, as such, are appointed to be engrossed in
 the charters, infeftments, and conveyances thereof, until the same be extinguished
 or discharged." John Hamilton made up titles under and in
 terms of this conveyance, and James Hamilton, the youngest brother,
 having died intestate, the right to his fourth share accresced to Hugh,
 his immediate elder brother.

In 1824, Mrs Jean Wylie, sister of the pursuer, John Wylie, setting
 herself forth as the wife of Hugh Hamilton, raised an action against him
 in the Court of Session, on the averment of his having deserted her, concluding
 for aliment to herself and a son of whom he was the father, on the dependence
 of which she used inhibition against him. In defence, Hugh Hamilton denied
 that they were married persons, and further pleaded, that the action was
 incompetent before the Court of Session, in the first instance, and ought to
 have been brought before the Commissaries. The Court having dismissed the
 action on the 8th July, 1824, (ante, III. 231), whereby the inhibition fell ; she
 raised, on the 26th, a summons of declarator of marriage and aliment before the
 Commissaries, on the dependence of which she again used inhibition against him,
 which was executed on the 9th of August. In the meanwhile, viz. on the 2d
 of August, Hugh Hamilton executed, in favour of his brother John, a
 discharge of his claim for the two-fourths of the property on the narrative
 that he had already, by diverse advances on the part of his brother,
 received full payment and satisfaction ; and pending the proceedings in
 the action, he executed a trust-deed, whereby he conveyed all his lands
 to the defender Smith, as trustee for his creditors. And

his brother John executed a similar trust-deed, in favour of Smith, for No. 370, behoo of his creditors, conveying to Smith the subjects contained in Crawford's settlement, but without expressing the burdens declared in the settlement to be real burdens on the property; and Smith was infeft without any reference to these burdens. Ultimately, in the process of declarator and aliment, Jean Wylie obtained decree in her favour, the aliment being modified at £60 per annum for herself, and £20 for her son. This decree she assigned to her brother, the pursuer Wylie, by a deed of assignation, which narrated that she and her son had hitherto been alimented by her father, and that on his request the assignation was made in favour of her brother. He thereupon raised two actions of reduction against Smith, the one concluding to have Hugh Hamilton's trust-deed set aside ex capite inhibitionis; and the other to have the discharge by Hugh in favour of his brother John and John's trust-deed reduced, so far as regarded Hugh's two-fourth's share of the property left by Crawford, on the ground that the discharge proceeded on a false narrative of Hugh's claim having been satisfied, and that it was without onerous cause; and that the trust-deed was in violation of the real burden created in regard to these shares by Crawford's deed of settlement.

On the other hand, Smith raised an action of reduction of the decree for aliment, in favour of Mrs Hamilton, as exorbitant; and he contended in defence against the reductions at the instance of Wylie, inter alia, that till judgment was pronounced in the process of reduction of the decree for aliment, Wylie could not insist in his reductions as a creditor of Hugh Hamilton. An issue was, however, ordered to be tried as to the grounds of reduction of the discharge, but after parties had met for the trial, they signed a minute, agreeing, "That the conveyance and discharge under reduction, shall be held as no bar to any just and lawful claim of the present pursuer or his cedent, against the estate of Hugh Hamilton."

Thereafter, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—"Having farther considered the closed

* "Giving the fullest effect to the pursuer's pleas, the Lord Ordinary does not see how he can give an interim decree for aliment in this process, while the averment, still clearly competent to be insisted in, that the value of the shares had been paid to Hugh Hamilton, is undisposed of. In the reduction of the Commissary decree for aliment, a remit has been made to an accountant. But it may be doubtful whether that will be sufficient for extricating the point required in this cause; and the Lord Ordinary doubts also, whether it can be extricated under the conclusions of this action. Clearly, unless the defenders take effectual measures, without delay, for proving what is now incumbent on them to prove, there will be ground for decree against them in this process, as soon as a decree, interim or final, shall

July 8, 1834.
Wylie v. Smith.

be pronounced in the other—and there can be no doubt that an interim decree, for a reasonable sum, must be given in that process, in case the report of the accountant is not nearly ready."

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And, in the meantime, reserves all questions of expenses other than those above found due." No. 370.

His Lordship having, at the same time, in the other process of reduction, reduced Hugh Hamilton's trust-deed *ex capite inhibitionis*, so far as the pursuer's interest might thereby be effected, Smith reclaimed in both processes, praying for *absolvitor*, or at least to have them sisted till the issue of his action of reduction of the decree of alimant.

July 9, 1834.
Bannerman v.
His Creditors.

THE COURT in both cases refused his reclaiming notes.

JOHN RONALD, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

BANNERMAN, Pursuer.—*Patton*.
HIS CREDITORS, Defenders.—*Forbes*.

No. 371.

Cessio Bonorum.—Benefit of *cessio* refused, notwithstanding three years' imprisonment till the bankrupt should procure a reconveyance of property conveyed by him to his own daughter, in defraud of his creditors.

BANNERMAN having raised a process of *cessio bonorum*, it was opposed by his creditors, on the ground that he had fraudulently taken the titles to certain heritable property belonging to him, in name of his own daughter. The Court being satisfied that this was the case, (29th June, 1833,) refused the benefit of *cessio* till he should procure a reconveyance. Having been now more than three years in prison, he presented a reclaiming note, but without having procured the reconveyance.

July 9, 1834.
2d Division.

THE COURT still refused to grant the *cessio*, and continued the cause till such reconveyance should be executed.

No. 372.

GEORGE M'TAGGART, Advocator.—*Keay—J. Anderson.*JAMES WEIR.—*D. F. Hope—Moncreiff.*

July 9, 1834.
M'Taggart v.
Weir.

Jurisdiction—Admiralty.—A raised an action against B, before the magistrates of a royal burgh, for payment of certain premiums advanced by him for insurance of property at sea belonging to B, effected by A on account and at request of B. Objection in limine to the jurisdiction of the magistrates that the cause was maritime, repelled.

July 9, 1834.

2d Division.
Bill Chamber.
Ld. Moncreiff.

THE respondent Weir raised an action against the advocator M'Taggart, before the Magistrates of Arbroath, concluding for payment of an account of £48, and £5 of interest. With the exception of a few trifling articles, the account consisted mainly of three items, being three several premiums of insurance, stated by the respondent as paid by him on account of M'Taggart, who commanded a vessel belonging to him, the insurance being, as averred, of M'Taggart's personal property on board the vessel, and effected at his request.

Weir, in defence, alleged, that the insurance had been in part effected to cover a chronometer, which he had purchased as master of the vessel, and for use of the vessel, and the value of which, if put to his credit, would bring out a balance in his favour; but he further pleaded as a preliminary defence, that an action for payment of premiums on a sea-insurance, was of a maritime nature, and incompetent before the bailies. The bailies having sustained their jurisdiction, M'Taggart presented a bill of advocacy, in answer to which Weir contended, that an action for the amount of premiums of insurance at the instance of a party effecting the insurance, and advancing the premiums on behalf, and at the request of another, was not a maritime cause, but an ordinary action, *ex mandato*,¹ and that the present action, therefore, except as to one item of £3, 14s. 7d., admitted to be maritime, was perfectly competent before the bailies.

The Lord Ordinary refused the bill, except quoad the item above-mentioned, as to which he passed on caution, adding the subjoined note.*

M'Taggart reclaimed, and Weir, with the view of having the bill refused in toto, abandoned the item of £3, 14s.

¹ Forbes v. Gordon, Dec. 8, 1812 (F.C.).

* "The Lord Ordinary was inclined to refuse in toto, it being very doubtful whether, including one small article, arising out of a proper maritime contract, in a general claim for payment of accounts, affords a good objection to the jurisdiction. If the suspender, however, insists upon trying that question, he must find cause to the charger."

LORD GLENLEE.—An objection of this kind, to be sustained in limine, must be that, *ex facie* of the summons, the claim is maritime, otherwise it must be reserved. **No. 372.**
 Now, *ex facie* of the summons here, there is no reason to hold the cause maritime, **July 9, 1834.**
 except as to the article which Weir is willing to abandon. On the face of the **Cowan v. Spreull.**
 summons it is just an action *ex mandato*, and it is not enough for the defender to say that it may turn out maritime, in which case it would be held incompetent. And therefore I am for adhering, except as to the £3, 14s.

LORD CRINGLETIE.—This is not an action on a policy, but a shipmaster writing to his friend to transact an insurance for him, and he advances the premium. This, therefore, is just an action *ex mandato*. Weir is neither broker nor underwriter, and I cannot consider the case as maritime. Then, how do we know any thing here about the chronometer at all. I have no doubt the interlocutor is right.

The other Judges concurring,

THE COURT accordingly refused M'Taggart's reclaiming note, and in respect of the abandonment by Weir of the item of £3, 14s., remitted to the Lord Ordinary to refuse the bill and find expenses due to the latter.

JOHN BROWN, S.S.C.—M'MILLAN and GRANT,—Agents.

HENRY COWAN and Others, Suspenders.—*Robertson—J. Anderson.* **No. 373.**
JOHN SPREULL, Charger.—*Rutherford—Russell.*

Process—Suspension—Juratory Caution.—Circumstances in which the Court refused to admit of juratory caution in part, in addition to a partial consignation, in order to the passing of a bill of suspension of a charge for payment of the monthly rents due by a tacksman of tolls.

THE suspender Cowan became tacksman, under the Magistrates of **July 9, 1834.**
 Glasgow, of the tolls and pontage dues leviable at two bridges over **2d Division.**
 the river Clyde, on which the magistrates were trustees, for one year from **Bill Chamber.**
 the first Tuesday of June, 1833, at a rent of £2400, payable by monthly **Ld. Moncreiff.**
 instalments of £200, for which Cowan and his cautioners granted bills to the charger Spreull, the city chamberlain. When the tolls were thus taken, another bridge, for which an Act of Parliament had been obtained by the trustees of Hutchison's Hospital, was nearly completed, and it was opened in the month of July, a bar being put up by the trustees, at which they levied the dues authorized by their act. This bar, however, they were obliged to remove, in consequence of an interdict of the Sheriff, obtained at the instance of certain proprietors on the south side of the Clyde, who contended that the trustees had not complied with the provisions of the act, in regard to the access to the bridge, so as to entitle them to levy tolls. The bridge thereafter remained open and free till the month of December, and on the allegation that he had suffered great damage in the way of evasion of tolls, by means of this bridge, which the Magistrates declined to take any measures to have shut up till the regular tolls should be levied by the trustees, Cowan refused to pay

No. 373. the rent fallen due. When two instalments had become payable, Spreull charged Cowan and his cautioners, who thereupon presented a bill of suspension. This bill was passed on consignment, and three further instalments having fallen due, and a charge having been given, a bill of suspension thereof was also presented.

July 9, 1834.
Mowbray v.
Scougall.

The Lord Ordinary having passed it on consignment of £300, and caution as to the remainder, Cowan, &c., reclaimed, praying to have the bill passed on consignment as to one £300, and juratory caution as to the other.

THE COURT adhered.

WM. DUNCAN, W.S.—J. C. REDDIE, W.S.—Agents.

No. 374.

JOHN MOWBRAY, W.S., Raiser.
RICHARD SCOUGALL, SCOUGALL'S CHILDREN.—*W. Bell.*
MRS BIRCH and HUSBAND.—*H. J. Robertson.*
JAMES THOMSON.—*Monteith.*
MRS WALKER'S TRUSTEES.—*Thomson.*
Claimants.

Testament—Condition—Personal or Transmissible—Si sine Liberis—Fee and Life-rent.—A testator left a share of his property to a married daughter, for her life-rent use alienably, and to trustees in fee for her children, and failing of children, for her other heirs and assignees whatsoever; she had four children, who all predeceased her, two of them only leaving issue, and two having assigned their interest to their husbands; held, on the death of the life-rentrix, 1. That children had not failed so as to open the destination to the assignees of the life-rentrix. 2. That no right of fee had previously vested in any of the children, so as to be transmissible by them; and, 3. That the issue of such as left issue were entitled to succeed to the whole property per stirpes, in such share as their respective parents would have taken had they survived the life-rentrix.

July 9, 1834.

2d Division.
Ld. Medwyn.
R.

THE late John Fraser, W.S., had four children—a son, Simon, who was in a state of mental derangement, and three daughters, Margaret, unmarried, Jean, married to the Rev. Mr Walker, minister of Canongate, and Ann, married to one Rae. In 1794, Mr Fraser executed a trust-deed of settlement, whereby he conveyed all his property, heritable and moveable, to trustees, with power to assume others in trust, for purposes thus expressed:—"That the said trustees do apply the same, in the first place, to satisfy and pay the expense of management, and the whole debts which shall be resting by me at my death: In the next place, that the said trustees lay out and employ such a capital sum from the trust estate as shall yield a yearly free income of £120 sterling, and that they use the rights and securities thereof, to and in favour of the said ~~estate~~ my wife, in case she shall survive me, in ~~lieu~~ ~~of~~ ~~her~~ ~~share~~ ~~of~~ ~~the~~ ~~same~~ ~~estate~~ ~~as~~ ~~she~~ ~~shall~~ ~~be~~ ~~entitled~~ ~~to~~ ~~receive~~ ~~thereof~~ ~~in~~ ~~case~~ ~~she~~ ~~shall~~ ~~survive~~ ~~me~~ ~~,~~ ~~in~~ ~~lieu~~ ~~of~~ ~~her~~ ~~share~~ ~~of~~ ~~the~~ ~~same~~ ~~estate~~ ~~as~~ ~~she~~ ~~shall~~ ~~be~~ ~~entitled~~ ~~to~~ 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the annual rent, or interest of the said capital sum, yearly during all the days of her lifetime, and to themselves and their foresaids, as trustees under this present deed, in fee, but which liferent is to be restricted to £60 sterling, in case my said wife shall marry again; and with regard to the residue of the said trust estate, and also the fee of the said capital sum, after the death of my wife, I hereby appoint and ordain the said trustees to divide the same into four equal parts, and to pay or convey one just and equal fourth part thereof to Margaret Fraser, my eldest daughter, and her heirs and assignees, and to settle and secure another just and equal fourth part thereof in favour of Jean Fraser, my second daughter, spouse to Mr Robert Walker, Minister of the Gospel in Canongate, and her said husband, and longest liver of them two in liferent, for their liferent use of the interest thereof, only during all the days of their lifetime, and to the said trustees themselves, in fee, as trustees for the children of the said Jean Fraser, of her present or any subsequent marriage, equally among them, and failing of children, to and for the behoof of the said Jean Fraser's other heirs or assignees; and in like manner to settle and secure another fourth part thereof in favour of Ann Fraser, my third daughter, spouse of John Rae, dentist and surgeon in Edinburgh, and her said husband, and longest liver of them two in liferent, for their liferent use of the interest thereof only, during all the days of their lifetime, and to the said trustees, in fee, as trustees for the children of the said Ann Fraser, of her present or any subsequent marriage, equally among them, and failing children, to and for the behoof of the said Ann Fraser, and her heirs and assignees; and as to the remaining fourth part, I hereby, in respect of the particular situation of Simon Fraser, my son, which renders him unfit for the management of what I intend for him, direct and appoint the said trustees to lay out the same on proper security, conceived in favour of themselves, as trustees for the said Simon Fraser, and the heirs lawfully to be procreated of his body, whom failing, to my said three daughters equally, and their issue, the shares falling to the said Jean and Ann Fraser being to be laid out and employed in the same manner as is above directed, as to the fourth part of my estate provided to them; and the said trustees are hereby empowered to apply the interest or yearly income of the said fourth part of my effects, provided for the said Simon Fraser, or so much thereof as they shall think proper, not being less than £60 sterling yearly, to and for his use and behoof in aliment and clothing, and otherwise as his situation shall require, as they in their own judgment and discretion shall deem proper; and in case the said Simon Fraser shall, in the opinion of the said accepting trustees, or survivors or survivor of them, or such as they may assume as aforesaid, so far reconalesce as to be fit to take the management of his own affairs, the said trustees are hereby directed to pay to the said Simon Fraser, his share of the trust-estate; but until such opinion is declared, the said Simon Fraser shall not have any further right or interest in the said fourth part of my estate than

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No. 374. the annual sum to be allowed by the trustees as aforesaid, nor shall he have any right to dispose of any part of the said fourth, or interest thereof, and all savings on the interest of the said fourth, shall belong to my said daughters, in the same proportion, and subject to the same settlement as the principal sum of the said fourth.”

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Mr Fraser died in 1795, being survived by all his children. Simon lived for some time afterwards, but ultimately died without having convalesced, and unmarried, whereby his share accrued to the others equally. Mrs Walker, the second daughter, had four children,—John, who died in 1806, leaving an only child, the claimant, Mrs Birch,—Robert, who died unmarried in 1811,—Magdalene, who was married to the claimant, Richard Scougall, and died in 1826, leaving several children by him, also claimants,—and Jean, who was married to the claimant Thomson, and died without issue in 1830. Mrs Walker having survived all her immediate children, conceived that, under the settlement of her father, and by their predecease, the share provided to her and her children fell to her own assignees, and she accordingly executed a trust-deed of settlement, whereby she conveyed to trustees all her property, specially including her interest in her father's succession. In 1831, she died, and Mr Mowbray, W.S., the sole surviving trustee under Mr Fraser's settlement, raised this process of multiplepoinding for distribution of the share provided thereby to Mrs Walker and her children.

Claims were lodged for the following parties :—

1. Mrs Walker's trustees, who contended that she, the testator's own daughter, being the favoured person, the construction of the terms of the deed ought not to be extended beyond their strict meaning against her, and, consequently, that it being only her immediate children, and not they and “their heirs,” who were instituted before her own other heirs and assignees, they must be held, although two of them left issue, to have failed by their predecease before her, so as to make way for the conditional institution in favour of her other heirs and assignees.

2. Scougall and Thomson, the husbands of Magdalene and Jean Walker, respectively claimed the shares which would have been payable to their wives, who had, by their contracts of marriage, conveyed all their property to their respective husbands; and they contended, that, under Mr Fraser's settlement, the fee of the portion destined to Mrs Walker and her children, vested in each child on its coming into existence, so as to be transmissible by them; and,

3. Mrs Birch, as the only child of John Walker, and Scougall's children, by Magdalene Walker, as coming in place of their respective parents, claimed exclusively the whole funds as succeeding, per stirpes,—one half to Mrs Birch, and the other half to the Scougalls—and they maintained that no right of fee could vest in any of Mrs Walker's children, under the terms of Mr Fraser's settlement, till her death; that, on that event, the beneficial interest vest, and, consequently, that it co

the children then surviving, or having left issue; and that, although the term "children" was alone used, the *conditio si sine liberis, &c.*, applied so, that two of the children having left issue, they had not failed in the intendment of the deed, but were entitled to take as in the place of their parents, and just as if these had survived the *liferentrix*. No. 374.
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The Lord Ordinary having reported the cause on Cases, the Court at once repelled the claim for Mrs Walker's trustees,* and, as to the others, ordered a hearing. Thereafter, at advising, the following opinions were delivered:—

LORD JUSTICE-CLERK.—It appears to me to be of extreme importance to attend to the undoubted rule, that we are to give effect to the will and intention of the testator, in as far as that appears from the words, considering the whole deed, as well as the particular clause founded on. This gentleman being a professional man, providing for the settlement of his whole effects, when he intends to give simply to the legatee, and the heirs and assignees of such legatee, uses the most distinct and accurate terms, as in regard to his daughter Margaret, to whom he gives, and to her heirs and assignees. This, it is important to attend to. There is another circumstance of extreme importance, viz., that the will was to be carried into effect through the medium of a trust, and there is clear evidence on the face of the deed, that the testator contemplated it to last for a considerable period. I at once start by saying that we cannot allow the applicability of cases where there was no trust to one where the will is to be carried into effect through a trust. Then I come to the material clause on which this case depends. This is totally different from the mode of provision to the eldest daughter. It is

* The opinion of the Court on this claim was thus expressed by the Lord Justice-Clerk—

LORD JUSTICE-CLERK.—The first question is as to the claim of Mrs Walker's trustees to be preferred to all the other claimants; for if the trustees were successful in this, it would supersede all other questions. But, looking to this deed of Fraser, it appears to me, that, taking the will of the testator for our guide, the true construction of it as to Jean Fraser's share, is, that it is for the *liferent* only of her and her husband. There are no words in that part of the deed giving a higher interest than a mere *liferent*, and the trustees were to hold the fee for her children; and then, no doubt, it says, that failing of children, they are to hold for Jean Fraser's other heirs and assignees. Now, it is clear, that if Mrs Walker had children, the trustees were holders of the fee for the children, be they ever so numerous. It is only on the utter failure of children that there is any other provision regarding this share. Mrs Walker, however, had children, some of whom married, and one left a child, Mrs Birch, and another (Mrs Scougall) left several children; and yet it is contended by Mrs Walker's trustees, that the clause, failing children, comes into operation, because her immediate children predeceased. I can arrive at no such conclusion. There was not that failure under which alone the clause could come into operation. It is enough, that of the four children which existed, two have left issue. As to those that left children, there is a stream of authorities binding us to apply the *maxim si sine liberis, &c.* I cannot hesitate, therefore, to say, that that alone is decisive against the claim of Mrs Walker's trustees, which must be re-

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perfectly clear on the face of the deed, that while we have a provision for the life use of Mrs Walker and her husband, the fee is ordained to be in the trustees themselves. They are to be heirs themselves, and are to hold for the children equally among them, and, failing children, for Mrs Walker's other heirs and assignees. Taking the fair rule of construction to discover and give effect to the true meaning of the testator, I cannot doubt that he had in view a course of management which was to last during the lifetime of his daughter and her husband, and that, at the death of the survivor, they were to divide the share among their children, or the issue of such children; and failing of these, the trustees were to divide among Mrs Walker's other heirs and assignees. Here Mrs Walker is the favoured person; and failing having children at the time when the life use expires, the trustees were to hold for her other heirs and assignees. If the testator had not put in this clause, I could understand the argument, that we were to deal with it as in the case of *M'Taggart*. But the trustees are to hold for the heirs and assignees of Mrs Walker, failing of children at the expiry of the life use, and not for the heirs and assignees of the children. The construction, however, contended for by Scougall and Thomson, would make the father of the children, and his relations, the favoured parties, instead of Mrs Walker, the daughter of the testator, and her relations. Therefore, I apprehend that, on a careful examination of this, it is demonstrable that it is her interests, and not her husband's, that are chiefly considered, and that there are no rules of law or decisions that can warrant me to put a different construction on the deed, than that it was to be a continued trust, to be carried on for the parties in their order,—that there was no vesting in any child till the death of both life tenants, and that, until this event, the children had nothing in them which they could convey by marriage-contract. As to the cases—that of *Duncan v. Myles*, 1809, has a clear affinity to this, and also that of *Gleedman* and *Gaunt v. Walker*, 1825, which is exactly applicable. The cases referred to on the other side are cases generally where there was no trust. The case of *Wallace* was a trust, but the point there, was, that a legacy to a nominam legatee went to his children. Then comes the case of *Sievright*, and it certainly comes nearer the point, but still it is not the same as this. There it was to the spouses in life use, and the children in fee, while here it is given to the trustees in fee, and the case, therefore, is not in terminis the same with the present. It is said, however, there are two other cases quite decisive—those of *Crawford* and of *Leitch*. My impression of *Leitch's* case is quite different. In the opinions in that case, I see great stress was laid on the case of *Crawford*; but what was the real nature of that case? The true and only question was, whether assignation was a competent mode of transferring the right. The Court preferred the assignee, because the right conveyed was in him at the time, being nominatim mentioned. Then, when we come to the case of *Leitch*, we, in the minority here, took no different view of the principles on which the majority proceeded, but only we thought that the conditions expressed as to the prior institutes, attached to *Andrew Leitch* also. It was only a matter of construction. We never doubted that, if satisfied that the trustees held unconditionally for *Andrew Leitch*, he might have conveyed. I am of opinion, therefore, that these cases afford no obstacle to our giving effect to the construction I have put upon this deed, and that the claims of Thomson and of Scougall must be disallowed, and those of Mrs Walker and Scougall's children sustained.

LORD CRINGLETIE.—I am ready to admit that there is some

the decisions are apparently conflicting. These may be reconciled, but this would not remove my difficulty. If Mrs Walker's children had survived their mother, it is clear the fee would have vested in them, and it is the mere circumstance of their predecease which is said to prevent the vesting. Now, I do not think that the predeceasing the liferenter prevents vesting. When the fee is given to trustees for a person nominatim, it vests during the life of the liferenter. That appears plain from every decision, unless there are particular qualifying words. Then this case turns on the words, appointing the trustees directly to hold for Mrs Walker in liferent allenary, and in fee for the children. If it had been to the children nominatim, the cases referred to would have applied, and the argument turns on its not being given to them nominatim, but through a trustee. As to this, the cases referred to appear to me in a different light from the view taken by your Lordship. The case of Duncan I do not think applies. The children there survived, and the fund undoubtedly vested in them, but, during the multiplepointing, they both died. If they had assigned, that would have evacuated the substitution to Sophia Beith. It was a case of proper substitution, and on that ground the Court preferred Sophia Beith, and so it is not at all applicable. The same is true as to Glendinning and Gaunt. The words there are just such as were used in the case of Leitch, while there are no such words here. Then the case of Sievwright seems directly in point. The fund was vested in trustees for children nascituri. Still it was held to have vested in them before the death of the liferenter. This appears a direct precedent; and there is another case, of Liston, 6th February, 1793, to the same effect. Then reading the clause here, I think the trustees are just holders for the parties beneficially interested. They are trustees for them as well as for the liferenter, and the only point is as to the term of payment, and the moment the children were born, the trustees held for them. The intention of the testator is certainly the rule, and I have no doubt that the intention was, that the share should vest before the death of the liferentrix, and that the mere circumstance of their predecease is not to forfeit their right, and, therefore, I am inclined to admit the claims of Scougall and Thomson.

LORD GLENLEE.—I concur with your Lordship; my opinion rests almost entirely on the nature of the ultimate destination of the share. There is no foundation for holding, that in a settlement of this kind, a grant to children is necessarily the same as a grant to them, their heirs and assignees. I doubt that as a general principle, even when a person takes a right to himself without mention of heirs. It is now held that it will go to his heirs, though it was not always so; and there are still some exceptions illustrative of this, one of which occurred in the case of Mrs Flora McLeod, of which there is a full narrative in Lord Hailes' report, and a curious discussion it was. I only mention this to show that it is not to be taken as a settled rule that a settlement on children is always the same as to children, "their heirs and assignees." As to this particular case, the nature of the ultimate substitution comes to have influence. It is quite unreasonable to suppose that the substitution was not made *enixa voluntate*, and for an event probable, or at least very possible, the predecease of all the children without issue; and yet the consequence of holding, that it was to go to their heirs and assignees, if all died, would have been, that the testator's own daughter could take nothing, but that the fund would go to the nearest heirs of the child by the father; and if there were none, to the Crown *de jure*, rather than to his own daughter's nearest heirs and assignees. It is impossible, therefore, to put the same construction on this bequest, as if it

No. 374.

July 9, 1834.
Mowbray v.
Scougall.

No. 374. were to the children, their heirs and assignees, and we must just take it as personal to the children, and that they had no right to dispose of it till the death of the liferentrix. As to the cases referred to, I will only say generally, that whether there be a trust or not, if nothing is said as to the disposal of the fund, failing children, the natural inference is, that it is to go to the heirs of the children, which may account for the case of *Siewwright*, the only one at all supporting the view of *Scougall* and *Thomson*. The case of *Glendinning* was in respect of the ulterior purpose, that the Court preferred the son *suo jure* to his father's creditors; and, therefore, on the ground of the ultimate destination, exclusive of the idea that it was to the heirs and assignees of the children, I agree with your Lordship.

July 10, 1834.
Christy v.
Paul.

LORD MEADOWBANK.—I have nothing to add. I agree with your Lordship and Lord Glenlee.

THE COURT accordingly also repelled the claims of *Scougall* and *Thomson*, and preferred *Mrs Birch* to one half, and *Scougall's* children to the other half of the fund in medio.

Authorities for Scougall and Thomson.—Turnbull, July 28, 1778 (4248); *Stevenson v. Barr*, June 24, 1784 (14862); *Siewwright v. Dallas*, Jan. 27, 1824 (ante, II. 643); *McDowall and Selkrig*, Feb. 6, 1824 (ante, II. 682); *Wallace v. Wallace*, July 28, 1807 (Ap. Cause, No. 6); *Leitch's Trustees v. Leitch*, June 2, 1826 (ante, IV. 659), and in House of Lords, Feb. 2, 1829 (3 W. & S. 366).

— *for Scougall's Children and Mrs Birch.*—*Duncan v. Myles*, June 27, 1809 (F.C.); *Glendinning and Grant v. Walker*, Nov. 30, 1825 (ante, IV. 237); *Wallace* *supra*; *Baillies v. Neilson*, June 4, 1824 (ante, I. 458); *Cuthbertson v. Thomson*, March 1, 1781 (4279); *Christie v. Paterson*, July 5, 1822 (ante, I. 543); *Booth v. Booth*, Feb. 8, 1831 (ante, IX. 406); *Fletcher v. Clavering*, Nov. 12, 1833, per Lord Mackenzie, (fully stated in the revised case for *Mrs Birch*).

— *for Mrs Walker's Trustees.*—*Ersk. 3. 3. 34*; *Christie*, July 13, 1681 (8197 and 14849); *Campbell v. Campbell*, 1740 (14755); *Brown v. Coventry*, June 2, 1792 (14863); *Laws and Tod*, Jan. 19, 1697 (14236); *Turnbull v. Tawse*, in House of Lords, April 15, 1825 (1 W. & S. 80).

MOWBRAY and HOWDEN, W.S.—M'LEAN and GIFFEN, W.S.—PEARSON, WILKIE, and ROBERTSON, W.S.—A. ROSS.—W. A. G. and R. ELLIS, W.S.—Agents.

No. 375.

JOHN CHRISTY and Others, Petitioners.—*Anderson*.
THOMSON PAUL, Respondent.—*Rutherford*.

Judicial-Factor—Trust—Sequestration of Land Estate.—A trustee died, during the dependence of a process of multiplepoinding, which was raised by him to obtain exoneration of the trust-estate; a litigation arose as to the right of a party to be assisted in that process as trustee, under a deed of assumption; the Court, at the instance of claimants on the fund in medio, sequestrated the trust-estate, in respect the party had never had possession, and they appointed a judicial-factor on the estate, "with power to appear and defend the interests of the trust, in the aforesaid process, and with all other usual powers."

THE late James Thomson, W.S., remained sole surviving trustee under a deed which gave him power to assume new trustees. He executed a deed of assumption in favour of Thomson Paul, W.S., but continued to act as sole trustee during his lifetime. He raised a multiplepoinding for the purpose of being exonerated of the trust estate, and winding up the trust; and, having died in 1831, during the dependence of the process, Mr Paul proposed to sist himself as being the trustee under the deed of assumption. This was resisted by the heir of Thomson, who alleged that the deed of assumption was never declared or acted on, and that Paul was not entitled to act as trustee. Considerable litigation ensued, during which the farther progress of the multiplepoinding was suspended. John Christy and others, who were interested in the fund in medio, and some of whom stated that their subsistence depended on it, enrolled the cause before the Lord Ordinary, in order to have it proceeded in, without awaiting the decision of the question between Paul and Thomson's representative. His Lordship reported the point, and it was suggested by the Court that Christy and others should present a petition for the appointment of a judicial factor, and a sequestration of the trust estate. They accordingly petitioned the Court to this effect, and to appoint the factor "with full power to appear and defend the interests of the trust in the aforesaid process of multiplepoinding, and with all other usual powers," &c.

No. 375.
1st Division
July 10, 1834
Christy v.
Paul.

Hunter v.
Mitchell.

Paul opposed the petition, but as the Court considered that there was no evidence of his ever having intromitted with, or been in possession of the trust estate, or having held the status of trustee, their Lordships granted as craved.

LORD PRESIDENT.—This is just one of the cases of competition and of disputed possession, where it is proper to appoint a judicial factor.

The other Judges concurred.

GIBSON-CRAIGS, WARDLAW, and DALZIEL, W.S.—R. RATTRAY, W.S.—C. and D. STEWART, S.S.C.—T. PAUL, W.S.—Agents.

JOHN HUNTER & Co., Petitioners.—*Sandford.*
JOHN MITCHELL and DAVID ROBERTSON, (Tait's Trustee,) Respondents.
Milne.

No. 376.

Bankruptcy—Recal of Sequestration.—A petition for recal of sequestration being presented, on the ground that the concurring creditor was not a true creditor to the extent required by law, the Court, of consent, remitted to John Parker, assistant-clerk, to report as to this, and, on considering his report, their Lordships refused the petition with expenses.

July 10, 1834
1st Division.

J. KNOX, S.S.C.—E. DEVEREAUX, S.S.C.—Agents.

No. 377.

JOHN PRINGLE, Suspender.—*Whigham.*

July 10, 1834.
Pringle v.
Tate,

TATE and OTHERS (Cleugh's Assignees), Chargers.—*Walker.*

Cautioner—Judicial Factor.—The cautioner for a judicial factor in a sequestration of lands, pending a ranking and sale, held to be liberated by the gross negligence of the creditors in their conduct towards the factor.

July 10, 1834.

2D DIVISION.
Ld. Mackenzie.
F.

In 1812, on the application of John Cleugh, merchant in London, and his sister, creditors in a ranking and sale raised in 1791, and then still depending, of a small property near Edinburgh, called New Grange, or Hamilton's Folly, which, pending the process, had been sequestrated, Robert Rattray, W.S., was appointed judicial factor thereon. The suspender, Pringle, as cautioner, signed, along with Rattray, a bond of caution, bearing as follows:—"Therefore, wit ye me, the said Robert Rattray, as principal, and John Pringle, writer to the signet, as cautioner, surety, and full debtor for and with me, to be bound and obliged, likeas we both, principal and cautioner, bind and oblige us, jointly and severally, our heirs, executors, and successors whatsoever, that the said Robert Rattray shall do exact diligence in uplifting the bygone rents and arrears in the hands of the tenants of the said subjects, and rents thereof in time coming, during the subsistence of the said factory; that I shall account for the said rents, and annual rents thereof, and make payment of whatever sum or sums of money shall be found justly due and resting by me, as factor foresaid, to the person or persons who shall be found by the said Lords to have best right thereto; and that I shall observe and perform any other duty incumbent on me as Lords' factor, in conformity to, and in terms of, the rules and instructions appointed and ordained by the several acts of sederunt of the Lords of Council and Session, in all points."

By act of sederunt, 22d December, 1711, the following provisions are made as to judicial factors on sequestrated properties:—"6, Item, for the benefit of creditors, and that they may be acquainted with the state of accounts of factors upon estates sequestrate, the Lords do enact and declare, that all such factors for hereafter, shall, within six months after the extracting of the factory, make up a rental of the estate, and of the bygone rents, to be reported to the Lords, and lodged in the hands of the clerk to the process, there to lie, and to be made forthcoming to the parties having interest, without fee or reward, that accordingly the factor may be charged thereby.

"7, Item, When any alteration happens in the rentals, by giving down any part of the rents, (which is always to be done according to the rules of law,) or when it falls out that the rental is increased or further discovered, then the alteration, and what is further discovered, shall, within three months thereafter, be reported and put in the ~~in manner~~ in manner, and to the ends above mentioned.

"8, Item, The said factor shall once every year give in a scheme of his accounts, charge and discharge, to the clerk of the process, so that the creditors may have access yearly to see them, and provide themselves with proper means of checking them, certifying such factors, that, if they fail in any part of the premises, it shall be a ground of removing them: And further, if the rental made up and reported by them shall be found deficient and concealed, or any addition thereof shall be omitted to be eiked in manner above mentioned, they shall in that case be decerned in the double of what is so omitted; and if they shall neglect yearly to give in a scheme of their accounts in manner foresaid, they shall be liable in such a mulct as the Lords shall be pleased to modify, not being under half a year's salary."

No. 377.
July 10, 1834.
Pringle v. Tate.

Ratray, in a great measure, neglected these provisions, and, in particular, he gave up no rental of the property, as required by the act of sederunt, to be done within six months; nor did he ever report any state of his intromissions, or give in his accounts from the date of his appointment till the year 1826; and it did not appear that the creditors had ever made any requisition to him to do so, or exercised any control or superintendence over him whatever. In 1826, he lodged a state of accounts, showing a balance due by him of £1263, but no steps were taken by the creditors to recover this, or to have it consigned, till 1831, when a petition was presented by Cleugh, praying to have Ratray ordained to give in his accounts, for the purpose of having them audited. Under this petition, it was ascertained that the balance due by Ratray was £1663, which he was ordered to consign, and, having failed to do so, and declared himself insolvent, intimation was, of date 7th June, 1832, for the first time made on the part of Cleugh, to the suspender Pringle, as cautioner, being the only communication received by him relative to the factory from the date of his having subscribed the bond of caution. After some proceedings, mentioned ante, X. 772, Pringle presented a bill of suspension, as of a threatened charge upon his bond, which, having been passed without caution (ante, XI. 47), the letters were expedite, and a record made up, from which the facts appeared to be as above stated.

In support of his suspension, Pringle maintained that the creditors being the only parties having an interest and title to look after the judicial factor, they were bound to have seen that he complied with the rules prescribed for the proper execution of his office, and that having failed to do so, or to make any intimation to the cautioner, who was entitled to rely on their exercising a reasonable superintendence over the factor, they were chargeable with such gross negligence as to liberate the cautioner on the principle of several recent cases in regard to this point.¹

¹ Thomson v. B. of Scotland in House of Lords, June 11, 1824 (2. Shaw's App. Ca. 317); Duncan, Dec. 18, 1826 (ante, V. 111); Forbes v. Welsh, June 10, 1829 (ante, VII. 732); Mein v. Hardie, Jan. 19, 1830 (ante, VIII. 346); Dalziel v. Menzies, Feb. 15, 1834 (ante, IX. 434); M'Taggart, Jan. 24, 1834 (ante, p. 332).

No. 377.
July 10, 1834.
Pringle v.
Macle.

On the other hand, it was maintained for the chargers (assignees of Cleugh under a commission of bankrupt) that, in the cases referred to, there was substantially some act of commission, and not mere neglect or omission, as in the present case, which had been held to liberate the cautioners; and, further, that there was a distinction between the situation of creditors in a process of ranking and sale, and that of creditors under a mercantile sequestration, or of the employers of bank agents, or the like, inasmuch as the creditors in the ranking had not the election of, nor any direct control over, the factor, who was appointed by the Court, and was only responsible to them, so that the creditors had no positive duty to perform towards the factor, which they had neglected, and that the present case, therefore, fell under the rule applied to the Court in regard to cautioners for curators bonis in the cases of *Eaton* and of *Morland*.¹

The Lord Ordinary pronounced this interlocutor, adding the subjoined note :—“ In respect of the gross negligence on the part of the chargers, or their authors, in allowing the judicial factor, Mr Robert Rattray, to go on for so very long a time exercising that office in a manner so irregular and improper, suspends the letters simpliciter, and decerns.”

Cleugh's assignees having reclaimed, the Court ordered Cases for the opinion of the other Judges.

The following unanimous opinion was returned :—

“ We are of opinion, in this case, that the suspender, Pringle, is not responsible, under his bond of caution, dated 23d April, 1812, for Robert Rattray, W.S., a judicial factor, and that the interlocutor of Lord Mackenzie of 16th November, 1833, is well founded, and ought to be adhered to.”

The Judges of the Second Division concurring—

THE COURT adhered to the Lord Ordinary's interlocutor.

JAMES BRIDGES, W.S.—WALKER, RICHARDSON, and MELVILLE, W.S.—Agents.

¹ *Eaton v. Murdoch*, June 9, 1826 (*ante*, IV. 688); *Morland v. Sprot*, Dec. 4, 1839 (*ante*, VIII. 181).

* “ It seems impossible to reconcile the principles recognised in the House of Lords with the doctrine, that there must be some positive act, on the part of the person, served to discharge the cautioner of a factor or other servant. Gross omission must certainly be sufficient under the doctrine there laid down. Then the Lord Ordinary finds it impossible to discover any solid ground on which to distinguish, in this respect, a judicial factor from any other factor, or a plurality of creditors in a ranking and sale, from one creditor, or from one, or a plurality of other employers of, or persons served by, a factor or other servant. Nor can the Lord Ordinary think the specialities in the situation of the creditors are relevant. If they owed a duty to the cautioner, and were not able in person to fulfil it, they were bound to get it looked after by some other person.”

PHOENIX FIRE INSURANCE COMPANY, Pursuers.—*Rutherford—Ivory.* No. 378.
JOHN YOUNG, S.S.C., Defender.—*Buchanan—Patterson.*

July 10, 1834.
Phoenix Fire
Insurance Co.
v. Young.

Reference to Oath.—Circumstances in which a general reference to oath of the
“whole matters at issue in the cause” was refused to be sustained.

Caithness v.
Burness.

. AFTER the judgment in this case, reported ante, p. 680, Young put
in a minute, referring generally to the oaths of the pursuers, and of
Richter, their accountant, said to be a partner, “the whole matters at
issue in this cause.” To this it was objected, that the judgment having
proceeded on the finding, that “there was no statement on the record
sufficiently specific,” Young could not be allowed a proof by oath of
party more than by any other mode.

July 10, 1834.
2d Division.

LORD GLENLEE.—This reference would be referring the law as well as the
facts, and it would be the most ludicrous thing in the world to send to these pur-
suers to give their opinion on oath as to these counter claims of Young's.

The other Judges concurring,

THE COURT refused to sustain the reference as framed.

GIBSON-CRAIG, WARDLAW, and DALZIEL, W.S.—J. CULLEN, W.S.—Agents.

JOHN CAITHNESS and ROBERT ANDERSON, Petitioners.—*D. F. Hope—* No. 379.
Pattison.

ALEXANDER BURNES (Sellar and Co.'s Trustee) and Others, Respon-
dents.—*Neaves.*

Arrestment—Expenses.—Under a warrant to arrest and dismantle a ves-
sel, Burness and others carried away some of her sails, &c., and deposited
them in the weigh-house of Aberdeen, where they were again arrested
by third parties, in the hands of the weigh-house keeper. After Caithness
and Anderson had obtained the recal of the first diligence, they petitioned
the Court to ordain Burness and others to redeliver the sails, &c., and, if
necessary, to recal the second arrestment, &c. Before the petition was
heard, the question had resolved into a mere point of expenses, as the
petitioners had, in the meantime, given a guarantee under which the
second arrestment was loosed. The Court found the petitioners entitled
to the expenses of their application.

July 11, 1834.
1st Division.

A. ROBERTSON, W.S.—GORDON and BARROW, W.S.—Agents.

No. 380.

ANDREW AITKEN, Suspender.—*Shene*—*J. Anderson*.ALEXANDER BARLAS, Charger.—*Penney*.

Diligence—Juratory Caution.—Circumstances in which a bill of suspension and liberation was passed on juratory caution; the suspender having been incarcerated for the expenses of a burgh-court process, which was in cursu of review under a process of reduction.

July 11, 1834.

1st Division.
Lord Jeffrey.
Bill Chamber.
B.

ANDREW AITKEN, manufacturer in Glasgow, raised an action before the Magistrates of Glasgow against Finlay and Nielson, merchants there, who were assoilzied with expenses. Decree for expenses was allowed to go out in the name of their agent, Alexander Barlas, writer, Glasgow, who raised diligence on it, and incarcerated Aitken. Prior to this, Aitken had brought a reduction of the decree of the Magistrates, the production had been satisfied, and an order for defences was current at the date of the incarceration. Aitken presented a bill of suspension and liberation, pleading, that his reduction was well founded on the merits, and as the decree was at all events in cursu of being reviewed, and no delay had occurred, it was nimious to use ultimate diligence against him. The charger pleaded, inter alia, that Aitken should have taken the usual remedy of advocacy, and that he avoided this, merely to evade the condition of finding caution for expenses; that he had thereby rendered himself liable to have the decree enforced in the meantime; and if his diligence were to be suspended without caution, other parties would adopt the same course with the suspender, and the object of ordering caution, in advocations, would be defeated. The bill was refused in respect of no caution. Aitken afterwards presented a second bill, and craved that it might be passed without caution. The Lord Ordinary passed it on caution, observing, that though there were circumstances not satisfactorily explained in regard to the merits of the burgh-court decree, and "the actual incarceration of the suspender at so advanced a stage of the process of reduction, was a painful feature in the case, still he could not deprive the charger of the benefit of his executed diligence, especially after the refusal of a former bill without caution."

Aitken reclaimed, and the Court, in the circumstances, remitted to pass the bill on juratory caution.

J. CULLEN, W.S.—J. FORBES, W.S.—Agents.

JAMES BARBOUR, Petitioner.—*Wilson.*

Sequestration—Bankruptcy.—The Court, on remitting to the Lord Ordinary for investigation, a petition by a trustee on a sequestrated estate for exoneration and discharge, refused to grant power to his Lordship to discharge during vacation. No. 381.

WILLIAM DALRYMPLE, S.S.C.—Agent.

Barbour, Petitioner.

Campbell v. Campbell.

Johnston v. Fergusson.

No. 382.

DUNCAN CAMPBELL, Pursuer.—*Robertson.*
ALEXANDER CAMPBELL and OTHERS, Defenders.—*Mylne.*

Process—Reference to Oath.—Incompetent to admit reference to oath by a motion.

MOTION by the pursuer in the case mentioned ante, p. 352, to allow decree to be extracted ad interim, the auditor's report not having been returned so as to admit of a final extract. July 11, 1834.
2d Division.
R.

The pursuer opposed this, and verbally tendered a reference to oath, but to this it was objected, that a reference could only be made in the form of an incidental petition.¹

THE COURT granted the motion.

C. M'DOWALL, W.S.—M'LEAN and GIFFEN, W.S. &c.—Agents.

WILLIAM JOHNSTON, Pursuer.—*Robertson.*
ROBERT FERGUSSON and OTHERS, Defenders.—*Rutherford.*

No. 383.

Expenses.—1. Charge for a new agent making himself acquainted with the state of the process disallowed. 2. Charge allowed for a visit by counsel to the locality which was the subject of dispute.

REPORT of the auditor on the account of expenses found due to the pursuer in this cause, mentioned ante, p. 572, which regarded disputed marches, and in which there had been a Jury trial. Various objections were taken to the report, but only the two following points are deserving of notice. July 11, 1834.
2d Division.

1. The auditor disallowed a charge by a new agent employed by the pursuer on the death of his former agent, for making himself acquainted with the state of the process, and the Court confirmed his judgment.

¹ Hill v. Livingston.

- No. 383. 2. Another charge disallowed by the auditor, was the expense, including a fee to counsel for his inspecting the locality prior to the trial. The Court sustained the objection to the report on this point, and allowed the charge to the extent of £10, 10s.

July 11, 1834.
Hamiltons v.
Hamilton and
Stewart.

R. BURN, W.S.—A. D. FRASER, W.S.—Agents.

- No. 384. ELIZABETH, ARTHUR, and ALEXANDER HAMILTON, Pursuers.—*Shene-Shaw.*
ALEXANDER HAMILTON, ANDREW STEWART and OTHERS, Defenders.—*D. F. Hope—Russell.*

Minor—Judicial Factor—Tutor and Curator—Parent and Child.—1. Circumstances in which a factor loco tutoris held justified in advancing to the widow of the deceased father of the pupils, a sum to enable her to carry on his business, although the security proved insufficient. 2. The mother entitled to an allowance for the board of the children.

- July 11, 1834. THE late Alexander Hamilton, spirit-dealer in Glasgow, died in June, 1817, leaving a widow and six children, the oldest of whom was under fourteen. His whole free estate, as reported upon by an accountant in the present process, amounted to £1628, whereof the widow was entitled to one-third jure relictæ. On the 11th of July following Hamilton's death, his brother John was appointed by the Court factor loco tutoris, and it being thought for the interest of the family, that the widow should carry on the business, the stock in trade, and furniture of the house, valued together at £974, was left in her possession, one-third being her own, jure relictæ, and she being debtor to her children in the remaining two-thirds. In 1821, John Hamilton died, and no factor was nominated in his place till 1823, when the late William Hamilton was appointed. At this period the debt due by the widow was £252, and, shortly afterwards, the premises in which she carried on business, and for which she paid a rent of £60, having fallen down, she took in lease for nineteen years, a vacant piece of ground, on which she erected a house, the factor advancing to assist her in doing so, the sum of £448, making the debt due by her, in all £700. By the lease, it was stipulated that the tenant should be entitled at the end of it to the value of the buildings erected, and, in security of the debt of £700 above mentioned, the widow executed an assignation of the lease in favour of William Hamilton, the factor, who intimated the same to the landlord, the possession, however, remaining unaltered. The widow thereafter continued to occupy the premises, and she carried on the business, and supported the children, paying the rent to the landlord, but not paying any interest on the £700 to the factor. In 1824, the factor died, and the eldest son coming of age, joined his mother in the business, thereafter carried on under the firm of Mrs H-

2d DIVISION.
Ld. Mackenzie.
T.

milton and Son. After the factor's death, Andrew Stewart, one of his cautioners, acted as pro-tutor in taking charge of the family affairs, and, in 1825 and 1826, he paid to the two eldest sons, on their respectively attaining majority, £199 each, being an equal share of the funds then invested. In 1826, he also paid to Mrs Hamilton, £125, on account of her outlay in the maintenance and education of the family. In 1827, Mrs Hamilton and Son became bankrupt, and their estates were sequestrated. On this event, Mrs Hamilton executed in favour of Stewart a supplementary assignation to the lease in security of the £700 due by her to her children; but it and the original assignation to William Hamilton were, in an action at the instance of the trustee, reduced, except in so far as regarded the claim for the value of the buildings at the end of the lease, estimated at £200. Thereupon, in 1829, the pursuers, Elizabeth, Arthur, and Alexander Hamilton, the three younger children, (the youngest of all having died, and the two eldest having received payment of their shares, as already mentioned,) raised the present action of accounting against the representatives of the two factors and their cautioners, and against Stewart, separately, as pro-tutor.

No. 381.
July 11, 1834.
Hamiltons v.
Hamilton and
Stewart.

A remit was made to an accountant, who returned a report on various disputed articles, for which credit was sought by the defenders, but it is only necessary to advert to two of them.

1. The one was the sum of £700 lent to the widow, for which the pursuers contended that the defenders were not entitled to credit, in respect of their failure to take sufficient security from her; and

2. The other was the payment to the widow of £125 to account of the maintenance of the children, together with the interest of the £700 not uplifted from her, and for which the defenders claimed credit as a proper allowance to her for support of the family, while the pursuers maintained that their services were equivalent to their support and maintenance.

With reference to these articles, it was pleaded for the defenders.

1. The advance of £700 to the widow was, in the circumstances, the most prudent and desirable measure for the advantage of the family, even without any security, as it enabled her to keep up the business, and support and bring up her children. The defenders, however, further offered to put the pursuers in exactly the same situation in which they would have been had the security been effectual, by assigning the claim for the value of the buildings, and also the lease itself, which had, in the meantime, been purchased for £150 by the son of Stewart.

2. The widow was undoubtedly entitled to an allowance for the support and maintenance of her children, and the interest of the £700, together with the sum received from the factor, did not exceed a fair consideration.

The Lord Ordinary, with reference to these two points, pronounced as follows:—“(1.) In respect to the first article of discharge in the account

No. 384. of William Hamilton's intromissions, which has been submitted as above, namely, the loan of £700 to Mrs Hamilton on 2d September, 1823; finds, that taking into consideration the offer judicially made by the defenders to place the pursuers in precisely the same situation, with regard to the lease conveyed in security, as they would have been in if the assignation by their mother had been unchallenged and unchallengeable, the said article ought to be sustained, and therefore sustains the same, and repels the objection thereto. In respect the two elder children's shares of the funds realized by the defenders, were paid to them in 1825 and 1826, on their reaching majority; finds that the defenders are entitled to take credit in a question with the pursuers for the whole contents of the bond; farther, finds that in consequence of said article of discharge being sustained, the defenders are bound to execute a valid conveyance of the said lease in favour of the pursuers, and to account to them for the surplus rents of the property since Mrs Hamilton's bankruptcy in 1827, deducting such repairs and other expenses as the defenders may be legally entitled to deduct. (2.) In respect to the fourth article of discharge in the account of William Hamilton's intromissions, and the first and second articles of discharge in the account of Andrew Stewart's intromissions, which have been submitted as above, viz. the interest of the £700 lent to Mrs Hamilton, from 2d September, 1823, to 11th November, 1824, being £41, 14s. 3d., the payment to her of £125, on 25th October, 1826, to account of boarding the children, and the interest from 11th November, 1824, to 15th May, 1827, of the said sum of £700, amounting to £87, 10s., not exacted in respect of boarding the children; finds that the said articles ought to be sustained, and therefore sustains the same, and repels the objections thereto."

The pursuers reclaimed.

LORD JUSTICE-CLERK.—I have read the report with much satisfaction, and on the only two points objected to, I have not seen cause to alter the interlocutor. It must be kept in view that this action is raised by the children against these parties, to account for the advance to their mother; and when we consider that it was to enable her to carry on the business for their behoof, it certainly seems no great misappropriation to lend her the money for the purpose of erecting premises on the ground taken by her, to get remuneration at the end of the lease. I would not, in these circumstances, go more strictly to work than the Lord Ordinary. As to the board—being only £5 for each child, I would not alter.

LORD CRINGLETIE.—I entirely agree. The proceeding here was totally different from lending money to a stranger. It was a proper arrangement for the good of all parties.

THE COURT accordingly adhered.

G. FISHER, S.S.C.—A. and J. PATTERSON, S.S.C.—Agents.

MRS MARY WYLIE, Pursuer.—*A. McNeill*.
CAPTAIN FRANCIS F. LAYE, Defender.—*A. Wood*.

No. 385.

July 11, 1834.
Wylie v. Laye.

Jurisdiction—Forum.—1. A child having been born in Scotland, of English parents, during the residence of the father there on military service—held that Scotland was not his forum originis. 2. A party not bound to answer in Scotch Courts a summons of declarator of marriage alleged to have been contracted in Scotland, he not being cited personally within Scotland, but edictally, and having no domicile of citation therein.

THE defender, Captain Laye, was born at Leith Fort in 1807, his father, General Laye, of the artillery, an Englishman, having been stationed there the year before on military duty. In 1814, General Laye was relieved, and returned with his wife and son to England, where they continued thereafter to reside. In 1826, Captain Laye having obtained a commission in the 25th Regiment of Foot, of which the reserve was then in Edinburgh Castle, joined it there, and, after remaining in Scotland on duty for two years, he went to the West Indies, where the regiment was. In 1831, the regiment being ordered to Scotland, he was placed in quarters at Paisley, where he became acquainted with the pursuer, Mrs Mary Wylie. He left Scotland with his regiment in 1833, and thereafter she raised against him an action of declarator of marriage, alleged to have been contracted at Paisley. The summons in this action was executed edictally after the defender had been more than forty days out of Scotland; and in defences put in for him thereto, it was pleaded that the Scotch Courts had no jurisdiction over him. The Lord Ordinary having reported the point orally to the Court, their Lordships desired a written argument, and the Lord Ordinary accordingly ordered Cases, with which he made avizandum.

Pleaded for the Pursuer—

The defender was born in Scotland, and lived there till his eighth year, Scotland is therefore his forum originis, and although it has been held in the case of *Grant v. Redie*, that the forum originis is not per se sufficient to constitute jurisdiction, yet, with other circumstances, and especially combined with the locus contractus, it is sufficient, according to various decisions, having reference, in particular, to questions such as that involved in the present action.¹ Scotland, therefore, being, in the present case, both the forum originis and the locus contractus, the defender must be subject to the jurisdiction of the Scotch Courts.

¹ *Dods v. Westcombe*, July 1, 1746 (4798); *Pirie v. Lunan*, March 8, 1796 (4866); *French v. Pilcher*, June 13, 1800 (F.C.); *Wyche v. Blount*, June 27, 1801 (F.C.); *McKensie*, March 8, 1820 (F.C.); *Edmonstone*, June 1, 1826 (F.C.); *Ferguson*, Consist. Law, August 24; *Ersk.* 1. 2. 19. note 28, Ivory's edition.

No. 385. *Pleaded for the defender—*

July 11, 1834.
Wylie v. Laya.

The defender's father being English, and only stationed in Scotland on military duty, did not acquire a domicile there, but remained during the whole period of his residence a domiciled Englishman, and consequently his son, the defender, though *de facto* born in Scotland, had no domicile there, but followed the domicile of his father; so that the argument founded on the supposed *forum originis*, is not applicable to the present case. But even if it were, the *forum originis* does not create jurisdiction, and although the *locus contractus* may have that effect, it can only be available when the party is cited within the territory, but cannot authorize the exercise of jurisdiction against a person such as the defender, not domiciled therein, nor cited within it, nor possessed of any property situated there.¹

The Court, considering that the decisions were, in some instances, inconsistent with each other, requested the opinion of the other Judges.

The following unanimous opinion was returned:—

We are of opinion that the defender cannot be subjected to the jurisdiction of the Courts of this country, on the ground that Scotland is to be held as his *forum originis*.

His father was an officer in the army, a domiciled Englishman, who was ordered to Scotland in the discharge of his duty. Owing to his service being in the artillery, he remained in quarters in Scotland, longer than he probably would have done had he been in a regiment of the line or dragoons. But still, he was here only on duty, and not *animo remanendi*, for as soon as his duty here was over, he returned to England, and there remained domiciled.

The defender was born in Scotland, while his father was thus here only on military and temporary duty, and when only five or six years old, his father carried him with him to England, as he had an unquestionable right to do, and as the father's domicile was in England, his infant son, the defender, could have no domicile but that of his father.

2dly, Although the alleged marriage between the pursuer and defender is stated to have been contracted in Scotland, we are of opinion that the *locus contractus* does not lay a foundation for a jurisdiction over a foreigner, unless he has been cited in this country, or, in some cases, unless his funds have been arrested here, *jurisdictionis fundandæ causa*.

The Judges of the Second Division concurring,

Their Lordships sustained the objection to the jurisdiction, and dismissed the action.

JAS. TAYLOR, S.S.C.—W. DICKSON, W.S.—Agents.

¹ *Brigg's Heirs*, March 23, 1639 (4816); *Wallace*, Feb. 9, 1798 (4784); *Sornist v. Gray*, Dec. 1, 1772 (4823); *Calder*, Jan. 10, 1798 (App. v. Execution); *Pedler v. Grant*, as reversed in the H. of L., July 5, 1825 (1 W. & S. 716); *Pettinger v. Wightman*, July 1, 1817 (3 Merivale); *Somerville v. Somerville* (5 Vesey, 787); *Ersk.* 1. 2. 16; *M'Kenzie Inst.* 1. 2. 6.

JOSEPH MACKINTOSH, Pursuer.—*D. F. Hope—Neaves.*
 LADY ASHBURTON, Defender.—*Sol.-Gen. Cockburn—Maconochie.*

No. 386.

Triennial Prescription.—Circumstances which held not sufficient to elide the triennial prescription of a tradesman's account.

July 11, 1834.
 Mackintosh v.
 Ashburton.

SEQUEL of the case mentioned ante, p. 518, which see. On the cause returning to the Lord Ordinary, Lady Ashburton insisted on her plea of prescription not disposed of. This was attempted to be elided by certain correspondence on the part of Mr Mowbray, W.S., the agent of Lord Ashburton, which, while it showed that Mackintosh disputed that the payments made to him had extinguished the amount due, so far from acknowledging that any thing truly was owing, bore that Mackintosh had been overpaid for the work performed by him.

July 11, 1834.
 2^d DIVISION.
 Ld. Melwyn.
 R.

The Lord Ordinary pronounced this interlocutor, adding the subjoined note : *—" Finds, that the present action, not having been raised till the

* " The last article in this account is in September, 1821, and the process is not raised till March, 1826. Lord Ashburton did not die till spring 1823, and the action is raised against his representative. Prescription then seems to apply. In the note of 6th June, 1833, the Lord Ordinary explained why he did not think this case could be decided on the same principles as the case of Smith, 17th February, 1831 ; and the case of Turnbull against Borthwick, 12th May, 1830, which was noticed at the Bar, is so far different from the present, that there the constitution of the debt was admitted, and it was a most sound view of the law, that in such a case the party could not discharge himself by estimating the value of the work himself. Now, here the amount of the work done is not admitted ; and Black, when on the spot, assisted by the pursuer himself, and at least by Mackenzie also, who is referred to in the report as being present, has reported that he found it impossible to measure it. There is no admission in any letter of Mr Mowbray's, if that would be sufficient, that any thing is due.

" As the defender has resorted to the plea of prescription, originally and all along stated in the pleadings, but not insisted in, and as it seems competent for her now to do so, the Lord Ordinary being of opinion that it is applicable to the circumstances of this case, has given effect to it, and thinks that this is a case peculiarly fitted for showing the propriety of such a rule of law.

" If this plea should not ultimately be sustained, the Lord Ordinary would find great difficulty in obeying the injunctions of the Court, ' to consider Mr Black's report, and if any facts therein shall require further evidence, to take such steps as he may see fit.' The proposal of the pursuer is to allow a proof by commission as to what work was done by the pursuer, consisting in a great measure of repairs during the years 1817, 1818, 1819, 1820, and 1821, and this proof to be by the workmen who were employed by him. The Lord Ordinary cannot conceive any plan less likely to bring out the truth at this distance of time, especially when the nature of the work to be paid for, and of course proved, is considered. It took eight or ten days to measure the various items of work, and the original jottings which are

No. 386. lapse of three years from the close of the accounts claimed, the presumption that the same have been paid and extinguished, introduced by the
 July 11, 1834. act 1579, c. 83, must be held to apply, unless they shall be proved to
 Mackintosh v. be resting owing by writ, or the oath of knowledge of the defender;
 Ashburton. and allows the pursuer to put in a minute of reference if he shall be so
 advised."

Mackintosh reclaimed.

LORD JUSTICE-CLERK.—There is nothing to preclude the plea of prescription being still insisted on, and on its merits I think it clear that the case of Falconer¹ does not apply. The person whose letters were there founded on, was the factor of the employers, and they contained a clear admission that the claim was unsettled, and that a debt was due, though the amount was disputed. The present case

produced, and which the Lord Ordinary has examined (from 5-18 to 17-18 of process), exhibit in a much stronger light than it is possible to do in words, the utter impossibility of attempting to prove the work done at this distance of time. The very abstract contains no less than sixty-one articles. The items in the jottings composing them almost exceed calculation.

"From the statement given in the condescendence and answers of the manner in which the work was measured, and the minute attention which the jottings exhibit, when 'Mr Mowbray measured every piece of work which was pointed out by the pursuer himself as remaining unmeasured and unpaid for, after ascertaining from Lord Ashburton that the pursuer's information was correct,' it is scarcely possible to suppose any inaccuracy, 'when the measuring-line was held by the pursuer himself, or by one of his servants, and every figure marked down at his sight.' There is no denial of these facts. Now, there might be inaccuracy in the subsequent calculations of the various items, or in the summations, and if such could have been pointed out, no doubt redress would have been long ago obtained, as the defender has, by not resorting to her legal defence of prescription, shown her willingness to do justice to the pursuer, if he can show any ground for it. And if prescription is not held to apply, the Lord Ordinary cannot conceive any way of proceeding likely to do justice, unless the pursuer will produce the copy of the account which must have been furnished to him at the time, made up from Mr Mowbray's measurements. It is stated in Mr Mowbray's examination, that he thinks such an account was furnished to him; and this has never been denied. If it should turn out that there is any miscalculation or mistake in the summation, such may be corrected, but beyond this there seems no data or probanda for going. The Lord Ordinary still retains the opinion expressed in his former note, that as there is no evidence, so there is not the slightest reason to believe or presume that the remeasurement by Rose and M'Kenzie was made with Lord Ashburton's consent, and with the view of superintending the former measurement. It is in consequence of the pursuer insisting to be paid according to this measurement, that has probably made him withhold the account made up from the only measurement which the defender can be called upon to recognise. The measurement of Rose and M'Kenzie, No. 2-2 of process, cannot even be checked by itself, it being truly stated only to be 'an abstract of the amounts in quantity of the different species of work, without the dimensions from which these amounts were made up.'"

¹ Smith v. Falconer, Feb. 17, 1831 (ante, IX. 474).

is totally different. Mr Mowbray was a law-agent, but the main thing is, that the letters contain no acknowledgment of any thing whatever being due ; but, on the contrary, a statement that the balance was the other way. I am therefore for adhering.

No. 386.
July 11, 1834.
Arnott v.
Hardie.

The other Judges concurring,

THE COURT adhered.

ANDREW FRASER, W.S.—MOWBRAY and HOWDEN, W.S.—Agents.

GEORGE ARNOTT and Trustee, Petitioners.—*Rutherford—Sandford.* No. 387.
THOMAS HARDIE and Others, Respondents.—*D. F. Hope—M'Neill.*

Bankruptcy—Sequestration—Composition.—Circumstances in which the Court refused, in hoc statu, to approve of an offer of composition by a sequestrated bankrupt.

SEQUEL of the case mentioned ante, p. 696. The principal objects of the case were, the composition being approved of, and the discharge granted, were,

July 11, 1834.
2D DIVISION.
Ld. Moncreiff.
R.

1. That the books of the bankrupt (who had been twice before sequestrated), afforded no means of ascertaining the exact state of his affairs, so as to determine whether the composition offered were reasonable or not.

2. That he had paid £5 to one creditor, to obtain his concurrence, and that the trustee had falsely represented to others in writing to them, applying for consent that “nineteen-twentieths,” or all the others except themselves, had concurred ; and,

3. That several creditors had withdrawn their concurrence, and, in particular, one whose consent had been obtained by the misrepresentation above-mentioned, while the number of creditors reported as concurring, being only a fraction above nine-tenths, a single creditor withdrawing was sufficient to reduce the number below the requisite amount.

LORD JUSTICE-CLERK.—We are not in a condition to grant this application. We have no statement to enable us to judge of the reasonableness of the composition, no answer being given to the averment as to the books. Neither can I overlook the statement that £5 was given to one creditor, to procure his concurrence, nor can I get over these letters of the trustee, and it is clear that if the consent of creditors have been obtained by misrepresentation, they may recall it, and oppose the application at the latest stage. I am therefore for refusing in hoc statu.

The other Judges concurring,

THE COURT, in hoc statu, refused the application.

D. FISHER, S.S.C.—J. T. MURRAY, W.S.—Agents.

No. 388.

July 5, 1834.
Hassett v.
Walker.

EDWARD HASSETT, Suspender.—*A. Bell.*ROBERT WALKER, Charger.—*W. Bell.*

Diligence—Imprisonment.—Where letters of caption bore, ex facie, that the bill of exchange had been protested and registered before the period when it fell due—letters suspended, with expenses, although it was alleged that there was a mere clerical error in the date of the registration, and that this was corrected by the reference made to the letters of horning, where the true date was correctly recited.¹

July 5, 1834.

1st Division.
Ld. Fullerton.

ROBERT WALKER, grocer, drew a bill on Edward Hassett, tavern-keeper, for the sum of £15. It was dated 18th July, 1833, and, being drawn at three months, fell due on 18-21 October. It was protested on 21st October; the protest was registered on the 29th of October; and letters of horning were raised, and a charge was given on the same day. Hassett was afterwards denounced, and a bill for letters of caption was presented, which erroneously set forth that the decree of registration was interposed on the 9th, in place of the 29th of October. Letters of caption were issued, which narrated the decree of registration as of the erroneous date of 9th October. As they also set forth the terms of the bill of exchange, it was apparent, ex facie of them, that the decree of registration was stated as having preceded the date of 21st October, when the bill fell due.

Hassett was incarcerated, and he presented a bill of suspension and liberation, pleading, that the letters of caption were not only disconform to their warrant, in purporting to proceed upon a decree of registration, dated 9th October, when no such decree existed; but also bore evidence ex facie that the bill had not fallen due at the date when the registration was said to have taken place.¹ Walker answered that the protest, registration, and letters of horning were regular in themselves, and were all referred to in the letters of caption, as the warrant for the caption; that it was not essential to the validity of a caption to state, in gremio, the date of the registered protest; and therefore, that the mere clerical error of omitting the word “twenty,” before the word “ninth,” in stating the day of the month when the protest was registered was immaterial, and must even be held to have been controlled and corrected by the reference which was made to the letters of horning, where the true date was accurately stated.²

¹ Freebairn, Feb. 26, 1829; M'Donald, Jan. 24, 1832.

² Inch, Nov. 27, 1832 (ante, XI. 93); Crichton, Nov. 25, 1830 (ante, IX. 68); Falconer, Nov. 20, 1830 (ante, IX. 38).

* Decided on 5th July, but omitted by mistake.

The Lord Ordinary (Moncreiff) "passed the bill on caution."*

No. 388.

Under the expedite letters of suspension, the Lord Ordinary, "in respect of the error in the date of the registered protest, as set forth in the letters of caption, and that in consequence of that error the diligence bears, ex facie of the letters of caption, to be null and void: Finds that the said letters of caption did not form a valid warrant for the suspender's imprisonment, and therefore suspends the letters simpliciter, and decerns: Finds the suspender entitled to expenses."

July 5, 1834.
Hassett v.
Walker.

Walker reclaimed, and the Court adhered.

R. ANDERSON.—D. KIRKHAM.—Agents.

* "NOTE.—By passing the bill, the Lord Ordinary does not mean to express any clear or decided opinion that the objection to the diligence is good, or the imprisonment illegal. But it is clear that the bill and letters of caption are disconform to the letters of horning. If the bill for the caption had been a document usually brought under the notice of the judge who grants the fiat or warrant for the caption, it is scarcely to be thought that he would have granted it on that document; for if the bill only were looked at, the whole diligence would have appeared to be illegal; and when the letters of horning were examined, though it might have been seen that the protest was rightly taken, and the horning rightly obtained, it would also have been seen that the bill proceeded on an untrue narrative of these warrants. But if the correct course on the above supposition would have been to refuse the fiat on that bill, leaving the party to apply for another, it is far from clear that the party who takes it suo periculo on such an incorrect instrument, and then gets the letters of caption, with the same flaw engrossed, has got a diligence which he can correctly or effectually execute; and caution being offered, the Lord Ordinary therefore thinks that these are sufficient grounds for passing the bill."

JURY SITTINGS.

SUMMER SESSION. 1834.

No. 389. HENRY MORELAND BALL, Pursuer.—*Solicitor-General Cockburn—Robertson.*

July 15, 1834.
Ball v.
Longlands.

DAVID LONGLANDS and Others, Defenders.—*D. F. Hope—Marshall.*

Reparation—Assault.—Circumstances in which an assault having been committed in contravention of lawburrows, and an action of damages, as well as an action of contravention of lawburrows having been raised and conjoined, the jury found for the pursuer.

July 15, 1834. In May, 1832, Henry Moreland Ball, of Tipperkevin, in the county of Dublin, residing at Kersiebank, took out letters of lawburrows against David Longlands, farmer at Kersiebank, and his son, Thomas Longlands. They found caution to the extent of 400 merks, Alexander Johnston of Beancross being their cautioner. On a Sunday in the month of September following, when Ball was on his way to church, in company with a young lady, and a boy, his son, he came into collision with the Longlands, and some horses and cattle, which they were driving along a rather narrow loan. Without any provocation, they committed a personal assault upon him, with blows of their fists or elbows, shaking him violently at the same time, and using offensive language; and they broke the walking-cane which he carried in his hand. Ball raised an action of contravention of lawburrows, concluding against the Longlands and their cautioner for payment of the penalty in the bond. After a record was made up and issues prepared, Ball raised a supplementary summons of damages, in respect of the inadequacy of the conclusions of the first action to afford due reparation.

Ld. President.

The actions were conjoined, and the following issues went to trial:—

“ It being admitted that, in the month of May, 1832, the pursuer obtained against the defenders, David and Thomas Longlands, letters of lawburrows, under the penalty of 400 merks each, and that the defender, Alexander Johnston, was cautioner for the said defenders in the said lawburrows;—

" 1. Whether, on or about the 16th day of September, 1892, on a No. 389. road leading southward from the gate of the avenue of the Mansion-house of Kersiebank, in the county of Stirling, the defender, Thomas Long-^{July 16, 1834.} lands, did assault, or assault and strike the pursuer, in contravention of ^{Duncan v. Thomson.} the said lawburrows ?

" 2. Whether, at the time and place aforesaid, the defender, Thomas Longlands, did assault, or assault and strike the pursuer, to the loss, injury, and damage of the pursuer ?

" 3. Whether, at the time and place aforesaid, the defender, David Longlands, did assault, or assault and strike the pursuer, in contravention of the said lawburrows ?

" 4. Whether, at the time and place aforesaid, the defender, David Longlands, did assault, or assault and strike the pursuer, to the loss, injury, and damage of the pursuer ?"

The LORD PRESIDENT, in charging the jury, observed, that it was clear that a contravention of the lawburrows had been committed, as the assault was proved; and in regard to the amount of damages which might be due, it was the province of the jury to assess them according to sound discretion, and looking at all the circumstances of the case.

The jury found for the pursuer.

HOPKIRK and IMLACH, W.S.—THOMSONS and ELDER, W.S.—Agents.

DAVID DUNCAN, Pursuer.—*D. F. Hope—A. Macneil.*
REVEREND WILLIAM THOMSON, Defender.—*Sol.-Gen. Cockburn—*
Marshall.

No. 390.

Proof—Witness.—Where an agent, in precognoscing, collected his client's witnesses in one room; took down the statement of each in writing; read it over to him, and got it signed by him; and all this was done in the presence and hearing of the whole witnesses—the Court held such witnesses inadmissible.

ACTION of damages by David Duncan of Balreaire, against the Rev. ^{July 16, 1834.} William Thomson, minister of the parish of Falkland, for defamation. ^{Ld. President,} When the pursuer called James Bogie, his first witness, Bogie deponed, in initialibus, that the agent of the pursuer* had precognosced him in the same room with the other witnesses for the pursuer; that he (Bogie) heard what the others said, and they heard what he said; that, after the statements were taken down, the agent read them over to each declarant

* Not the agent whose name appears at this report.

No. 390. respectively, to ascertain if they were correctly taken down; that he and the others heard the whole of each statement so read, and that they all signed their respective statements.

July 16, 1834.
Stewart v.
Stewart.

The defender moved the Court to reject the witness, on account of the irregularity which the pursuer had thus gratuitously committed, as it had a manifest tendency to tutor even honest witnesses, and as it would give the most dangerous power to less scrupulous witnesses to concoct a common story.

Dean of Faculty, for the pursuer.—I am afraid your Lordship does not feel any hesitation in regard to the weight due to this objection.

LORD PRESIDENT.—I have no hesitation whatever. The witness cannot be received.

The pursuer tendered no other witness, and the jury found for the defender.

R. HALL, W.S.—W. COOK, W.S.—Agents.

No. 391. JAMES STEWART, Pursuer.—*D. F. Hope—Forsyth—Robertson.*
MISS MARGARET STEWART, Defender.—*Skene—Rutherford.*

Process.—Verdict found on one of two issues for the pursuer, the defender not having contested it; and on the other issue for the defender, under reference to an arranged minute.

July 16, 1834. SEQUEL of the case reported ante, XI. 327, which see. In following out the remaining questions between the parties, two issues were sent to a jury. The defender, before the trial began, gave up the second issue; and, after the trial had proceeded a certain length, it was arranged that there should be a finding for the defender on the first issue, under reference to a relative minute lodged by the parties.

Ld. President.

VERDICT accordingly.

C. and D. STEWART, S.S.C.—WOTHERSPOON and MACK, W.S.—Agents.

No. 392. WILLIAM ROSS, Pursuer.—*Robertson—A. McNeill.*
JOHN RONALD, Defender.—*D. F. Hope—Penney.*

Reparation—Slander.—Action of damages for malicious defamation, in which the jury found for the defender.

July 16, 1834. WILLIAM ROSS, member of the Incorporation of Coopers in Glasgow, applied to the master court of the incorporation, for a loan of £45. After delaying the loan for some time, until Ross should produce satisfactory

Ld. President,

security, he got the money. He afterwards raised an action of damages No. 392. against John Ronald, a member of the same incorporation, and one of the master court, alleging, that Ronald had conceived groundless hatred July 16, 1834. against him, and did every thing in his power to prevent his obtaining the Bryson v. Crawford. loan, and falsely and maliciously said, in presence of several members of the incorporation, that if the pursuer got the loan he would go off to America, "and would not repay the same, and that the pursuer had stated, that he did not care a damn for the incorporation, and that he did not intend to repay the loan, if obtained." Ross laid his damages at £500.

Ronald stated, that he had no malice against the pursuer; that he never made the allegations imputed to him; and that he had offered no obstruction to the effecting of the loan, except that of requiring satisfactory security, which it was his duty to do, and in which the master court of the incorporation had concurred with him.

The following issue went to trial:—

"Whether, on or about the 12th day of November, 1832, in or near the house of John Grindlay, vintner, in Virginia Street, Glasgow, and in presence and hearing of Robert Graham, James Hood, and James Paterson, all coopers in Glasgow, or one or other of them, the defender did falsely, maliciously, and calumniously say, that if the incorporation of coopers granted a loan of £45 to the pursuer, he would go to America and would not repay the same—meaning that the pursuer would go to America, and defraud the said incorporation of the said sum; or did falsely, maliciously, and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer?"

The pursuer's evidence broke down, and the jury found for the defender.

C. FISHER, S.S.C.—A. HAMILTON, W.S.—Agents.

MRS TAYLOR or BRYSON and HUSBAND, Pursuers.—*Cunninghame—Deas.* No. 393.
WILLIAM CRAWFORD, Defender.—*A. McNeill.*

Proof—Witness.—1. In a declarator of trust, in which the pursuers admitted that they pursued for behoof of all the creditors of their deceased ancestor, and under an issue as to the authenticity of the signature of the alleged trust,—held, that a creditor, adduced by the pursuers, was inadmissible, though the bill constituting his debt was prescribed. 2. The signature of an officer of a bank, at a bank-account, not allowed to be proved by another of the officers, as the first party was alive, and not adduced. And, 3. Circumstances in which the authenticity of a party's signature was held to be proved.

No. 393. IN 1829, Mrs Taylor or Bryson and her husband, James Bryson, sawyer in Lochee, raised a declarator of trust, with conclusions of count, July 17, 1834.
Ld. President. reckoning, and payment, against William Crawford, residing in Lochee.

Bryson v.
Crawford.

They set forth, that an ex facie absolute disposition of heritage, for £350, had been granted to Crawford in 1817, by the late John Taylor, to whom Mrs Bryson was an heir-portioner, but that it was qualified by a back-bond, or back-missive, declaring that the property was held in trust. The back-missive consisted of three sections, the first stating, that Taylor's money in the Dundee New Bank had been transferred to Crawford's name, but for Taylor's behoof; the second, that a purchase of Taylor's moveables at a roup, though ostensibly made by Crawford, had been effected with Taylor's money, and for his behoof; the third was set forth in the libel, and was of this tenor:—"3dly, I farther agree that I purchased your whole property of both houses and lands of Old Milhouse, Lochee, in the month of January, 1818, at £350 sterling; but as I paid no money of my own for said property, I hereby agree that you and your heirs is to have the right to dispose, to use said property in any manner you or they shall please; and you or your heirs is to have the rights which you have given me of your property a keeping, and to destroy them when you or your heirs sees it proper, as they are declared to be null and void, only if needessity require. I am to get those rights only to shew whatever you or your heirs shall direct me to do, and then return said rights to you or your heirs, at your or their request. This paper to be stamped at any time you or your heirs shall require it, at your or your heirs' expense. "WILLIAM CRAWFORD."

A signature, purporting to be William Crawford's, was adhibited at the close of each of the other two sections of the missive.

Not long after the date of the missive, Taylor raised a process of *cessio*, in which he stated the heritage to have been sold, at the price of £350, and he accounted as for that price. He obtained the benefit of the process, upon executing a disposition, in common form, for behoof of his creditors.

Crawford, in defence against the declarator, denied that the missive was authentic, or that the signatures were genuine; and he also pleaded, that the document was improbative, and could not found an action. The Court, considering that if the signatures of Crawford were genuine, the transaction had been a device to defeat Taylor's creditors in the process of *cessio*, ordered intimation to be made to them. They were not, however, sisted to the process, but the pursuers entered a minute on record, bearing, that they held themselves accountable to the creditors, and as pursuing for their behoof.

The Court repelled the defender's plea, founded on the improbative nature of the missive, and found that, if the signatures of William

ord were genuine, the missive "was a sufficient declaration of No. 399.

; but in respect it is denied, on the part of the defender, that the
criptions are genuine, they remit to the Lord Ordinary, to proceed July 17, 1834.
the investigation of this defence, and do therein as shall be just." Bryson v. Crawford.

Under this remit, the following issue went to trial:—"Whether the name 'Wm. Crawford,' inscribed and subscribed to the letter, No. 2 of Process, are the true and genuine subscription and proper handwriting of the late William Crawford, feuar in Lochee?"*

The pursuers put in evidence, inter alia, the signatures of Crawford, adhibited to a deposition which he had emitted as a haver, and to two bank orders, which had been acted on by the bank, and paid on his account. They adduced

William Christie, joint-cashier of the Dundee Commercial Bank, who was in the Dundee New Bank in 1817. He was asked whether the signature of Boag, another officer of the bank, appended to a bank-account, was genuine?

The defender objected, that Boag was alive, and should have been called to prove his own signature.

Objection sustained.

Christie deponed, that he had frequently seen Crawford write, and knew his handwriting; that he was satisfied the three signatures adhibited to the missive were Crawford's genuine signatures, and he would have acted upon them as such. He also deponed to various other signatures of Crawford, including those above mentioned.

R. Hope Moncreiff, writer in Perth, agent for Sir Patrick Murray, who was a creditor of the late John Taylor, received a written notice from one Jackson, in 1828, not long after Taylor's death, informing him that Taylor had left considerable property. He made inquiries at the time, and, in consequence, had a meeting with Crawford, whom he recollected to have heard admitting that the property was Taylor's, and that he was willing to retrocede it upon being freed from some obligations. Witness also recollected having seen a document under Crawford's hand, admitting the property to be Taylor's. He refrained from prosecuting the matter, partly because Sir Partick was a creditor only to the extent of about £70, and partly as he thought the disposition under the process of cessio might interfere.

Clark deponed in initialibus, that he was the holder of a bill granted by Taylor in 1827, and that it was never paid, but that he had not come under any obligation for the expenses of this action, and that Taylor was not a debtor of his at the time of executing the deposition under the cessio.

* Another issue was taken, whether a part of the missive was holograph, but this was given up by the pursuers.

No. 393. The defender objected, that as Clark was a creditor, and the pursuers had entered on the record of the process that they pursued for behoof of the creditors, he had an interest in the issue of the action. The pursuers were, in truth, no better than trustees for Clark and the other creditors, and had a much less substantial interest in the issue than he and the creditors had. Though the bill was prescribed, the witness might have other evidence of his debt; and, at all events, he had sworn he was a creditor, the bill having never been paid.

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The pursuers answered—

That the bill constituting the debt was prescribed, and nothing remained but the witness's own belief that he was a creditor, which was not enough to disqualify, as there was no evidence of his actually being a creditor. But even if he were a creditor, he was no party to this suit; he was not even liable for the expenses of it; and if he meant to make good any claim on the funds which might be recovered under this process, it could only be done by his raising a separate action, so that he was not disqualified from giving evidence in this cause. Separately, it was only the creditors prior to the cessio to whom the minute on record applied, and any other creditor had no interest farther than the creditor of any pursuer must always have in the success of an action which his debtor had raised to recover money or effects.

LORD PRESIDENT.—I think the witness has an interest, and that is an insuperable objection to admissibility, without regard to the patrimonial amount of the interest. The action is, in substance, prosecuted for behoof of the creditors. Suppose that the trustee of an individual party should raise an action to recover effects for that party's behoof, I think it would be difficult to deny that the party had a substantial interest. But it seems to me that the pursuers are truly trustees for a number of persons, of whom this witness is one, and thus the objection to his admissibility is brought, in point of principle, precisely to the case supposed.

Objection sustained.

Another witness spoke to several facts, intended to evince that Taylor had retained possession of the heritage notwithstanding the disposition; and some written vouchers of transactions, leading to the same conclusion, were also produced.

The defender led no evidence, but contended, *inter alia*, that the evidence of Christie was uncorroborated, and, however respectable, was insufficient to prove the authenticity of the signatures.

LORD PRESIDENT to the jury. The only question put in issue is, whether the signatures are the genuine subscription of William Crawford. On this point the evidence of Mr Christie has been explicitly given; but the defender contends that his testimony is uncorroborated. I think there are circumstances in the case sufficient to corroborate it. I may observe, that a considerable number of signatures were exhibited to Mr Christie, and deponed to as authentic, some of which

were signatures confessedly made by Crawford, and affixed to his deposition as a haver, and others were bank orders of Crawford, which had been acted on and paid. You will have an opportunity of inspecting all these, and comparing them with those at the missive in question, and if they tend to satisfy you that the signatures at the missive re written by the same person who wrote the genuine subscriptions, this is a piece of real evidence, corroborative of the deposition of Christie. But besides this, there is the evidence of Mr Hope Moncreiff, who stated that Crawford had admitted the property not to be his, and who added, that he had seen a writing under Crawford's hand to that effect.

His Lordship noticed that the other circumstances in the case, leading to the conclusion that Crawford was not the real, but merely the ostensible proprietor, were to be weighed, as being real evidence in corroboration of the fact, that he had truly signed a missive declaring that he was only the ostensible, and not the real owner. His Lordship added, that it was the province of the jury to determine whether the matter of fact put in issue was proved; but that he, individually, had no doubt the signatures were proved to be genuine.

The Jury found for the pursuer.

BROWN and MILLER, W.S.—C. F. DAVIDSON, W.S.—Agents.

WILLIAM BRODIE and SPOUSE, Pursuers.—*D. F. Hope—Shaw.*
JOHN BLAIR, Defender.—*Sol.-Gen. Cockburn—M'Neill.*

No. 394.

Reparation—Slander—Process.—A pursuer raised an action of damages in an Inferior Court, alleging that the defender had stated that the pursuer, a married man, had had carnal connexion with a maid-servant, and he libelled that the family peace was thereby broken; and the defender answered, that his family peace had previously been broken, by his having been accused of attempting, prior to his marriage, to have carnal connexion with a girl, and attempting to knock her down—and that on this coming afterwards to his wife's ears, he charged her with being too gracious with their man-servant. Held in an action of damages by the pursuer and his wife, in respect of these judicial statements, for malicious slander, 1. That they were not pertinent to the cause. 2. That it was not necessary to prove that the defender disbelieved their truth or pertinency, if they were, in fact, neither true nor pertinent. 3. That the defender was not entitled to prove that the statements had been previously current rumours in the country; and 4. a verdict of £200 awarded to the wife, but no damages to the husband.

WILLIAM BRODIE, residing in Kerse, raised an action of damages July 17, 1834. against John Blair of Kerse, for defamation, before the Sheriff of Renfrewshire, setting forth, that the defender had falsely and maliciously said that he, Brodie, had had carnal connexion, or attempted to have it, with one of his female servants, in consequence of which Brodie's "feelings had been wounded, his family peace destroyed, and his good name in the public, and his character as a member of a religious community, had been hurt and lessened."

Blair lodged defences, and Brodie averred, in his condescendence, that Blair said he "had seen the pursuer and his servant, Mary Mackie, or one of the pursuer's female servants, have carnal connexion below

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July 17, 1834.
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Ld. President.

No. 394. the bridge over the water of Maich, on the high-road leading from Lochwinnoch to Kilburnie; or, that the pursuer was attempting to have carnal connexion with such servant below said bridge; or, that he, the pursuer, was there hugging or embracing said servant; or, that he had detected or discovered them in curious or suspicious circumstances in said place, and that, when so detected by him, they disappeared; or, did use language of the meaning and tendency that the pursuer and his said servant had illicit intercourse, or were in said place for the purpose of having illicit intercourse together." He also set forth that he was a married man with a family, and that the slander had destroyed his family peace.

July 17, 1834.
Brodie v.
Blair.

Blair made the following statement in his answers:—"The pursuer's family peace was broken, if not destroyed, long before the date of the fama libelled. He was married three or four years ago. Previous to this, he had been accused of attempting to have carnal connexion with his father's servant girl, and attempting to knock her down because she resisted. This came to the ears of his wife afterwards; and he, on the other hand, accused his wife, previous to the dates libelled, with being too gracious with one of his servant-men. Quarrels between them have, in consequence, often occurred, but without any reference to the matter libelled."

Blair made the following statement in his answers:—"The pursuer's family peace was broken, if not destroyed, long before the date of the fama libelled. He was married three or four years ago. Previous to this, he had been accused of attempting to have carnal connexion with his father's servant girl, and attempting to knock her down because she resisted. This came to the ears of his wife afterwards; and he, on the other hand, accused his wife, previous to the dates libelled, with being too gracious with one of his servant-men. Quarrels between them have, in consequence, often occurred, but without any reference to the matter libelled."

Upon this, an action of damages for malicious defamation was raised in the Supreme Court by Brodie, and also by his wife as a co-pursuer. The summons set forth the defender's statements in the inferior Court, and that the defender meant "thereby to insinuate and make it to be believed that the pursuer, William Brodie, had, previous to his marriage, been guilty of, or accused of being guilty of, an assault, with intent to ravish one of the female servants of his father; that this had been communicated to his wife after his marriage, and that she had charged him with being guilty of the said offence; that, on the other hand, the pursuer, William Brodie, had accused his wife of infidelity, or of having taken improper liberties with one of the men-servants in his employment: And farther, meaning to insinuate that the other pursuer, Mrs Mary Boyd or Brodie, had been guilty, or had been accused of being guilty, of infidelity to her husband, or adultery with one of the said men-servants, or had so acted as to lead to a suspicion of her fidelity as a married woman, and that thereby dissensions and quarrels had arisen between her and her husband, and the peace of their family destroyed: That the said statement was, and is, utterly false—was totally irrelevant and impertinent to the question at issue in the said process between the pursuer, William Brodie, and the defender, and was made by him maliciously, and for the purpose to insult the pursuer, William Brodie, and his wife, and to injure their good character and reputation." Brodie concluded for £2000 in name of damages and solatium, and Mrs Brodie concluded for a sum of the same amount.

Blair pleaded in defence—

1. That the statements made in the Sheriff Court were pertinent to

the cause. The pursuer had raised an action of damages on account of the injury to his family peace, &c. The defender was entitled to plead whatever would either extinguish or diminish the claim of damages, and therefore he was entitled to state that the family peace was broken long ago. Whether the cause of breaking it was the infidelity or levity of the husband, or of the wife, or of both together, the statement, that the family peace was broken, remained equally pertinent as a ground of alleviation, at least of damages. But, if pertinent, it could not be held to be maliciously made,¹ and it fell within a litigant's privilege to state it in self-defence.

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Blair.

2. The defender bona fide believed, on reasonable grounds, that the statements were pertinent, and this took away all room for imputing malice. If he believed them to be pertinent to his defence, either in alleviation or exculpation, he could not be held to be malicious in making them.² Unless, therefore, the pursuers could convince a jury that the defender did not even believe the statements to be pertinent, they could not claim damages as for malicious defamation.

The following issue went to trial—

“ Whether, on or about the 12th day of March, 1833, in a paper or pleading, entitled, answers for John Blair to the condescendence of William Brodie, in a cause depending before the Sheriff of Renfrewshire, the defender did insert, or cause to be inserted, the following words, or words to the following effect, according to the meaning herein set forth: viz. ‘ 1. The pursuer's family peace was broken, if not destroyed, long before the date of the fama libelled. He was married three or four years ago. Previous to this, he had been accused of attempting to have carnal connexion with his father's servant girl, and attempting to knock her down because she resisted. This came to the ears of his wife afterwards; and he, on the other hand, accused his wife, previous to the dates libelled, with being too gracious with one of his servant-men. Quarrels between them have, in consequence, often occurred, but without any reference to the matter libelled,’ meaning thereby to insinuate and make it to be believed, that the pursuer, William Brodie, had, previous to his marriage, been guilty of, or accused of being guilty of, an assault, with attempt to ravish one of the female servants of his father: That this had been communicated to his wife after his marriage, and that she had charged him with being guilty of the said offence: That, on the other hand, the pursuer, William Brodie, had accused his wife of infidelity, or of having taken improper liberties with one of the men-servants in his employment: And farther, meaning to insinuate that the other pursuer, Mrs Brodie, had been guilty,

¹ Cullen, March 14, 1832 (ante, X. 501); and Lord Wynford's speech (1 Supp. 101.)

² Gilchrist, Sept. 10, 1823; Borthwick on Libel, 439.

No. 394. or had been accused of being guilty, of infidelity to her husband, or adultery with one of the said men-servants, or had so acted as to lead to a suspicion of her fidelity as a married woman, and that thereby dissensions and quarrels had arisen between her and her husband, and the peace of their family destroyed. And whether the whole, or any part of the said words, are of and concerning the pursuers, or either of them, and are false and calumnious, and were maliciously inserted in the said paper, to the loss, injury, and damage of the pursuers, or either of them?"

July 17, 1834.
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Blair.

At the trial, the proceedings in the inferior Court were put in, *inter alia*, containing the statement in the issue, and several witnesses were called, including the minister of the parish, to speak to the character of the pursuers, and the fact of their domestic harmony. One of the witnesses, who lived in the neighbourhood of the pursuers, was asked by the defender whether he ever heard any report of the pursuer's having attempted to have carnal connexion with one of his servants? or of this coming to the ears of his wife? &c. And, *seriatim*, as to each of the statements judicially made by the defender, the witness was asked whether he had heard it commonly reported.

Dean of Faculty Hope, for the pursuers, objected, that no issue in justification had been taken, and that if the statements made by the defender were neither true, nor pertinent in themselves, the existence of a report would not make them true or pertinent, and would not take away malice. This objection applied to all the parts of the statement in the issue; and some parts of it were liable to other objections.

Solicitor-General, for the defender.—I am entitled to prove whatever will either alleviate or exculpate. The action in the Sheriff Court libelled not merely injury to family peace, but also to Brodie's good name in the public, and to his character as the member of a religious community. If I prove that the whole statement made by the defender was notoriously current in the country long before the defender's statement, I shall confidently submit to the jury that that circumstance alone should greatly mitigate damages, if any damages should be found due. But further, the fact whether this judicial statement is an invention of the defender, or a mere repetition of a common report, goes to the very essence of the question of malicious intention; and unless the pursuers can make out malice they have no case. I may be able to satisfy a jury, that a man who merely repeats a common report, is not actuated by malice, though I might fail to satisfy them of that, if he appears before them as the inventor of the statement. I have a right therefore to prove the rumour.

LORD PRESIDENT. I disallow the questions as to the existence of a report. Even supposing that there was a report, there may be just as much malice in circulating it, as in originating it. And, even if the report were proved to exist, *quo modo* constat, that this party, who certainly did propagate it, was not also the original inventor.

The defender, in addressing the jury, maintained that the pursuer's case had failed in each of three essential points; 1. he had not proved

that the defender disbelieved the truth of the statement; 2. that he had not proved that the defender did not bona fide consider the statement pertinent; and, 3. the whole statement was, de facto, pertinent to the cause.

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July 7, 1834.
Brodie v.
Blair.

LORD PRESIDENT.—This action involves questions of very serious importance, not only to the parties, but to the public and the law. The record of the inferior Court, which has been produced, proves the tenor of the statement which the defender judicially made. In regard to the privilege which a litigant possesses, and to the great latitude which must undoubtedly be allowed to him in stating his case, I adhere to the doctrine which I laid down in charging the jury in the case of Cullen. If there was a different doctrine laid down in the House of Lords in reviewing that case, it must undoubtedly receive the fullest effect in the action in which such doctrine was delivered. But, where there is a well-established principle of the law of Scotland involved, I should incline to hesitate before I made that principle to bend, in all future cases, in consequence of a single dictum or opinion, however high the quarter from which it proceeded, and however great the respect which is due to it. And in reference to the particular case of Cullen, I have the less difficulty in expressing this view, because, on a very recent occasion, I understood my brethren on the Bench to express their concurrence in the doctrine which I had laid down, before the cause was taken to appeal.

It is mainly upon the opinion, said to have been expressed in the House of Lords in Cullen's case, that it has been argued that the pursuers must prove the defender's actual disbelief in the truth or pertinency of the judicial statement, or they must fail in the action. I own it appears to me to be impossible to adduce absolute proof of this, in a case where the confession of the party is out of the question. The actual belief of a man's heart can be known with certainty only to his Maker. It cannot be made the subject of direct or absolute proof, according to any means of evidence which human beings possess. It is only by proving the circumstances under which the statement was made, the place, the time, the purpose, &c., that an inferential proof is adduced, which will approach more or less near to certainty, according to the strength of moral conviction which it produces. I consider, therefore, an absolute proof that the defender privately disbelieved the judicial statement, cannot be adduced in this case. Allowing, then, as laid down to the jury in Cullen's case, that a litigant possesses a privilege, and a large latitude as to the statements which he judicially makes, it is necessary to consider whether the defender's statements in the Sheriff-court, attacking both pursuers, were pertinent to the cause. They should be pertinent, and they should be material, to the questions in issue in the cause, if they are to fall within the privilege allowed to litigants. They should also be innocently made. But when the defender was pursued for defamation, and breaking the pursuer's family peace, he put in a pleading that the family peace was broken long before. (His Lordship read the statement, as contained in the issue.) I do not conceive that this statement was justifiably or pertinently made. Indeed, it would seem to me to be an extraordinary position to maintain, that, because a man had a wife whose jealousy was already awakened, whether causelessly or not, it was lawful to any party to propagate reports against him, so as to aggravate and inflame that jealousy. Although a man may believe his neighbour to have had his family peace already broken, he must not conceive that he is thereby at liberty to disturb his neighbour.

No. 894. with fresh cause of domestic discord ; he might as well contend that, because his neighbour had once got his head broken, he was at liberty to break it over again.
July 18, 1834. I conceive the statement in this cause to have been unjustifiably made ; and I now
Rae v. Hunter. leave the case in your hands.

Barker v.
North British
Insurance Co.

After the jury had retired, a discussion arose between the parties as to the tenor of a portion of his Lordship's charge, against which the defender excepted. At the request of the pursuer, his Lordship called back the jury, and repeated this part of his charge, in those terms, which were to be inserted in the bill of exceptions.

The jury found a verdict for Mrs Brodie, damages £200 ; but for the defender, as to the claim of damages made by William Brodie.

BOWIE and CAMPBELL, W.S.—M'LEAN and GIFFEN, W.S.—Agents.

No. 895.

WILLIAM RAE, Pursuer.—Rutherford—Whigham.
ROBERT HUNTER, Defender.—Shene—Brodie.

Verdict.—Under an issue whether a defender was indebted in a certain balance of the price of sheep to the pursuer, the jury found for the pursuer.

July 18, 1834. **ACTION** by Rae against Hunter for payment of £75, 3s. 2½d., as
Ld. President. the alleged balance of the price due to him for one half of the stock of sheep on a joint farm, which had been given up by Rae to Hunter on leaving the farm.

An issue was taken whether the defender was indebted and resting owing in that sum, or any part of it.

The jury found for the pursuer.

J. PHILLIPS, S.S.C.—R. WELSH, S.S.C.—Agents.

No. 896.

JOHN BARKER, Suspender.—D. F. Hope—Mora.
NORTH BRITISH INSURANCE COMPANY.—Sol.-Gen. Cockburn—
Cuninghame—Marshall.

Proof—Payment.—Verdict finding that a bill which had been taken by the secretary of an insurance company from a party who was indebted to the company in a bond for £2500, and also in the premium on a life policy to that amount, was received in payment of the premium ; though the bill, when tendered, was far from maturity, and was not tendered till after the lapse of the days allowed for paying the premium.

July 23, 1834. **SEQUEL** of the case reported ante, IX. 889, and XII. 500, which see.
Ld. President. The following issue went to trial :—“ It being admitted that the de-

James Lyon, writer in Edinburgh, received in loan from the defenders No. 396. the sum of £2500, and ensured his life in their office for the said sum, and paid the interest on the said sum, and premiums due on the said insurance, up to the 4th day of May, 1827 :

July 24, 1834,
M'Clive v.
Jamieson.

" It being also admitted that, on the day of , the said James Lyon put into the hands of John Brash, secretary to the said company, a bill of exchange for the sum of £140, accepted by D. S. Ronaldson Dickson, and blank indorsed by the said James Lyon :

" Whether the said bill was received by the said John Brash in payment of the premium which fell due on the said 4th day of May, 1827, for the continuance of the said insurance on the life of the said James Lyon, for one year, from and subsequent to the said 4th day of May, or for what other purpose ? "

The jury found for Barker.

CAMPBELL and MACK, W.S.—J. and C. NAIRNE, W.S.—Agents.

JOHN M'CLIVE and OTHERS, Pursuers.—*D. F. Hops—Robertson.* No. 397.
QUINTIN JAMIESON, Defender.—*Sol.-Gen. Cockburn—Cowan.*

Fraud—Facility.—Verdict finding a deed of settlement to have been executed by a facile person, and under the influence of fraud and circumvention.

JOHN M'CLIVE and others, next of kin to the late John Harvie, July 24, 1834. residing in Maybole, raised an action to reduce a last will and settlement, and two subsequent codicils, executed by Harvie in favour of Quintin Jamieson, postmaster, Maybole. They libelled that the deed was imputed from Harvie, by fraud and circumvention, when old age, frailty, and mental imbecility had rendered him incapable of understanding or executing any settlement. Jamieson denied these statements, and alleged that Harvie was fully aware of the purport of the deed in executing it, and that it was his true and genuine deed. Ld. President.

The following issue went to trial :—" Whether, on or about the 13th and 23d days of April, 1830, and 8th January, 1831, the dates of the last will and testament, and codicils thereto annexed, sought to be reduced, of which No. 11 of process is an extract, or on or about any, or all of the said days, the late John Harvie, residing in Maybole, was a person of a weak and facile mind, and easily imposed on ? And Whether the defender, Quintin Jamieson, taking advantage of his said facility and weakness, did, by fraud or circumvention, wrongfully cause, or procure the said John Harvie to execute the said deed to his lesion ? "

The jury found for the pursuers.

H. M'QUEEN, W.S.—W. PATRICK, W.S.—Agents.

WILLIAM LOW (Blincow's Trustee), Pursuer.—*Skene—Robertson—Wilson.*

No. 398.

ALEXANDER ALLAN and COMPANY, Defenders.—*D. F. Hope—Sandford—Whigham.*

July 25, 1834.
Low v. Allan
and Co.

Bankruptcy—Stat. 1696, c. 5.—Verdict finding that neither the indorsation of certain bills by a party to the bankers with whom he transacted his business, nor the payment of a sum to them, though within sixty days of bankruptcy, was reducible as being contrary to the statute 1696, c. 5.

July 25, 1834. SEQUEL of the case reported, Jan. 22, 1831 (ante, IX. 317); June 12, 1829 (ante, VII. 753); and Dec. 3, 1828 (ante, VII. 124); which
Ld. President. see. The following issue went to trial:—"It being admitted that the estate of William Blincow and Company, silkwarehousemen in Edinburgh, was sequestrated on the 30th day of May, 1827, and that the pursuer is trustee on the said estate, and that the defenders were the bankers with whom the said William Blincow and Company transacted their business.

"It being also admitted, that on the 28th day of September, 1825, the said William Blincow as principal, and his brothers, John and Valentine Blincow, as cautioners, granted to the defenders a bond in the English form, for the penal sum of £5000, the condition of the said bond being for the payment of the sum of £2500, by three equal instalments, and that the second instalment of the said bond, amounting to £833, 6s. 8d., became due on the 4th day of April, 1827:

"It being also admitted that, within sixty days of the said sequestration, the said William Blincow and Company indorsed to the defenders the thirty bills of exchange specified in the inventory, No. 12 of process, amounting to the sum of £1662, 6s. 9d., and that the proceeds of the said bills were placed to the credit of the said William Blincow and Company by the defenders:

"1. Whether the indorsation of all or any of the said bills were made to the defenders by the said William Blincow and Company, in satisfaction or security of a prior debt in preference to the other creditors of the said William Blincow and Company, contrary to the statute 1696, c. 5?

"2. Whether, on or about the 7th day of May, 1827, the said William Blincow and Company paid to the defenders the sum of £878, 15s., or any part thereof, in satisfaction or security of a prior debt, in preference to the other creditors of the said William Blincow and Company, contrary to the statute 1696, c. 5?"

It appeared from the evidence that the transactions were not out of the ordinary course of Blincow's business with his bankers.

The jury therefore found for the defenders on both issues.

WILLIAM DRUMMOND (Cashier of Second Fife Banking Company), No. 399.
 Pursuer.—*Skene—Robertson—H. J. Robertson.*
 JOHN RUSSELL and OTHERS, Defenders.—*D, F. Hope—Sol.-Gen.* July 29, 1834.
Cockburn—Shaw. Drummond v.
 Russell.

Sale—Homologation.—Verdict finding that the Second Fife Banking Company did not, by themselves or others duly authorized by them, purchase the shares of certain partners in the First Fife Banking Company.

JOHN RUSSELL of Middlefield, and the late Oliver Russell of Hayston, July 29, 1834 were partners of the original Fife Banking Company, whose contract of copartnery commenced on 2d August, 1802, and ended on 2d August, 1823. The stock was divided into sixty shares, and the holders of fifty-three shares resolved to carry on business, under the same firm, but with some modifications of the original contract, for five years longer. The two Messrs Russell did not become parties to this arrangement, but advertised that the original contract had expired, and that they were not partners of the new concern. The Second Company stopped payment about the 15th of December, 1825, and William Drummond, their cashier, afterwards raised an action against John Russell and the representatives of Oliver Russell, now deceased, alleging that the original Company and the partners were liable to the new Company to the amount of £143,005, in respect of advances made by the new Company in retiring obligations due by the first. The defenders, besides other defences, pleaded, that, in the beginning of December, 1825, the new Company had bought their shares at the price of £60 each, and had got an assignation to them, and were liable to implement every obligation which might have been previously incumbent on the defenders. In support of this plea, they alleged that the offer of purchase was verbally made and agreed to at a previous meeting on 24th November; and that various transactions had occurred, since the sale, all of which showed that the new Company, as well as the defenders, had acted upon the footing that an absolute sale and transference of interests had taken place. The pursuer alleged that the new Company had never purchased the shares; that no authorized assignation ever took place; and that they had never sanctioned such transaction.

With a view to dispose of this part of the case, the following issue was sent to trial:—"It being admitted that, in the year 1802, John Russell, pursuer, and the late Oliver Russell, along with certain individuals, formed a company for the purpose of carrying on the business of banking in Cupar of Fife, and other places, under the firm of the Fife Banking Company, and that the contract of said copartnery expired on the 2d day of August, 1823:

"It being also admitted that another company under the same firm, of

950 CASES DECIDED AT THE JURY SITTINGS.

No. 399.
July 4, 1834.
Boyes v. In-
corporation of
Tailors of
Canongate.

which the pursuer and the said Oliver Russell were not partners, commenced business at the same places after the said 2d day of August, and continued the same to on or about the 14th day of December, 1825 :

“ Whether, on or about the 8th day of December, 1825, the Company last aforesaid, by themselves or others duly authorized by them, purchased from the said John and Oliver Russell, or either of them, their share or shares of the stock of the Company first aforesaid, in terms of the assignation or assignations Nos. 64 and 65 of process ?”

The defenders were held pursuers, under the issue. The jury found for the defender, under the issue.

W. ALEXANDER, W.S.—W. COOK, W.S.—Agents.

NOTE.—The Jury Causes of the Second Division during these sittings will be published amongst with those of next sittings.

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IN

VOLUME XII.

ACCOUNT.

1. Where an arithmetical error had been committed in consigning a sum in 1818—held competent to rectify this, under an action for payment raised in 1831, notwithstanding that there was an intermediate adjustment of accounts, and that no reduction was brought. *Forbes's Trustees*, Jan. 31, 1834, p. 365.
2. A party, at a meeting for settlement of accounts, received a sum in cash, considerably within the balance claimed by him as due, and docqueted the account as "settled per stamp," but without specifying the amount paid in cash, or the mode of settlement; and a few days thereafter, transmitted a stamp receipt, containing an acknowledgment for the cash paid to him, but as a partial payment only, and a notandum, objecting to the counter claims in respect of which the other party had retained the balance, and the accounts for which counter claims had not been rendered him; and the receipt so qualified was accepted, and retained without objection; held that there had been no settlement of accounts to bar the ascertainment of the justice of the counter claims. *Napier*, March 4, 1834, p. 523.
3. Circumstances in which the agent of an Insurance Company, having for nearly fourteen years taken credit in his quarterly accounts for his own commission at the rate of 5 per cent, not allowed at the end of his employment to claim an additional $2\frac{1}{2}$ per cent as short charged. *Phoenix Insurance Company*, June 5, 1834, p. 680.

See *Agent and Client*, 6.—*Arbitration*, 1. 3.—*Proof*, 1 V. 1.

ACQUIESCENCE.

1. A proprietor, whose embankments on a stream were challenged by the owners of mills thereon, having averred that their authors saw the operations carried on without objection, but not alleging that they had remained silent after they found that injury was thereby done to them—held not entitled, on such averment of facts, to an issue of acquiescence. *Johnston*, Feb. 26, 1834, p. 492.
2. Circumstances in which a party was not held to have acquiesced in a judgment of the Sheriff, to the effect of cutting off his right to seek redress at common law. *Grant*, Dec. 5, 1833, p. 167.

See *Account—Bankruptcy*, 16.—*Process*, V. 1.

ACT OF GRACE.

- (1.) A debtor having been incarcerated in the evening between six and eight, and no aliment being averred to have been given to him that night—held, that in estimating the days for which aliment awarded under the act of grace had been lodged, the day of incarceration was not to be taken into account; and the magistrates of the burgh of incarceration having, on the

ACT OF GRACE (Continued.)

certificate of the jailor that the aliment was exhausted, liberated the debtor, while (excluding the day of incarceration) there was aliment in the jailor's hands till the expiry of the day on which he was liberated—held liable for the debt qua magistrates, but not personally, and with relief reserved against the jailor.

(2.) Held, that no direct action lay against the jailor at the instance of the creditor. *Gibb*, Nov. 18, 1833, p. 28.

ADJUDICATION.

1. A party executed a settlement of his estate in favour of a sister and her family; he thereafter executed a trust-deed for payment of his debts, and reconveyance of the residue to himself, or the party called by his settlement; and the brother after his death did not make up titles, but having become bankrupt, and his estates being sequestrated, he granted a disposition of the property of his brother deceased, in favour of his trustee—held, that the trustee was not entitled to an adjudication in implement of the estate on a charge to the bankrupt to enter heir to his brother, under the previously subsisting investiture, but that he could only adjudge the right of reversion in the bankrupt's person, under the trust-deed and the settlement of the deceased brother. *Renton*, Dec. 20, 1833, p. 266.
2. After the death of a bankrupt, the Court, on a petition by the trustee, adjudged from the bankrupt's heirs, an heritable subject in which the bankrupt had been infeft at the date of the sequestration, but which was not then known to the trustee. *Ramsay*, Feb. 1, 1834, p. 385.
3. In a first adjudication, the Lord Ordinary, after hearing objections at the bar, appointed intimation, and the defender having presented a reclaiming note, along with defences, the Court remitted to the Lord Ordinary to repose the defender on paying reasonable expenses, and with power to his Lordship to hear parties as to the legality of recalling the intimation. *Malcolm*, May 20, 1834, p. 609.

See *Title to Pursue*, 10.

ADMINISTRATION OF JUSTICE.

A person who was not licensed to practise before the Court, having acted as agent in a cause, and affixed the name of a practitioner to a paper without his consent, the Court publicly censured him, and intimated that any similar offence would in future be visited with exemplary punishment. *A. B.*, Feb. 27, 1834, p. 504.

ADMIRALTY. See *Process*, XV.

ADULTERY. See *Husband and Wife*, 7, 9.

ADVOCATE.

Question as to the extent of a counsel's power, without a special mandate, to bind his client, the pursuer of a cessio, to execute the disposition *omnium bonorum*, in favour of a particular creditor (the incarcerator) as trustee. *Gordon*, Feb. 6, 1834, p. 401.

See *Bankruptcy*, 5.—*Poor's Roll*.

ADVOCATION. See *Expenses*, 7.—*Process*, XIV.

AGENCY AND PARTIAL COUNSEL. See *Proof*, II. 3, 6.

AGENT AND CLIENT.

1. Circumstances in which an agent, who had obtained from his client (a rustic) a conveyance to his lease, purporting to be an absolute sale for a price paid, with a back-letter declaring it redeemable on payment of the price, was held not entitled to avail himself of it to a further effect than as a security for repayment of the money advanced. *Walker's Executrix*, Nov. 14, 1833, p. 44.
2. A process was conducted ostensibly in the name of a qualified agent, but the actual agent neither possessed a license, nor belonged to any class of procurators or agents qualified to act before the Court; the client gained his cause, and moved for expenses; held, that the losing party was liable only for outlay, and not for fees of agency. *Urquhart*, Dec. 21, 1833, p. 371.
3. The law-agent of a deceased heir of entail, holding him taken, is not entitled

AGENT AND CLIENT (Continued.)

to found on his hypothec against a creditor adjudging the lands and titles, in virtue of an obligation by the entailor, secured by infestment in the entailed lands. Callander, Feb. 11, 1834, p. 417.

4. A party, in whose favour expenses had been awarded, having gone abroad—held, that his agent was entitled to compare and crave that decree should go out in his own name, without there being any mandatory sisted for his client. Henderson, Feb. 20, 1834, p. 468.

5. Circumstances in which, held, that an agent had undertaken to conduct a defence for a married woman, against an action of adherence by her husband, solely on the faith of recovering from the husband, and not on the responsibility of his client. Landale, June 12, 1834, p. 724.

6. Bill of suspension and liberation passed, on juratory caution, of a charge on a decree in absence obtained by an agent on a bill granted by the client, bearing to be for "an account of business rendered," but which was never audited. Neilson, June, 13, 1834, p. 726.

7. Circumstances in which a party was found entitled to plead, that he had given no authority for raising an action in the Sheriff-court to recover the expenses of diligence which had been raised in his name, and with his sanction, but at the desire of another party; and a charge for expenses under a decree absolvitor suspended. Menzies, June 21, 1834, p. 772.

8. A party sent a bill to a law-agent with the view of his attending to his interests in the estate of the acceptor, who had died; and the agent lost the bill. Held that the agent was responsible to his client for the amount of the bill; but an enquiry ordered, as to certain circumstances averred by the agent to have the effect of exonerating him from that responsibility. M'Farlane's Executors, June 26, 1834, p. 824.

A party, who was charged in virtue of a decree in a process of suspension and liberation for expenses, and against whom a claim of damages existed, obtained a discharge in general terms from the party in whose name the charge was given, containing a disclamation of the suspension and charge; and the agent of the latter, after arresting in the hands of the party charged, and obtaining decree against his client, raised a multiplepoinding in name of the party charged—held,

(1.) That the multiplepoinding was competent; and,

(2.) That the discharge was not effectual against the claim of the agent. M'Millan, July 4, 1834, p. 882.

Administration of Justice.—Attorney's Certificate.—Expenses, 10, 11, 17, 24.—Lease, 1.—Reparation, 8.—Process I. 6; Henderson, p. 121.

AGENT AND PRINCIPAL.

—(1.) A commission, by a party abroad, authorizing the commissioner to take all necessary steps for serving him heir to a predecessor, and institute all actions necessary to make his right effectual, held sufficient to warrant the commissioner raising an action of reduction of an adverse service, by another party in a competition of brieves.

(2.) Statements as to the circumstances of a mandatary, not amounting to an averment of bankruptcy, held not relevant to support a demand for a new mandatary, or for caution being found for expenses, in a reduction of a service by a competing party residing abroad. Gifford, Feb. 11, 1834, p. 421.

Held that a banking company were not entitled to plead ignorance of the entries made in their books, or of the actings of their own officers. Drummond (for Fife Bank). May 22, 1834, p. 620.

Commission-agents who did not guarantee their sales, but were not to conclude a sale without approval of their employers, having with such approbation sold goods to A, to be paid by an acceptance of B, for whom the goods were intended—held, on A's failure, that the agents had not rendered themselves personally liable for the price, by delivering the goods without having obtained the bill. Steel and Co., June 26, 1834, p. 810.

Account, 3.—Reparation, 4.

ALIEN. See *Foreign*.

ALIMENT. See *Husband and Wife*, 5.—*Parent and Child*, 1.—*Bankruptcy*, 13.

APPEAL. See *Process*, X.

APPEAL, EXECUTION PENDING.

In granting execution pending appeal of a judgment decerning for the removal of a stake-net fishing, the Court allowed the stakes to remain. *McWhir*, Dec. 21, 1833, p. 272.

APPEAL TO CIRCUIT COURT.

Decree of an Inferior Court, appealed to a Circuit Court of Justiciary, having been recalled *hoc statu*, and a remit made to take further proof, and to decide, with power to award the expenses of the appeal, as well as the other expenses of process—Held that the cautioner in the appeal was not liable to implement the judgment of the Inferior Court, repeating their former decree, and decerning for expenses, including those of the appeal. *Snell*, May 22, 1834, p. 626.

See *Jurisdiction*, 15.

ARBITRATION.

1. An arbiter made up accounts between a landlord and tenant, on the assumption of the rent of a farm being L.70, and decerned for a balance thus brought out against the landlord, subject to deduction should the landlord be able to instruct an averment that the rent was L.100; and the landlord having established this, held that the amount of surplus rent and interest was not to be deducted from the sum of balance, but that the balance payable was the amount brought out by stating the L.100 in place of the L.70 in the arbiter's state, as at the terms when the rent periodically fell due. *Lord Duffus*, Dec. 12, 1833, p. 205.

2. In an action containing conclusions of declarator and accounting, a record was made up without any objection by the defender to the conclusion of accounting, and a judicial reference was entered into of the whole cause; and the referee having given an award, to which the Lord Ordinary interposed his authority, the Court refused to open it up, that the defender might be heard against the competency of the conclusion for accounting. *Roberts*, Dec. 13, 1833, p. 210.

3. In an action raised by a company against a party, who had managed for them an extensive retail trade for a few years, to account for L.500, afterwards restricted to L.120, the parties agreed to a judicial reference to an accountant, stipulating that the "losing party" should be ordered to pay all costs; and the referee found, that out of a series of retail transactions, amounting to upwards of L.45,000, a few trifling errors had occurred, making a balance due by the defender of L.4, 3s. 11½d., but holding the pursuers to be the losing party, he ordered them to pay all expenses. Held, that this was consistent with the terms of the reference, and the justice of the case. *Gye*, Jan. 18, 1834, p. 311.

4.—(1.) The terms of a general submission, construed by reference to the previous correspondence and subsequent pleadings of the parties.

(2.) Circumstances in which the Court held that a decree-arbitral was not *ultra vires*—that it was not pronounced *parte inaudita*—that an objection of its binding one party, and not the other, and not exhausting the submission, was ill founded, and that it was not reducible. *Finlay*, June 25, 1834, p. 792.

5.—(1.) A party in a submission to two accountants, regarding a complicated accounting, having raised a declarator to have the proceedings decerned to be null, and the arbiters incapable of pronouncing decree, in respect of their having required the parties to sign an obligation for their remuneration, at the same time presented a bill of suspension and interdict to have the arbiters prohibited from in the meanwhile taking any further steps in the submission. The Court refused the bill, reserving all competent pleas in the submission, as in a reduction. *Fraser*, July 5, 1834, p. 867.

See *Title to Pursue*, 4.

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ARRESTMENT.

1. A landlord to whom arrears of rent were due for crops 1828 and 1829, obtained a sequestration in security of the current rent for crop 1830; and the tenant, to supersede farther proceedings therein, authorized him to sell the crop, "and apply the proceeds in payment of rents due by me, without obtaining a warrant from the Sheriff:" the landlord, under this authority, sold the crop to an amount exceeding the rent for crop 1830, and a creditor of the tenant arrested in the hands of the purchasers before they had paid or granted bills to the landlord for the price—held, in a question with the arrester, that the landlord was not entitled to apply the proceeds of the sale, except to the rents of crop 1830, and that, *quoad ultra*, as the sale was made by the landlord as mandatary of the tenant, the surplus was arrestable by the creditor. Young, Dec. 19, 1833, p. 233.
 2. A debtor having transmitted a sum to his agent to pay certain creditors, and a discharge having been signed and delivered by them,—Held, that an arrestment thereafter used in the hands of the debtor, was inept to attach a part of the fund remaining unpaid in the agent's hands. Ballandene, Feb. 6, 1834, p. 402.
- See *Inhibition*.—*Diligence*, 2.—*Interest*, 3.—*Jurisdiction*, 7, 14.—*Caitness*, &c. p. 921.

ASSIGNATION. See *Warrandice*.

ATTORNEY'S CERTIFICATE.

- (1.) A law-agent being trustee under a trust-deed, in which he had a personal interest, having, as agent, conducted processes on behalf of the trust-estate—held not entitled to credit for his charges and disbursements as agent, while he had no attorney's certificate.
- (2.) Question whether a party having an attorney's certificate, but not being an admitted practitioner before the Court, having carried on processes under the name of an admitted practitioner, can insist against his client for remuneration and reimbursements. Johnson, June 21, 1834, p. 770.

AUDITOR. See *Expenses*.

BANKRUPTCY.

- 1.—(1.) When the first ten months have elapsed after sequestration, and the commissioners have audited the trustee's accounts, fixed his commission, and ascertained the first dividend—any creditors who have not produced their claims and grounds of debt prior to the minute of the commissioners, are excluded from all share of that dividend.
- (2.) Petition by the postponed creditors to ordain the trustee to rank them on the first dividend, disposed of on answers, without closing a record, or remitting to the Lord Ordinary. Howe, Nov. 26, 1833, p. 128.
2. A creditor acceded to a composition-contract under the condition that, as part of his debt was secured by a cautioner, the consent of the cautioner should be obtained, and the claim against him reserved entire; held that as this stipulation was not implemented, the creditor was not bound by the contract, but might proceed with a poinding which he had used previously to the offer of composition. Neil, &c., Dec. 5, 1833, p. 162.
- 3.—(1.) Circumstances in which a discharge was granted to a bankrupt residing abroad, against whom a sequestration had been awarded as a partner and an individual, separately from the estates of a company, although the latter estates were still under sequestration, and the bankrupt had no individual estate.
- (2.) Held competent (in the absence of opposition) for the trustee to act as mandatary for the bankrupt, who was abroad, in presenting a petition for discharge.
- (3.) Opinion by the Lord Ordinary that, if a petition for discharge under § 61 of the bankrupt statute has been presented with the requisite concurrence, creditors who subsequently rank can only oppose on cause shown. How, Dec. 14, 1833, p. 211.
4. After the Court had pronounced the usual decree discharging a bankrupt

BANKRUPTCY (Continued.)

- (except as to his composition), exonerating the trustee of his intromissions, ordaining his bond of caution to be delivered up, and declaring that all proceedings in the sequestration shall cease—Opinion by the Court, that it was incompetent for the cautioner for the composition to present a summary petition against the trustee and his cautioner, to ordain them to exhibit full accounts of the trustee's intromissions, to remit to the auditor to examine these, and report the amount of funds appearing to be in the trustee's hands, and the sum that should be allowed in name of commission, &c., and in the meantime to find the petitioner entitled to retain the trustee's bond of caution. Baxter, Dec. 20, 1833, p. 253.
- 5.—(1.) An advocate who had purchased shares in a joint-stock trading company immediately before applying for sequestration, held not to be within the description of persons subject to the provisions of the bankrupt act.
- (2.) A concurring creditor, who, in his affidavit, had made oath that the party was within the description, held liable in the expense of a petition for recall of the sequestration. Brown, Dec. 20, 1833, p. 264.
6. A party executed a settlement of his estate in favour of a brother, on condition of paying certain burdens to a sister and her family; he thereafter executed a trust-deed for payment of his debts, and reconveyance of the residue to himself, or the party called by his settlement; and the brother after his death did not make up titles, but having become bankrupt, and his estates being sequestrated, he granted a disposition of the property of his brother deceased, in favour of his trustee—held, that the trustee was not entitled to an adjudication in implement of the estate on a charge to the bankrupt to enter heir to his brother, under the previously subsisting investiture, but that he could only adjudge the right of reversion in the bankrupt's person, under the trust-deed and the settlement of the deceased brother. Renton, Dec. 20, 1833, p. 266.
7. The Court refused to approve of a composition, and grant discharge, where the advertisement of the second meeting of creditors to decide upon it had not been inserted in the Gazette fourteen days prior thereto, although notices had been given to all the creditors, through the Post-office, in due time. Johnstone, Jan. 15, 1834, p. 293.
8. A party, who was truly an operative weaver, held not to fall within the description of persons to whom the bankrupt act applies, though he generally worked webs which were his own property, and occasionally employed at least one weaver to work on his account. Rodger, Jan. 23, 1834, p. 317.
- 9.—(1.) A claimant, who was so situated as to be unable to make any other oath than that a sum was due to him, according to the best of his knowledge and belief, upon the premises founded on in a depending action against the bankrupt, but without prejudice to augment or restrict the sum afterwards—held entitled to vote for a trustee.
- (2.) Where a party made affidavit to a precise sum as being due, and was so situated as not to require, *hoc statu*, to produce a voucher, held, that his founding on a deed, in support of his claim, did not vitiate his vote, although the deed did not support the claim made, but was at variance with it.
- (3.) A party, in emitting an affidavit, having deponed that he could not write, and the oath being signed by the magistrate—held that there was no need of a signature by notaries for the party.
- (4.) A married woman whose husband was abroad under sentence of transportation, having been found entitled to pursue an action of count and reckoning, with concurrence of a curator ad litem; and the defender's estates being sequestrated—held entitled to claim and vote in the election of a trustee, without her husband's concurrence.
- (5.) A party having contracted debt in Jamaica, and having returned to Scotland—held that his creditor was not bound to deduct the difference of exchange, in claiming and voting in the sequestration of his estate. Paul, Feb. 13, 1834, p. 431, 432.
10. A trustee on a sequestrated estate, during a discussion as to the validity of

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BANKRUPTCY (Continued.)

- an heritable security over a feu in which the bankrupt had been infeft, entered into possession, drew the rents, and paid the feu-duties, but did not take infeftment, and on the security being found effectual, abandoned it—Held that he was entitled so to do, and that he was not liable to the superior for the feu-duty, and other prestations in the feu-contract, in time to come. *Mitchell's Trustees*, Jan. 23, 1834, p. 322.
11. One of two competing candidates for a trusteeship on a sequestrated estate retired in favour of the other, on an agreement that he was to have half the commission, and he afterwards drew part of the commission; and the trustee elected having resigned without accounting for the funds of the estate, an action against the former, founding on the agreement as constituting a partnership, and concluding for count and reckoning, or at least for repetition of the sums actually received from the trustee, dismissed. *M'Taggart's Representatives*, Jan. 25, 1834, p. 336.
 12. Circumstances in the conduct of commissioners on a sequestrated estate with reference to their course of dealing with the trustee, which held sufficient to liberate the cautioner of the trustee from liability for a deficiency of funds. *M'Taggart's Representatives*, Jan. 24, 1834, p. 332.
 13. Opinion by the Court, that, where a party engaged in trade, and apparently solvent, makes advances bona fide for the maintenance of a minor brother, ex pietate, his creditors are not entitled to claim repayment of these by afterwards proving that the party was insolvent at their date. *Drummond*, Jan. 28, 1834, p. 342.
 14. A creditor having, posterior to a sequestration of the estates of a farmer and grain-dealer, poinded part of the effects on the farm, a bill of suspension, without caution, passed (in the circumstances) at the instance of the trustee and bankrupt, though the lease contained a clause excluding assignees or subtenants, and the bankrupt had continued in the occupancy of the farm. *Thom*, May 20, 1834, p. 612.
 5. Circumstances in which the Court fixed the commission of a trustee on a bankrupt estate at the sum of L.40, 1s. 2d., being at the rate of 5 per cent on the amount of his intromissions. *Thomson*, May 31, 1834, p. 660.
 6. An account for work performed by a tradesman was lodged on a sequestrated estate, with a claim and oath of verity, and no objection stated to it; and the claimant was counted as a creditor to the amount thereof in various proceedings, and particularly in an application by the bankrupt for discharge, but he never was discharged—held, in an action raised against him about twenty years after the account was first lodged, that he was not entitled to object to a particular item of it as not sufficiently specific, and to throw the burden of establishing it upon the creditor. *Duncan*, June 3, 1834, p. 678.
 7. After an application for approval of composition has been given in, it is still competent for additional creditors to claim and assent to the composition, so as to be taken into account by the Court in determining whether the requisite concurrence has been obtained. *Arnott*, June 7, 1834, p. 696.
 8. In a complaint by a trustee on a sequestrated estate against the resolutions of the commissioners and creditors fixing his allowance for commission, the Court, before answer, remitted to an accountant to report as to what would be a suitable allowance. *Bruce*, June 24, 1834, p. 788.
 9. The principal obligant in a bank cash-account, having informed one of his two cautioners that he desired to sell heritable property, and pay up his cash-account, that cautioner found a purchaser, and got an order from the principal on the purchaser for the price, which by desire of the principal he received, and paid into the cash-account; and the principal became bankrupt within sixty days thereafter; held, that though none of the cautioners then knew the principal to be embarrassed, and one of them knew nothing of the sale; and though the disposition was good to the purchaser, and the payment of cash into the bank was irreducible as to the bank, yet the sale having been made through the instrumentality of one cautioner, with the design and effect of

BANKRUPTCY (Continued.)

relieving both, the transaction was liable to reduction, under 1696, c. 5, and 54 Geo. III. c. 137, in so far as the cautioners obtained benefit thereby. Mitchell, June 26, 1834, p. 802.

20. A renunciation of the lease of a coal-pit was executed by the trustee and three of the commissioners on a bankrupt estate, with concurrence of, and in favour of the landlord, who was also a commissioner, and who let the coal-pit to a third party; and the trustee was afterwards discharged, and the sequestration closed—held that, after a lapse of above fourteen years, a creditor was not entitled to reduce the trustee's discharge and the renunciation of the lease, either upon vague allegations of irregularity, or upon the plea that the renunciation of the lease was in favour of one of the commissioners. Robertson, July 3, 1834, p. 875.

21. A woman raised action of declarator of marriage and of aliment, on which she executed inhibition, and obtained decree; pending the proceedings, her husband discharged a claim against his brother, for the value of certain shares of a property under a deed of settlement, which were declared to be real burdens; and he also executed a trust-conveyance to a third party for behoof of creditors, and his brother granted a similar deed to the same party, without declaring the value of the shares to be real burdens; and the wife having been in the meanwhile alimented by her father, for whose behoof she assigned her claim under the decree for aliment to her brother; held, in an action of reduction, by the brother, of the discharge (which of consent was waived as a bar to any just claim) and of the trust deeds, and a counter action of reduction of the decree for aliment as exorbitant,

(1.) That the brother as assignee of the wife was entitled to have the discharge set aside ex capite inhibitionis, and the trust-deeds reduced, in so far as the value of the shares were not declared real burdens, and to insist against the trustee as an intromitter, as if the shares had been duly constituted real burdens; but,

(2.) In respect it was alleged the value of the shares had been paid, that the trustee was entitled to have that fact investigated before any decree could be pronounced against him. Wylie, July 8, 1834, p. 903.

22. The Court, on remitting to the Lord Ordinary for investigation, a petition by a trustee on a sequestrated estate for exoneration and discharge, refused to grant power to his Lordship to discharge during vacation. Barbour, July 11, 1834, p. 923.

23. Circumstances in which the Court refused, in hoc statu, to approve of an offer of composition by a sequestrated bankrupt. Arnot, July 11, 1834, p. 931.

24. A petition for recal of sequestration being presented, on the ground that the concurring creditor was not a true creditor to the extent required by law, the Court, of consent, remitted to John Parker, assistant-clerk, to report as to this, and, on considering his report, their Lordships refused the petition with expenses. Hunter and Co., July 10, 1834, p. 917.

See *Cautioner*, 1, 2, 8.—*Competition*, 1.—*Process*, II. 2.—*Hunter and Co.* p. 917.

BASTARD. See *Judicial Factor*, 7.—*Parent and Child*.

BILL CHAMBER. See *Process*.

BILL OF EXCEPTIONS. See *Expenses*, 5.

BILL OF EXCHANGE.

1. An allegation by one of two brothers, ex facie co-acceptors of a bill, that his signature had been forged by his brother, held barred, as he had received a charge for payment, and acquiesced in it for a long time, during which his brother, the true debtor, left the country. Maiklem, Nov. 16, 1833, p. 53.

2.—(1.) The Court, satisfied by ocular inspection that a name had been erased from below that of the apparent acceptor of a bill, refused action thereon.

(2.) Circumstances considered to afford sufficient proof that a party was

LL OF EXCHANGE (Continued.)

not an onerous bona fide holder, without the necessity of resorting to his writ or oath. *M'Ewan*, Nov. 21, 1833, p. 110.

3. A bill of exchange having been transmitted, indorsed to a bank for discount, and the bank having declined to discount, but not having returned the bill—held, that they could not retain it in security of any claims for which they could not specially instruct that it was agreed to be allowed to be so retained. *Borthwick*, Nov. 22, 1833, p. 121.
4. Circumstances as appearing from the oath on reference of the drawer of a bill of exchange, which held to establish that the bill was without value. *Thomson*, Dec. 10, 1833, p. 190.
5. The drawer of a bill, which had been indorsed to a bank, having agreed to give to the acceptor indulgence for a month from the time it fell due, and authorized him to show a letter to that effect to the bank; and the bank having in consequence allowed the bill to lie over without intimation of dishonour, either when it fell due or at the expiry of the month for which indulgence was given—Question, whether the bank had thereby lost recourse against the drawer? *Campbell*, Dec. 20, 1833, p. 269.
6. Circumstances in which held, that a party, who, after diligence was raised on a bill against the acceptor, paid it, and took an assignation, and raised diligence thereon against one of the indorsers, was the trustee and agent of the acceptor. *Farquhar*, Jan. 23, 1834, p. 327.
7. Held by the Lord Ordinary, and acquiesced in, that letters after the lapse of six years from the time of payment of a bill of exchange, admitting the constitution of the debt, but alleging that it had been compensated, barred the sexennial limitation, and that the alleged counter claims must be established by the debtor. *Macdonald*, March 7, 1834, p. 533.
8. In an action founded on a bill written on a stamp below the proper value, and signed by the defender—held, that although on a reference to oath, he admitted that he had signed the bill to enable another party to get the contents from the pursuer, the latter was not entitled to decree. *Walker's Executors*, May 14, 1834, p. 586.
9. The onerous indorsee of a bill which was manifestly vitiated in the sum, not entitled to enforce payment of it against an acceptor, where the alteration was not proved to have been made with the acceptor's knowledge or consent, before issuing the document. *MacLean*, May 20, 1834, p. 613.

See *Cautioner*, 1, 3.—*Title to Pursue*, 3, 6.

ONA FIDES. See *Entail*, 1.—*Prescription*, 1.

OUNDING CHARTER. See *Property*, 1.

URGH.

Stat. 3 and 4 Wil. IV. c. 76.—Held, that where there was not a sufficient number of qualified persons in a burgh to constitute a new magistracy and council under the Burgh Reform Act, the former magistracy and council continued in office, in terms of § 18; and, therefore, that an application for the appointment of managers was unnecessary. *Spence*, Dec. 21, 1833, p. 275.

See *Act of Grace*.—*Consuetude*.

AUTIONER.

1. A cautioner for payment of a composition by instalments, at different dates, indorsed the instalment bills, and obtained from the bankrupt an assignation to a certain amount of effects to meet them, and charged the bankrupt on one of these bills which he had retired—held a sufficient ground of suspension that he would, at the date of the charge, have had sufficient funds wherewith to have retired this bill out of the proceeds of the effects impressed into his hands, had he not retired certain other of the instalment bills before they fell due. *Owen and Morrison*, Nov. 26, 1833, p. 130.
2. Circumstances in the conduct of commissioners on a sequestrated estate with reference to their course of dealing with the trustee, which held sufficient to liberate the cautioner of the trustee from liability for a deficiency of funds. *M'Taggart's Representatives*, Jan. 24, 1834, p. 332.

CAUTIONER (Continued.)

- 8.—(1.) A guarantees that a bill drawn by A upon B, would be honoured by the latter, held not to cover a bill drawn by C upon B in favour of A.
(2.) Observed that decree ought not to pass against a cautioner when the question was still in dependence, whether any obligation attached to the principal. *Ross*, Feb. 11, 1834, p. 427.
 4. Parties having become cautioners for a composition, under an arrangement whereby the debtor's estate was conveyed to trustees for payment thereof, and relief of the cautioners; and during the currency of the contract, a new arrangement, containing essential alterations, being entered into by the debtor, the trustees, and creditors, without consulting the cautioners—held that they were discharged. *Scott*, Feb. 14, 1834, p. 447.
 5. A was bound to B in a collateral obligation for payment of interest on an heritable bond, in which C was the debtor; A was also a creditor of C, and he and B both acceded to a trust-deed by C, whereby they and the other creditors acceding bound themselves not to do diligence against him—held, that A was not entitled to plead B's accession, as done without his consent, and so relieving him from his collateral obligation to B. *Wright's Trustees*, June 7, 1834, p. 692.
 6. A party having obtained the consent of a creditor temporarily to liberate an incarcerated debtor, on his giving an obligation to return him to prison under the diligence, or pay the debt—held, in an action for payment on the allegation that the debtor was not returned, that it was not sufficient to aver that the debtor had been presented to the jailor, who did not receive him as a prisoner, no intimation to the creditor being alleged to have been made. *McFarlane*, June 10, 1834, p. 699.
 7. Circumstances of negligence on the part of a Friendly Society in regard to the control exercised by them over their treasurer, which held sufficient to liberate his cautioners. *Thistle Friendly Society of Aberdeen*, June 17, 1834, p. 745.
 8. Circumstances in which it was held, that where a sequestrated bankrupt, being discharged under a composition-contract, offered payment of the composition to a creditor, who refused it, because he believed he had a claim for payment of part of the debt in full; and no notice of refusal was given to the cautioners for the composition; and the bankrupt after some years was again sequestrated,—the creditor had lost his claim for the composition against the cautioners under the first sequestration. *Cooper*, June 27, 1834, p. 834.
 9. Letters which held to import a cautionary obligation for a current cash credit, and not merely for a single set of transactions to the extent of the sum mentioned in the guarantee. *Houston's Executrix*, July 3, 1834, p. 879.
 10. The cautioner for a judicial factor in a sequestration of lands, pending a ranking and sale, held to be liberated by the gross negligence of the creditors in their conduct towards the factor. *Pringle*, July 10, 1834, p. 918.
- See *Appeal to Circuit Court—Interest*, 3.—*Lease*, 1.—*Process*, XV. 1.

CESSIO.

1. Circumstances in which the benefit of cessio refused to a party who had been seven months in jail. *Lawson*, Nov. 21, 1833, p. 109.
2. Observed, that where a foreigner and his mandatary recover a decree against a party in this country, and the party afterwards raises a process of cessio, it is not enough to call the foreigner edictally, but his mandatary should also be called. *Fadheuille*, Feb. 1, 1834, p. 382.
3. In consequence of an agreement at the bar, that a creditor should withdraw opposition, and be named trustee in the disposition omnium bonorum, the Court signed an interlocutor, finding the pursuer entitled to the benefit of the cessio; he having refused to implement the agreement, but offered to consent to the interlocutor being cancelled, and the case pleaded of new, the Court expressed a doubt as to the competency of recalling the interlocutor, and superseded the case. *Gordon*, Feb. 6, 1834, p. 401.
4. Circumstances in which the benefit of cessio refused in hoc
March 1, 1834, p. 517.

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CESSIO (Continued.)

5. An officer, having a wife and four children, with half-pay of £82, and whose debts were £180, found entitled to the cessio, on assigning £18 yearly. A. B., March 4, 1834, p. 522.
6. The father of a natural child had contributed nothing towards its support, though it was about two years old; being incarcerated by the mother, he declared that he was neither able nor willing to support the child; after incarceration for nine months, he was found entitled to the benefit of the cessio only on condition of his father finding caution that he should not leave Scotland for the next eight years, and should pay one-fourth of his wages, during that period, to the mother of the child. Russell, March 11, 1834, p. 543.
7. Benefit of cessio refused, notwithstanding three years' imprisonment till the bankrupt should procure a reconveyance of property conveyed by him to his own daughter, in defraud of his creditors. Bannerman, July 9, 1834, p. 907.
8. Where a party was found entitled to the benefit of the cessio, but parties could not agree as to the individual who should be named trustee, the Court remitted to the Sheriff of the county where the pursuer lived, to name a trustee. Fraser, July 3, 1834, p. 871.

See *Fraser*, p. 871.

CHURCH.

1. A bill of suspension of a decree by a presbytery for additions to the offices of a manse, having been refused by the Lord Ordinary, the Court altered and passed it. M'Kenzie, Nov. 30, 1833, p. 151.
- 2.—(1.) Condition of a church in regard to decay, which held not to warrant decree for a new church.
(2.) A remit having been made in a suspension of the presbytery's decree to an architect to report—held to supersede entirely reports of tradesmen on which the presbytery had proceeded; and,
(3.) The Court refused in Inner House to allow additional queries to be put to the architect as to measurements, after the cause had come to the Inner House. Murray, Dec. 11, 1833, p. 191.

See *Jurisdiction*, 5, 9.

CITATION.

1. An execution of citation, under a summons, bearing that the messenger, not having personally found the defender, had left a copy for him in the hands of a woman within his dwelling-house, sustained (on a verbal report by the Lord Ordinary, to the Inner-House), although it did not specify her to be either the wife, daughter, or servant of the defender. A. B., Jan. 28, 1834, p. 347.
2. A party, with no fixed domicile, but exercising a profession, in following which he is in use to travel constantly throughout the country, passing from one jurisdiction to another, liable to be convened in that jurisdiction where he is personally cited. M'Niven, Feb. 14, 1834, p. 453.
3. Where the principal execution of citation is *ex facie* regular, and not brought under reduction, an alleged defect in the service copy cannot be founded on in impeachment of the citation. MacQueen, May 20, 1834, p. 610.
4. An execution of citation was written on a sheet of paper, containing no part of the summons, but stitched up under the same cover with it, and the pursuer was not designed—held, that the execution could not be sustained. Collier, June, 3, 1834, p. 674.

See *Jurisdiction*, 18.—*Lease*, 7.—*Marriage*, 2.

CLAUSE.

Question as to the construction of a clause, bequeathing to a lady who resided with the testator, "the whole of the furniture in her own room, and any other she may choose." Reed, Feb. 11, 1834, p. 426.

See *Commonty*.—*Entail*, 3, 8.

CLERGYMAN. See *Slander Privileged*.

COLLATION.

The heir-male and of line of a party deceased, being one of his nearest of kin, and

COLLATION (Continued.)

succeeding in the character of heir-male to certain entailed estates, in which the deceased had been infeft under entails executed by a predecessor in favour of heirs-male, held not entitled to claim a share of the executry, without collating his life interest in the entailed estates. *Anstruther*, Nov. 28, 1833, p. 140.

COMMONTY.

(1.) A process of division of commonty having been raised, and a defender having established that it was his sole property—action dismissed.

(2.) Question as to the effect of a dispositive clause, with all and sundry mosses, &c., and parts and pertinents, in conferring a right of property in part of a common. *Bain*, March 4, 1834, p. 522.

COMPENSATION.

Two copartners having separated—held that one of them was entitled to set off to the extent of one-half, a debt due to the company, against a debt due by him individually to the company's debtor, although the other partner had, after the dissolution, in settling his own accounts with the party, taken credit for the whole. *Oswald's Trustees*, Dec. 3, 1833, p. 156.

COMPETENT AND OMITTED. See *Poor's Roll*, 3.

COMPETITION.

1. After an heritable creditor had executed a poinding of the ground, the debtor's estates were sequestrated under the bankrupt act, and the poinded effects were sold by the trustee, under an arrangement of parties; thereafter the creditor obtained full payment of his bond, partly under a ranking and sale of the heritable estate, and partly from the proceeds of the poinded effects paid to him by the trustee—held, in the circumstances, that the creditor was not bound to account to the postponed heritable creditors, for the whole proceeds of the sale of the poinded goods, but was bound to assign to them his claim of accounting against the trustee. *Goldie*, Feb. 27, 1834, p. 498.

2. Where a child was in possession of the status of legitimacy, at the death of the parent—held, that a party, with a competing brief, who claimed the estate of the deceased, on the allegation of the child being a bastard, was not entitled to obtain a sequestration of the estate. *Burden*, July 3, 1834, p. 871.

See *Poinding.—Sequestration of Land Estate*.

COMPOSITION CONTRACT. See *Bankruptcy*.

CONSOLIDATION. See *Entail*, 2.

CONSUETUDE.

An ancient Royal grant to a burgh effectual, as explained by use, to entitle the Magistrates to levy customs beyond the territory of the burgh. *Magistrates and Town-Council of Wigton*, Jan. 15, 1834, p. 289.

CONTEMPT OF COURT. See *Jurisdiction*, 13.

CONTRACT.

Circumstances in which the Court assoilzied from a claim founded on a contract, which was dated nearly thirty years before the action was raised—the claim not having been prosecuted tempestive, and a change of circumstances having occurred in the interim. *Black*, May 29, 1834, p. 643.

CONVENTIONAL IRRITANCY. See *Lease*, 13.

CORPORATION. See *Incorporation.—Title to Pursue*, 3.

CURATOR BONIS.

1. Where an application by a relative, for the appointment of a curator bonis to a party alleged to be imbecile by reason of old age, and incapable of managing his affairs, was opposed, the Court remitted to the Sheriff to enquire and report on his state, and suggest a proper person for the office. *Dewar*, Jan. 21, 1834, p. 315.

2. Authority refused to the commissioner of a curator bonis of a lunatic to invest a portion of the lunatic's funds in the purchase of an annuity, although this was said to be necessary for his maintenance, and the curator ~~had been~~ abroad without communicating with the commissioner, and his ~~known~~ unknown;—*Observed, that one of the nearest relations of the*

CURATOR BONIS (Continued.)

apply to have the existing appointment recalled, and a new curator named.
Bell, March 7, 1834, p. 531.

DEATHBED. See *Proof*, IV. 4.

DECREE IN FORO. See *Diligence*, 1.

DELIVERY. See *Lease*, 4.

DERELICTION. See *Teinds*, 4.

DILIGENCE.

1.—(1.) A clerical error, by writing "for" instead of "per," in extracting a decree, not sufficient to invalidate it and the diligence raised thereon.

(2.) Bill of suspension on the merits of an inferior court decree in foro not to be passed without caution. Adamson, Nov. 23, 1833, p. 124.

2. Questions, (1.) Whether it be competent for the Supreme Court to loose arrestments, which have been laid on by an inferior Court.

(2.) Whether letters of loosing arrestment be a competent mode of proceeding where the arrestment is one in execution, and the objection is, that the subject arrested does not belong to the debtor.

(3.) Whether imposts or town customs let or assigned in consideration of the payment of an annual sum, be arrestable by a creditor of the tacksman or assignee; and,

(4.) Whether his cautioner can object to the arrestment. Drummond, Feb. 14, 1834, p. 454.

3. Circumstances in which the Court refused a petition to recal inhibition without caution or consignment. Glenlyon, June 24, 1834, p. 787.

4. Circumstances in which a bill of suspension and liberation was passed on juratory caution; the suspender having been incarcerated for the expenses of a burgh-court process, which was in cursu of review under a process of reduction. Aitken, July 11, 1834, p. 922.

5. Where letters of caption bore, ex facie, that the bill of exchange had been protested and registered before the period when it fell due—letters suspended, with expenses, although it was alleged that there was a mere clerical error in the date of the registration, and that this was corrected by the reference made to the letters of horning, where the true date was correctly recited. Hassett, July 5, 1834, p. 932.

See *Husband and Wife*, 3.—*Partnership*, 3.—*Lease*, 1.—*Minor*, 3.—*Title to Pursue*, 3.—*Process*, XX. 5.

DISCHARGE.

Circumstances in which the Court held that a debt claimed by one insolvent estate against another, fell under a previous compromise of claims between these estates. Balfour, Feb. 26, 1834, p. 490.

See *Right in Security*, 4.

DIVORCE. See *Husband and Wife*, 7, 9.

DOMICILE.

Opinion by the Lord Ordinary, that an Englishman, an officer in the army, who was appointed Governor of Fort-Augustus in 1746, and held that office and resided there till his death in 1796, and who married in Scotland a domiciled Scottish lady, and acted as a Justice of the Peace, had acquired a Scottish domicile. Clarke, Dec. 20, 1833, p. 255.

See *Jurisdiction*, 18.—*Lease*, 7 (2.)

DONATION.

Circumstances in which advances made by a brother, apparently in good circumstances, for the maintenance of a minor brother during his apprenticeship, were held to be made as a donation, though they had been entered in his ledger. Drummond, Jan. 28, 1834, p. 342.

See *Husband and Wife*, 2.

ENTAIL.

1.—(1.) Bona fide purchasers of lands formerly part of an entailed estate, and

ENTAIL (Continued.)

excambed under the 10 Geo. III., not affectable by any objections to the transaction not appearing ex facie of the proceedings.

(2.) Ex facie objections which held insufficient to invalidate the excambion.

(3.) Excambion valid, though of the surface merely, the minerals being reserved hinc inde.

(4.) (Note.) Questions raised, (1st,) whether the objection that in the lands given by the heir of entail the minerals were included, while, as to those acquired, the minerals had previously belonged to the entailed estate, was fatal to the transaction, the difference in value on this account not having been taken into consideration; and (2d) whether, in a question between a subsequent heir and the party excambing, the payment of a sum of money to induce the heir in possession to excamb, is probatio probata, that fair value was not obtained to the entailed estate? Hamilton, Nov. 13, 1833, p. 23.

2. A crown-vassal was infeft in the barony of Ballencrieff, except the dominium utile of a minor portion called Stantalane, to which he held right under a disposition in favour of himself "and his heirs succeeding to him in the lands and barony of Ballencrieff;" he executed an entail by procuratory of resignation, containing the whole barony, and expressly the lands of Stantalane; the heirs of entail were bound "to take and possess the lands above written upon this taillie only, and upon no other right or title whatsoever; and to use any other rights they may happen to have or acquire thereto, as additional and collateral securities and titles for strengthening and supporting this deed of taillie only, and for no other purpose whatsoever:" the first heir took up the procuratory, by general service, as heir of taillie and provision under the deed of entail, and he expedie a charter of resignation, and was infeft: succeeding heirs expedie services under the same deed, and were infeft: during upwards of forty years they exercised all acts of proprietorship, and in the course of that period the creditors of one of the heirs adjudged his liferent interest under the entail, therein including the dominium utile of Stantalane, and a sale was made for redemption of the land-tax, computing the same property as within the entail: afterwards a party was served heir under the same entail, and sold the dominium utile of Stantalane, conceiving himself not bound by the entail as to it, and a reduction was raised by the next heir—Held,

(1.) That the personal right of the entailer under the disposition, was not taken up by the service of any heir of entail:

(2.) That prescription had run upon the entail, not only in questions with third parties, but also inter heredes:

(3.) That consolidation of the dominium utile, with the superiority of Stantalane, must be held to have taken place by forty years' possession, under a charter and sasine which contained the lands of Stantalane, while the base fee lay unclaimed in the superior's hands, and consequently that the dominium utile was now within the entail: and,

(4.) That the lands stood sufficiently recorded in the register of entails, by virtue of the procuratory of resignation as recorded in that register by the entailer. Lord Elibank, Nov. 21, 1833, p. 74.

3. Terms of an irritant clause in a deed of entail held sufficient, in fair construction, to reach sales of the estate. Lord Elibank, Nov. 21, 1833, p. 74.
4. An heir of entail who had been above three years in possession, disposed the entailed estate to a trustee for creditors, who took infeftment: he also entered into a minute of sale of the estate: in a reduction of these deeds after his death, it was disputed whether part of the estate was free from the entail, and had been possessed merely on apparence—question, on such assumption, whether the next heir would have been barred from reducing quoad hoc, by 1695, c. 24. Lord Elibank, Nov. 21, 1833, p. 74.
5. A party executed an entail in favour of himself in liferent, and his heirs and a certain series of heirs in fee, with prohibitions directed *heirs-male and female of my body*, and the other heirs of tail

NTAIL (Continued.)

declaration that his heirs general and of tailzie should be obliged, out of his other funds and estate, to relieve the entailed estate of any bond of provision he might grant in favour of his younger children; he bequeathed a sum to his eldest son, in trust for a daughter, but not by a bond, declaring it a burden on the entailed estate; and thereafter died, leaving considerable funds besides the entailed estate, to all which the eldest son succeeded; and the latter having died without having paid this provision, and being succeeded in the entailed estate by a brother—held that this party, as heir of entail, was not liable therefor; and observed, that the prohibitory clause extended the fetters to the institute. *Baugh, Jan. 14, 1834, p. 279.*

6. A party entailed his estate A on a certain series of heirs, declaring that if any of them should come at any time to succeed to another estate, B, they should lose all right of succession to the lands A, which should fall to the next heir, as if the person so succeeding were dead; and an heir having first succeeded to B, and the succession to A having thereafter opened to him—held, that the prohibition was effectual to prevent his holding both estates, but that he was entitled to his election, which he should take. *Stirling, Jan. 16, 1834, p. 296.*
7. Decree having been obtained by an heir of entail in possession against the next substitute, in an action of declarator to which the substitute was duly cited, but in which he made no appearance, constituting a certain amount of debt for improvements, as made under the 10th Geo. III. c. 51, and no appeal having been taken within the time allowed by the statute—held, on the substitute succeeding, and being sued for payment by the representatives of the former heir, that he was not entitled to plead alleged defects in the notices and procedure in making the improvements for the value of which the decree had been given. *Lindsay, May 30, 1834, p. 657.*
- 8—(1.) Terms of a clause in an entail, allowing an heir to grant a bond of provision to younger children, under which it was held competent for him to grant a bond, burdening the heirs, in case only of failure of his own issue male; and which bond became exigible, on the death of the granter's son, above twenty years after the granter's decease.
(2.) Where a bond is granted under permissive powers in an entail, it is like an entailor's debt, and the entailed estate is liable to be attached both for principal and interest, so that any heir of entail, taking up the estate, incurs a liability to that extent—the estate being of greater value. *Howden, June 17, 1834, p. 734.*

See *Agent and Client*, 3,—*Collation*.

XCAMBION. See *Entail*, 1.

RECUTOR. See *Title to Pursue* 6, (2.)

XPENSES.

1. A defender not having tendered the sum ultimately found to be due by the verdict of a jury, though less than the amount sued for, found liable in expenses; and Observed, that this course should be followed as a general rule. *Heriot, Nov. 29, 1833, p. 145.*
- 2.—(1.) A party who failed in an objection to the title, but gained the cause on the merits, and was allowed his expenses—held not entitled to the expense of discussing the objection to the title.
(2.) Expense of written copies of a summons disallowed, where the summons was afterwards printed, and at less expense than it was copied. *Macdowall, Dec. 3, 1833, p. 154.*
3. A claim by an accountant for L.596, 9s., as the expense of a report, modified to L.393, 15s. *Fraser and others, Dec. 13, 1833, p. 209.*
4. Fee to counsel for revising summons, and advising whether the action should be raised, sustained as a proper charge. *Gibb, Dec. 14, 1833, p. 218.*
5. Expenses refused of discussing a bill of exceptions, as to a point held to be attended with much difficulty, which had been disallowed by the Court, but allowed by the House of Lords. *Ralston, Dec. 14, 1833, p. 219.*

EXPENSES (Continued.)

6. In an action of damages, laid at L.1000, for wrongous apprehension and imprisonment, the jury found for the pursuer, and assessed the damages at one shilling—held, that the pursuer was entitled to his expenses. Cowan, Dec. 17, 1833, p. 221.
7. Though a Sheriff found no expenses due to either party,—competent to award these expenses to the respondent in an advocacy. Young, Dec. 19, 1833, p. 233.
8. Objections sustained to the report of the auditor,
 - (1.) That he had disallowed a fee to counsel, for advising whether the action should be raised.
 - (2.) That he had struck off L.1, 1s. from a fee of L.2, 2s., sent to counsel to advise whether the record was in a fit state to be closed.
 - (3.) That where there had been three counsel at a jury trial, he had disallowed the fee of the second counsel, who opened the cause, in place of disallowing the fee of the junior. But,
 - (4.) Objection that he had not allowed fees to three counsel at the trial, repelled. Schuurmans, Dec. 20, 1833, p. 247.
9. Pending an advocacy a declarator was brought by the advocator ; and the respondent obtained a judgment in the advocacy, with expenses ; the auditor and Court disallowed a charge as in the advocacy for a consultation with counsel as to the effect the declarator might have thereon. Magistrates of Dundee, Jan. 18, 1834, p. 310.
10. The pursuer of a reduction, who was found not entitled to expenses in an incidental discussion with a third party's law-agent relative to production of title-deeds, held to have no claim for these expenses against the defender, although the defender was found liable generally in expenses. Lord Elibank, Jan. 29, 1834, p. 354.
11. Under an agreement, given effect to by judgment of Court, that the expenses on both sides in a litigation regarding certain trust-funds, should be paid out of the funds—held that the account of the losing party fell to be taxed as between agent and client, not as between party and party. Henderson's Trustees, Feb. 4, 1834, p. 399.
12. Circumstances in which the pursuer of an action of constitution was refused the expense of making up a record on the point of expenses, after the cause on the merits was at an end. Ballendene, Feb. 7, p. 409.
13. Circumstances in which a party who craved interdict on an erroneous allegation, that the respondent had stopped up a water-course, was subjected in modified expenses. Clark, Feb. 14, 1834, p. 451.
14. In an action against a Bank by a legatee, alleging that they had, in collusion with the executor, transferred to his individual credit, sums in their hands known by them to have been specially set apart by the testator to pay legacies, the Court of Session, holding that no relevant averment had been made on this head, assoilzied the Bank ; and the pursuer, on appeal, obtained a reversal, with a remit to send an issue to a jury ; and a verdict was found for the Bank ; held, that the Bank was entitled to the whole expenses of process, as well prior as subsequent to the appeal. Taylor's Trustees, Feb. 6, 1834, p. 403.
15. A tender having been made by a defender, previous to the raising of an action, of the sum ultimately awarded,—found entitled to expenses, but subject to modification, as he failed in a defence pleaded against the full claim. Alexander, Feb. 22, 1834, p. 484.
16. Objection sustained to the auditor's report, that he had struck off £2, 2s. from a fee of £3, 3s., sent to a senior counsel to advise whether the record should be closed—no charge being made for a fee to a junior counsel, and the cause being important. Allan, Feb. 25, 1834, p. 488.
17. In a jury cause, where a country agent was employed, as well as an agent in Edinburgh, and the former was sufficiently acquainted with ~~the facts of the case~~ *qualified to precognosce witnesses*—held that the Edinburgh

EXPENSES (Continued.)

- nosing witnesses in the country, was only entitled to charge the opposite party at the rate which a precognition by the country agent would have cost. Williamson, Feb. 25, 1834, p. 488.
8. Held, after consultation of the whole Judges, that the Court cannot award, as part of the expenses of process, charges for taking the opinion of counsel as to raising the action. Dougal, March 7, 1834, p. 532.
 9. Unless required by the Lord Ordinary, the expense of furnishing his Lordship with a copy of documents in process, not to be allowed as a charge against the opposite party. Caledonian Dairy Company, March 11, 1834, p. 546.
 20. A party presenting a petition for applying the judgments of affirmance by the House of Lords in cross appeals, is not entitled to decree against the respondent for one half of the expense of the petition. Mackenzie, May 15, 1834, p. 589.
 21. The Court, in repelling an objection to the report of the auditor, observed, that, in a question of detail, depending upon an examination of the steps of procedure, it would require strong ground to be stated, to induce them to alter his award, founded on such an examination. Wilkie, May 20, 1834, p. 616.
 22. Certain documents appended to a reclaiming note being alleged not to have been before the Lord Ordinary, the Court remitted to his Lordship to point out what documents had been before him; and his Lordship having made a return that all, except one of little importance, which was ordered to be withdrawn, had been before him, and the party taking the objection having ultimately gained the cause with expenses, the expense of this remit disallowed, except as to a small sum, held to effier to the document ordered to be withdrawn. Brown, Nov. 21, 1833, p. 112.
 23. Circumstances in which a party who was postponed by the Sheriff in a multiplepinding, in consequence of remissness in prosecuting his claim, was allowed, under an advocacy, to insist in his claim, on paying such expenses as the Lord Ordinary should consider reasonable. Martin, Dec. 3, 1834, p. 155.
 24. Where a case involves questions of importance and intricacy, the Court will allow a charge for the Edinburgh agent going to London to be present at the examination of a principal witness, though taken on interrogatories previously adjusted. Armstrong's Trustees, March 1, 1834, p. 510.
 - S. Where the auditor reserved a point for the consideration of the Court, and objections were taken against other parts of his report, which were repelled.—held not imperative to award expenses against the objector, in respect that there must have been a discussion, at all events, under the reservation in the auditor's report. Dempster and Mandataries, June 28, 1834, p. 844.
 - i. Where one defender was subjected in one shilling damages, by the jury, and other three defenders were assoilzied, the Court, of consent, modified the pursuer's account of expenses, as against the first defender, to one-half, in respect that a part of the record, and of the proof adduced, applied to the defenders who were assoilzied, and not to the defender who was subjected. Cowan, July 3, 1834, p. 881.
 - . A litigant having betaken himself to hiding to avoid diligence, and a discussion having taken place as to the sufficiency of a proposed mandatory, and the party having thereafter produced evidence that he was still in the country—held that his opponent, who had required a mandatory, ought not to be subjected to the expense of the discussion. Thomson, July 5, 1834, p. 889.
 - (1.) Charge for a new agent making himself acquainted with the state of the process disallowed.
 - (2.) Charge allowed for a visit by counsel to the locality which was the subject of dispute. Johnston, July 11, 1834, p. 923.

EXPENSES (Continued.)

29. Under a warrant to arrest and dismantle a vessel, Burness and others carried away some of her sails, &c., and deposited them in the weigh-house of Aberdeen, where they were again arrested by third parties, in the hands of the weigh-house keeper. After Caithness and Anderson had obtained the recal of the first diligence, they petitioned the Court to ordain Burness and others to redeliver the sails, &c., and, if necessary, to recal the second arrestment, &c. Before the petition was heard, the question had resolved into a mere point of expenses, as the petitioners had, in the meantime, given a guarantee under which the second arrestment was loosed. The Court found the petitioners entitled to the expenses of their application. Caithness and Anderson, July 11, 1834, p. 921.

See *Agent and Client*, 2.—*Arbitration*, 3.—*Appeal to Circuit Court*.—*Bankruptcy*, 5. (2.).—*Lease*, 1.—*Personal or Real*.—*Process*, I. 1. (2.) 3; II. 2; III. 1.—*Title to Pursue*, 2, (2.) 9.—*Removing*, 2.

EXPENSES PRIOR TO APPEAL. See *Expenses*, 14.

EXTRINSIC AND INTRINSIC. See *Proof*, III.

FACULTY AND POWER.

A lady executed a settlement, conveying to her sisters the whole means and estate, heritable and moveable, which should belong to her at her death; afterwards, her uncle died, whose settlement directed his trustees to pay her an annuity of L.100, "and with power to her, by will, or other deed under her hand, to dispose of and convey as she may think proper, after her decease, the capital sum of L.2000, to be set apart by my trustees for answering her annuity, and which sum my trustees are directed to pay in the way she may order and appoint"—held that her settlement was a valid exercise of the power to dispose of the L.2000, and carried it to her sisters. Hyslop, Feb. 11, 1834, p. 413.

See *Fee and Liferent*, 2.—*Trust*, 4.

FEE AND LIFERENT.

1. By a contract of marriage, the lady contributed a tocher of L.2500, which was provided to her and her husband in liferent, and to the children nascituri in fee, while, on the other hand, the husband's father bound himself at his death, "to content and pay, or otherwise to provide and secure, on heritable or moveable security, to the said husband and wife, in conjunct fee and liferent, for the liferent use alienably of the wife in case she shall happen to survive her husband, and to the children to be procreated of the marriage, in fee; whom failing, to the husband, his heirs and assignees whomsoever, in fee, the sum of L.5000;" with power to him to divide it among his children as he thought fit; but declaring that, as soon as the sum was payable, he should invest it on good security, "in terms, and for the purposes before written," and that, at the sight of parties named in the deed: and the father farther bound himself, if the husband predeceased him, to pay the interest of the L.5000 yearly to the wife, and, if she also predeceased, to the children: held, That the obligation undertaken by the father was onerous; and that the fee of the L.5000 was in the children. Miller, Nov. 14, 1833, p. 31.

2. A liferentrix by constitution, with power to cut such wood as in the opinion of the granter's executors could be done without injury to the estate, having avowed an intention to cut wood which the fiar considered would be injurious to the estate, the Court passed a bill of suspension presented by him, and granted interdict prohibiting the cutting of all wood as to which a month's previous intimation of the intention to cut should not be specially given to the fiar, whose right to apply de novo for an interdict was reserved. Dingwall, Dec. 14, 1833, p. 216.

3. Statement by the fiar as to a proposed cutting of wood under the judgment mentioned p. 216, which not held to afford sufficient grounds for interdicting it. Dingwall, March 8, 1834, p. 541.

See *Marriage Contract*, 1.—*Testament*, 6.

FOREIGN.

A lady born in America after the date of the declaration of independence, but before the treaty whereby the same was recognised by Great Britain, and whose father, a native colonist, acquiesced in the declaration, and thereafter continued to reside in America as a citizen thereof—held, in a question as to terce, to be a natural-born subject of the King of Great Britain, and therefore not liable to the objection of alienage. *Lady Nisbet*, Jan. 16, 1834, p. 293.

See *Bankruptcy*, 9. (5.)—*Jurisdiction*, 2, 11.—*Marriage*, 2.

FORGERY. See *Bill of Exchange*, 1.

FORUM. See *Jurisdiction*, 18.

FRAUD.

The acting director of a joint-stock company, and who was also a partner thereof, raised an action to compel a third party to accept a transfer of shares alleged to have been purchased by him on the employment and for behoof of this party, though by arrangement with them taken in his own name; and the purchaser pleaded in defence, that he had been led into the transaction by false representation and by concealment on the part of the directors, whose property he alleged the shares to have been—held that he was entitled to an issue whether he had been induced to purchase by fraudulent “concealment,” as well as by fraudulent “representation.” *Brown*, March 8, 1834, p. 536.

FRIENDLY SOCIETY. See *Cautions*, 7.—*Incorporation*, 2.

HEIR AND EXECUTOR.

A decree for bypast rents in favour of an heir, reduced, in respect that the executor was the party entitled to it, and it had been taken *parte inaudita*. *Girdwood*, May 13, 1834, p. 576.

See *Collation*.

HOMOLOGATION.

1.—(1.) A summons in an Inferior Court, signed by the substitute of a Sheriff-clerk depute, who had no power to name a substitute, held null, and incapable of being homologated.

(2.) Opinion intimated, that when a summons is not called within year and day, the instance falls, and cannot be revived even by the defender entering defences, and making up a record.

(3.) An execution of citation bearing that a party was cited to a day prior to the execution, inept; and it is *pars judicis* to give effect to an objection to it, though stated at a late stage in the cause. *Cumming*, Nov. 19, 1833, p. 61.

2. A widow was entitled to above L.1000, in name of *jus relictæ*, besides L.20 of terce; her husband had executed a settlement, making very inferior provisions in her favour, and even these she was to forfeit in the event of a second marriage, which she made; after a lapse of ten years from the death of her first husband, during which time a series of actings by all parties had taken place, on the footing that the settlement was unchallengeable—held competent to her to recur to her legal claims, in respect that any acts of alleged homologation were done in ignorance of her legal rights, and therefore afforded no proof of a consent to surrender them. *Hope*, Dec. 17, 1833, p. 222.

3.—(1.) The contract of a company provided, that a partner could not effectually assign a share, unless certain stipulations were complied with; and a partner assigned a share, without observing these stipulations, but the company homologated the assignation—held, that they could not afterwards object to the validity of the transference.

(2.) Circumstances held sufficient to infer homologation of an assignation of a share of a company's stock, though the regulations of the contract of copartnership were not complied with. *Drummond* (for *Fife Bank*), May 22, 1834, p. 620.

4. A decree in absence being brought under reduction, the defender pleaded, *inter alia*, that the pursuer had consented to it; in an issue whether the pursuer had so consented, the defender was held as pursuer under the issue; verdict for the pursuer under the issue. *Johnstone*, March 17, 1834, p. 568.

HUSBAND AND WIFE.

1. Question whether a wife, who is a trustee, can sue without concurrence of her husband. Laird, Nov. 16, 1833, p. 54.
- 2.—(1.) Circumstances in which a husband found entitled to revoke a mutual deed of settlement between him and his wife, conveying their whole estate and effects to the survivor, so far as regarded the fee of his heritable property.
(2.) A destination in an heritable bond taken by the husband to himself and his wife, for her liferent use allenary, and to his heirs and assignees in fee—held to import a revocation of the previous settlement, which would have carried the fee to her. Henderson's Trustees, Nov. 27, 1833, p. 133.
3. A married woman, whose husband resided in England, and who, for several years, had carried on an independent business on her own account in Scotland—held liable to personal diligence under a bill which she accepted, though not in the course of her trade. Observed, that the case of Churnside has been acted on ever since, and that it cannot now be called in question. Orme, Nov. 30, 1833, p. 149.
4. Question, what presumptive evidence would suffice to warrant the Court in passing a bill of suspension on the ground that a woman was married? Orme, Nov. 30, 1833, p. 149.
- 5.—(1.) Circumstances in which, a wife having raised an action of separation on account of maltreatment, an interim aliment was awarded before any proof was adduced, although an offer was made to take her home and aliment her.
(2.) Opinion by the Court, that it is not incompetent to crave interim aliment at the earliest stage of the cause, but that it is discretionary with the Court to withhold it, every such application being a question of circumstances. Currie, Dec. 6, 1833, p. 171.
- 6.—(1.) A party gave to a woman, with whom he had previously lived in concubinage, a letter in these terms: "You and I having lived together as man and wife for some time, I hereby declare you to be my lawful wife in the event of a child being born in consequence of the present connexion betwixt us," and the intercourse having continued thereafter, and a child been born—held not to constitute marriage.
(2.) In a declarator of marriage and legitimacy, it is competent for the defender to prove that a letter given by him to the pursuer, was, on the understanding of both, intended not to constitute marriage, but to deceive others. Observed, however, that a proof of the one party's intention thereby to deceive the other, would not be admissible. Stewart, Dec. 6, 1833, p. 179. See *Fraud*, 1.
7. English parties married in England, having come to Scotland, and one of them having committed adultery there, and having been personally cited in an action of divorce—held, that the Scotch court had jurisdiction to entertain it. Oldaker, Feb. 20, 1834, p. 468.
- 8.—(1.) A wife, with consent of her husband, disposed heritage in security of her husband's debt; but refused to execute a ratification; held, that the deed was not reducible on the ground of non-ratification, unless force, fraud, or undue influence by the husband, was proved.
(2.) Question as to the effect of a clause of absolute warrandice, an obligation to infest, &c., inserted by a wife, with consent of her husband, in a disposition by the wife. Buchan, March 1, 1834, p. 511.
9. Though two witnesses deposed expressly to their having committed an act of adultery with the defender, the Court, considering their testimony to be entirely unworthy of credit, assoilzied from an action of divorce. Sim, May 23, 1834, p. 633.
10. A husband having in his marriage-contract, conveyed his property to a trustee, with power to sue all actions relative to the reduction of settlements of his uncle and father, deceased—held bound to allow his name to be used for this purpose by the trustee, and not entitled to disclaim an action ~~relative to~~ in

HUSBAND AND WIFE (Continued.)

his name, the trustee relieving him of the expenses and consequences of the action. *Pitcairn*, June 21, 1834, p. 769.

See *Fee and Liferent*, 1.—*Foreign*.—*Bankruptcy*, 21.—*Homologation*, 2.—*Marriage*.—*Marriage-Contract*.

LYPOTHEC. See *Lease*, 8, 11.—*Right in Security*, 3.

IMPLIED OBLIGATION. See *Relief*, 2.

IMPLIED WILL. See *Testament*.

INCORPORATION.

Circumstances in which the member of an incorporation established mainly for support of its poor members, was held not entitled to a particular rate of superannuated allowance under a set of regulations to which he had conformed, but which had been rescinded, and another scheme substituted in their place. *Corstorphine*, Feb. 4, 1834, p. 397.

See *Title to Pursue*, 3.

INHIBITION.

Where one of four cautioners in a bond, (the term of payment of which was postponed till 1836, and the amount due depended on an accounting,) was bankrupt, and a second was apparently involved to a considerable extent with him, and the third had burdened part of his heritage—held that the holder of the bond was entitled to use inhibition and arrestment in security against the fourth cautioner, without alleging that either of the principal obligants was vergens, and without using any diligence against them, except inhibiting one; and that the Court could not recal the diligence without caution. *Bennet*, June 20, 1834, p. 760.

See *Bankruptcy*, 21.—*Diligence*, 3.

INTERDICT.

A bill of suspension and interdict was ordered to be answered, and interim interdict granted till it should be advised, and the Court, on advising the bill, with answers, continued the interdict to a certain extent, and recalled it quoad ultra, and the suspender appealed from this interlocutor—held, on the bill being advised, that the interim interdict fell, without the necessity of a special recal, and that the appeal had not the effect of continuing it in force. *Laird*, Nov. 16, 1833, p. 54.

See *Expenses*, 13.—*Arbitration*, 5.

INTEREST.

1. Question, in regard to claims of relief among heritors, what interest is due on over-payments of stipend. *Weatherstone*, Nov. 12, 1833, p. 1.

2. A party competing for a share of a fund having been allowed the benefit of accumulation of interest, on a general settlement as to the balance of a claim remaining due—held also liable to have accumulations charged against her as to prior advances made to herself. *Baillie's Trustees*, Jan. 14, 1834, p. 285.

3. Bank interest, but without accumulations, allowed in a forthcoming upon an amount due by a cautioner in a loosing of an arrestment, from the date of the loosing. *Anderson*, Jan. 17, 1834, p. 301.

4. A party conveyed his lands to trustees, with discretionary powers as to the times of sale, for payment of legacies which were declared not to be payable till after such sale, and the trustees allowed several years to elapse without selling—held, in a question between the special legatees and the residuary legatee, that interest should run on the legacies of the former, from the first term after the lapse of three years from the testator's death, which was allowed as a reasonable period within which to have sold the lands. *Ogilvie's Legatees*, Dec. 10, 1833, p. 189.

5. A trustee, who had himself a beneficiary interest under the trust, having entered into litigation with the other parties interested therein, as to points affecting his own individual interests, in which he was ultimately found to have been in the wrong; and he in the meantime withheld from the other parties certain annual payments to which they were entitled under the trust—

INTEREST (Continued.)

deed, and deposited the funds in a bank, but without judicial authority or consent—held liable in interest at the ordinary rate, and not entitled to have it restricted to what he drew from the bank. *Darling*, May 16, 1834, p. 598.

See *Parent and Child*, 1, (2.)

INTERIM DECREE. See *Process*, VIII.

ISSUE. See *Process*, VII.

JUDICIAL FACTOR.

1. Sequestration awarded of an heritable estate alleged by the petitioner to have been sold to the respondent, but which allegation the respondent denied—an action of declarator being about to be brought, and the respondent not opposing. *Buchanan*, Dec. 19, 1833, p. 232.
2. A judicial factor having been appointed over an extensive mercantile concern, “with power to take the funds and estate under his charge, and to manage and wind up the whole affairs of the company;” and no cause of complaint being verified against him; the Court refused to subject his accounts to an unusual audit and order of distribution, or to ordain him to consign all sums above L.100, or to allow certain parties to make up titles to the heritage placed under his charge and sell it, subject to the orders of the Court. *Dixons*, Dec. 20, 1833, p. 248.
3. Question, what title will suffice for opposing a petition by a factor loco absentis, to get up his bond of caution and to be exonerated, presented on the assumption that his constituent is dead, and that he himself is now proprietor of the subjects which fell under the factory? *Reid*, Jan. 14, 1834, p. 278.
4. The Court refused to sequester a trust-estate and appoint a judicial-factor, on the allegation that there were only two trustees capable of acting, and that they differed as to the management. *Laird*, Dec. 7, 1833, p. 187.
- 5.—(1.) Sequestration of a land estate, (which was craved in respect of pending actions of mails and duties,) of which the rents had already been sequestered—and there being a subsisting trust for behoof of creditors, though no acting trustee, refused.
(2.) Special powers also refused to the judicial factor previously appointed to recover the fruits reaped by the proprietor from lands in his own possession. *Littlejohn*, Feb. 14, 1834, p. 451.
6. The Court refused to recall the sequestration of an estate and appointment of a judicial factor, at the instance of a party claiming right to act as trustee under a deed of assumption which was under challenge, and whose interests as an individual were conflicting with what would be his duty as trustee. *Hunter*, Feb. 7, 1834, p. 406.
7. Curators appointed to an illegitimate child, whose father had left property to her without naming curators, on a petition merely, the requisites of the act 1672, as to citing next of kin, &c., being inapplicable to such case. *Wood*, May 31, 1834, p. 663.
8. The estates of an extensive and solvent mercantile concern were sequestered by the Court after the death of the last partner, and a judicial factor was appointed “with power to take the funds and estate under his charge, and to manage and wind up the whole affairs of the company;” and all parties concurring in the expediency of selling the heritable property of the company, but some of them opposing the sale by the factor—held, that as the heritable property must be viewed as part of the funds of the company, the factor was entitled to make up titles and sell it; and authority granted accordingly. *Fullarton*, June 19, 1834, p. 750.
9. A factor loco tutoris having expended the minor's money in purchasing heritable subjects—held, that this was an act of extraordinary administration, and that the subjects must be held by the factor on his own account and risk, and the price accounted for to the minors. *Lambe*, June 24, 1834, p. 775.
10. A trustee died, during the dependence of a process of ~~sequestration~~ *which was raised by him to obtain exoneration of the trust*.

JUDICIAL FACTOR (Continued.)

arose as to the right of a party to be sisted in that process as trustee, under a deed of assumption; the Court, at the instance of claimants on the fund in medio, sequestrated the trust-estate, in respect the party had never had possession, and they appointed a judicial-factor on the estate, "with power to appear and defend the interests of the trust, in the aforesaid process, and with all other usual powers." Christy, July 10, 1834, p. 916.

See *Cautioner*, 10.—*Jurisdiction*, 8.—*Minor*, 2, 5.

JUDICIAL REFERENCE. See *Arbitration*, 2.

JUDICIAL REMIT.

Where two inspectors, under a prout de jure judicial remit, were at issue with each other, and had returned an incomplete report, the Court conjoined a third party with them, and remitted of new. Muir, Nov. 26, 1833, p. 129.

See *Church*, 2.—*Process VI*.

JUDICIAL SLANDER. See *Slander*.

JURATORY CAUTION.

1. Bill on caution having been refused in respect sufficient caution not found, incompetent under a reclaiming note to pass on juratory caution. Forsyth, Jan. 25, 1832, p. 337.

2. Circumstances in which the Court refused to admit of juratory caution in part, in addition to a partial consignment, in order to the passing of a bill of suspension of a charge for payment of the monthly rents due by a tackman of tolls. Cowan, July 9, 1834, p. 909.

See *Diligence*, 4.—*Partnership*, 3.

JURISDICTION.

1. The heritors and kirk-session of a landward parish resolved that the assessment for the poor should be levied "from the owners and occupiers of property in the parish, according to the real rent of lands, houses, shops, public works, and all other heritable property; one-half from the proprietor, and the other half from the tenant, in proportion to their real rents;" held that the Sheriff had no power to review this order, and that his decree, enforcing it, was not subject to advocacy. Pollok, Nov. 12, 1833, p. 14.

2. In an action against a domiciled Scotswoman, concluding that she should be ordained to concur with the pursuer in uplifting a sum of money, alleged to belong to him, lying in the hands of a clerk in the English Court of Exchequer, to whom (after certain proceedings in that Court) it had been paid under a power of attorney granted by her; it being disputed whether these proceedings had not decided the question of right between the parties; the Court sisted process, that the pursuer might apply to the English Court of Exchequer, although he offered to prove by opinions of English counsel, that the proceedings could not have the above effect. Clarke, Dec. 20, 1833, p. 255.

3.—(1.) Held to be a sufficient compliance with the Justice of Peace Small Debt Act, that an account sued for, explaining the nature of the claim, was copied on the back of the summons, although not inserted in the body of it, and therefore this Court had no jurisdiction to review.

(2.) Question, whether a claim for the value of an article impledged, which the pawnbroker refused to account for, was an offence under the pawnbrokers' act, which could only be dealt with as is provided as to offences in that act, or whether it was a civil claim competent in the Small Debt Court. Henderson, Jan. 18, 1834, p. 313.

4. Where road-trustees act beyond the powers of a statute, they are not within its protection. Grant, Dec. 5, 1833, p. 167.

5. Under deed, for erecting a church, granted to seven trustees, four being a quorum, it was provided that, when reduced to six, a seventh should be elected by the male church members, whom failing, by the remaining trustees; only four accepted, and when these were reduced to one, he applied to the Court, praying to appoint a person to supply the place of the trustees or a

JURISDICTION (Continued.)

- quorum thereof; the Court remitted to the members who were males of the church, in terms of the trust-deed, to elect new trustees, in order to fulfil the purposes of the trust, and to report the election to the Court. Morison, Jan. 18, 1834, p. 307.
6. A bill of suspension of a decree under the Sheriff's Small Debt Act, presented on the allegation that part of the defender's name in the summons was written on an erasure, refused as incompetent. McLean, Jan. 28, 1834, p. 348.
 7. The titles to an heritable property were taken in name of A, and the property was afterwards sold, and the price received by A, who paid part of it to B, after a creditor of B had arrested in his hands on the assumption that the property truly belonged to B.
 - (1.) Held competent to try B's right to the price in a forthcoming before the Sheriff, at the instance of the arrester, without any declarator of trust against A.
 - (2.) Admissions sufficient to establish B's right, without the necessity of referring to the writ or oath of A; and,
 - (3.) Payment by A of part of the price to B, held proof that that amount was due, and a demand for an accounting as between them refused. Adamson, Jan. 29, 1834, p. 359.
 8. (1.) Incompetent for the Court to authorize the sale at Glasgow of part of a bankrupt estate, under a ranking and sale.
 - (2.) Circumstances in which the Court granted authority to strike an heritable bond out of the process of ranking and sale, the petition being presented by the pursuers of the process, and by the common agent, with concurrence of all the creditors. Cruttenden, Mackillop, and Co., May 17, 1834, p. 602.
 9. A chapel trust-deed directed, that when the trustees were reduced to six, a seventh should be elected by the male members of the congregation, whom failing, by the remaining trustees; the Court, on the application of an only surviving trustee, remitted to the male members of the congregation to elect new trustees, and the election being reported to the Court, their Lordships confirmed it. Morison, March 11, 1834, p. 547.
 10. An application under 4 Geo. IV. c. 49, for the removal of a toll-bar, and to interdict the levying of toll there, having been presented to the Sheriff, within six months after a table of rates were put up, and posts with a chain thrown across the road; and the Sheriff having pronounced judgment in terms thereof, an advocacy held incompetent. Lang, June 12, 1834, p. 719.
 11. An action having been brought in the Court of Session by residuary legatees, under an English will, against parties domiciled in Scotland, who had administered to the will, which specially directed the English Court of Chancery to be the forum in the event of legal discussion; and the administrators having, in obedience to an order of the Lord Ordinary, filed a bill in that Court, and it being ascertained by the opinion of counsel, that they might be there compelled to account, the Court sisted farther procedure, *hoc statu*. Macmaster, June 17, 1834, p. 731.
 - 12.—(1.) A baron bailie has jurisdiction to grant warrant to sequester and sell the crop for rents falling under hypothec, although a warrant to poind and sell had been previously granted by the Sheriff, under a decree at the instance of a creditor of the tenants; but,
 - (2.) A poinding for arrears under his warrant, inept to the effect of securing a preference for these arrears over the creditor poinding under the warrant of the Sheriff. Tulloch, June 19, 1834, p. 754.
 13. Complaint for alleged breach of sequestration granted by the Sheriff—held incompetent before the Court of Session, the Sheriff's own Court being the proper forum. Monroe, June 24, 1834, p. 788.
 14. Question whether the sea basin of the Forth and Clyde C

JURISDICTION (Continued.)

ing the river Clyde, but above the level thereof, and separated by a lock, be within the jurisdiction of the water-bailie, so as to warrant the arrestment, under his precept, of a vessel lying in the basin. *M'Donald*, May 30, 1834, p. 654.

15.—(1.) In determining whether the subject-matter of a suit does not exceed the value of L.25, so as to render an appeal to the Circuit Court incompetent, the Court look only to the terms of the conclusions of the summons.

(2.) A summons concluded for payment of "L.21, 5d., or such other sum, less or more," as should appear, on accounting, to be the just balance of the defender's intromissions; decree was pronounced for L.21, 1s. 10d.; the defender appealed,—held, after certifying the case, that the appeal was incompetent. *Stott*, June 26, 1834, p. 828.

16. An action of damages was raised in the Court of Session, against a party, alleging that he had usurped the office of Chancellor of a Jury, at a trial in the Circuit Court of Justiciary; that he maliciously took the opportunity of his office of jurymen to injure the pursuer and screen the party accused; that he controlled the rest of the jury, and deprived them of the right of due deliberation; that he had maliciously returned a verdict as unanimous, which was not unanimous, and thereby occasioned the pursuer, as private prosecutor, to be subjected in expenses—held, that it was incompetent for the Court of Session to enquire whether the verdict was illegally or irregularly returned or recorded as alleged, and the action therefore dismissed. *Mackintosh*, July 3, 1834, p. 872.

17. A raised an action against B, before the magistrates of a royal burgh, for payment of certain premiums advanced by him for insurance of property at sea belonging to B, effected by A on account and at request of B. Objection in limine to the jurisdiction of the magistrates that the cause was maritime, repelled. *M'Taggart*, July 9, 1834, p. 908.

18.—(1.) A child having been born in Scotland, of English parents, during the residence of the father there on military service—held that Scotland was not his *forum originis*.

(2.) A party not bound to answer in Scotch Courts a summons of declarator of marriage alleged to have been contracted in Scotland, he not being cited personally within Scotland, but edictally, having no domicile of citation therein. *Wylie*, July 11, 1834, p. 927.

See *Husband and Wife*, 7.—*Marriage*, 2.

JURY TRIAL. See *Process*, VIII.

JUSTICE OF PEACE SMALL DEBT COURT. See *Jurisdiction*, 3.—*Process*, I. 2.

KING. See *Consuetude*.

LANDLORD AND TENANT. See *Lease*.

LAWBURROWS. See *Reparation*, 13.

LEASE.

1.—(1.) Caution in a sequestration for rent covers the expenses of process.

(2.) Agents getting decree against the defender for expenses to go out in their own name, entitled in virtue thereof, and the registered bond granted by the cautioner to the client, to obtain letters of horning in their own names, against the cautioner. *Clark*, Dec. 3, 1833, p. 158.

2. Circumstances in which held, that, where a landlord's factor had granted receipts for rent, and had also addressed a letter, to A, as tenant of a house, the landlord had failed to prove by the parole evidence of the factor and his wife, that B was the true tenant. *Cowan*, Nov. 19, 1833, p. 65.

3. The landlord of an inn, under lease for ten years, from Whitsunday, 1826, having agreed, in 1831, with the tenant (now a bankrupt) and with his trustee, to give a deduction of L.30 from the rent, from Whitsunday, 1831, to Whitsunday, 1832, if the tenant kept up the establishment, and carried on the business till Whitsunday, 1832; and the stock of the tenant being sold off by the trustee, and the business suspended for a few days in February, 1832,

LEASE (Continued.)

- after which, a subtenant, with the consent of the landlord, entered to the inn, and carried on the business till Whitsunday—held that the tenant was entitled to the deduction of L.30. Thomas, Jan. 15, 1834, p. 285.
4. A tenant, holding a fourteen-years' lease, and entering into possession in terms of it—held not entitled to found on an alleged new lease for nineteen years, granted during its currency, which, though signed by the landlord, was never delivered, and for which a stipulated grassum had never been paid. Hamilton, Dec. 13, 1833, p. 206.
 5. Circumstances in which a notarial copy of a missive of lease, delivered by the landlord's factor to the tenant, was held sufficient proof of the terms thereof, in a question with the landlord's representative, in regard to a claim for meliorations. Williamson, Feb. 18, 1834, p. 466.
 6. The proprietor of grain-lofts let to a tenant on a bargain for a year, sequestered the grain in security of the rent, and, pending a litigation which ensued, the sequestration was recalled, on condition of the tenant finding caution; and the tenant not having found caution, and having allowed the grain to remain under sequestration in the premises until after the term—held to be bound as tenant for another year. Robertson, Feb. 21, 1834, p. 477.
 - 7.—(1.) Competent for the factor of a landlord abroad, to apply (as the landlord might have done) for an order against a tenant, who had taken his lease from the factor, to put furniture into his house, under pain of summary ejectment.
(2.) Circumstances, involving a question of domicile, in which it was held that a petition and warrant of ejectment were duly served upon a tenant. Thomson, Dec. 27, 1833, p. 557.
 - 8.—(1.) Claim of hypothec over the machinery of a mill, refused, in respect that the alleged tenant was not the tenant for the year in question.
(2.) Observed, that although the machinery of a third party lies for a term within the mill, yet, unless the mill be effectually let to a tenant, no hypothec can exist.
(3.) Question whether a lease, extended on stamped paper, but signed by neither party, would have been valid (but for special circumstances), in respect of possession having followed on it. Girdwood, May 13, 1834, p. 576.
 9. A party in possession of a farm under an unstamped missive of lease, having, during the currency thereof, been charged under a decree to remove, for not finding caution in terms of the Act of Sederunt, and objected that the missive was not stamped, the Court, in a suspension, after the missive was stamped, remitted to the Sheriff to proceed in terms of the Act of Sederunt. McNaught, May 22, 1834, p. 619.
 10. Competent in a summary petition by a landlord against his tenant before the Sheriff, for the purpose of having him interdicted from pursuing a course of management inconsistent with good husbandry and the stipulations of his lease, to conclude for damages, in so far as injury should be suffered by his actual deviation. Fraser, June 6, 1834, p. 684.
 11. A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water: and the rent for the premises was fixed, but the amount of the consideration for the steam-power and water was left to the determination of arbiters—held, that his right of hypothec over the *invecta et illata* in the premises let, was available in security for the whole consideration, including that for the power and water. Catterns, June 6, 1834, p. 686.
 12. Description of new buildings on a farm, which held to have been "built in lieu of" others previously on the farm, and for which the tenant was entitled to remuneration, as being so built. Jolly, June 24, 1834, p. 789.
 13. The tenants in a perpetual tack containing a condition that ~~the right should~~ *be ipso facto* irritated by failure to pay the tack duty for the

LEASE (Continued.)

failed to make payment thereof, and deserted the premises; and the landlord having, after four years' duty had become due, and the premises had been deserted for two years, entered into possession, though without any proceedings at law, and retained possession unchallenged for twelve years—held, that the irritancy had taken effect, and that the tenants were not entitled to be reponed. *Ogilvie*, June 28, 1834, p. 857.

14. A landlord bound himself to perform draining, &c., by missives of lease, in 1813, and the tenant to pay interest on the outlay, and to perform carriages—the operations to be made at the sight of a person mutually chosen; the tenant, after entering to possession, attempted to repudiate the missives; but, in 1817, he was decerned to implement them; and he continued to pay his full rent till 1822;—held in an action of damages against the landlord for non-implement of the draining, &c., that the landlord was not liable in damages prior to 1817, nor after 1817, unless the tenant could show that he had expressly required the landlord to implement the stipulation. *Reay*, July 1, 1834, p. 860.

See *Removing*.—*Arrestment*, 1.

LEGACY. See *Testament*.

LIBERATION, LETTERS OF. See *Process*, XIX. 3.—XX. 7.

LIFERENT. See *Fee and Liferent*.

LIS ALIBI PENDENS. See *Process*, I. 3.

MANDATARY. See *Process*, XII.—*Bankruptcy*, 3 (2).—*Agent and Client*, 4, 7.

MANSE. See *Church*.

MARRIAGE.

1. In an action for declaring the date of contracting a marriage, (which had been found by a previous decree to have been constituted, but without specifying the date,) the Court, of consent, pronounced decree, fixing the date as on 1st January, 1827. *Sim*, May 23, 1834, p. 633.

2. A domiciled Scotsman contracted a marriage in England with an English-woman, and continued to be a domiciled Scotsman after the marriage; a voluntary contract of separation was entered into, providing a separate maintenance to the lady, who afterwards resided abroad for many years, when a summons of divorce, on the head of adultery committed abroad, was raised against her in the Courts of Scotland—held,

(1.) That the domicile of the husband being in Scotland, the wife had a legal domicile there, and was amenable to the jurisdiction of the Scottish Courts:

(2.) That an edictal citation, being accompanied with actual intimation, by serving a copy of the summons on her personally, was good citation: and,

(3.) That it is competent for a Scottish Court to pronounce a sentence of divorce, although the marriage has been contracted in England. *Warrender*, June 28, 1834, p. 847.

See *Husband and Wife*.

MARRIAGE CONTRACT.

1. Construction of a judgment of the House of Lords, involving questions as to power of a father to make gifts and provisions in favour of younger children, after having become a party to his eldest son's contract of marriage, and stated the provisions to the younger children at a limited amount. *Miller*, June 11, 1834, p. 708.

- 2.—(1.) Terms of a marriage-contract, under which it was held, that, a conveyance of heritable subjects being made, not in implement, but in security of a husband's obligation to provide a liferent of a sum of L.1500 to his wife, she was not liferentrix of the subjects, but was bound to account for their rents, under deduction of the interest of L.1500. *Lambe*, June 24, 1834, p. 775.

MASTER AND SERVANT.

Verdict finding a contract of hire of a riding-groom or jockey, in England, for a year, proved, and that £150 of wages were due. *Jackson*, March 12, 1834, p. 568.

MESSENGER-AT-ARMS. See *Stamp*, 2.

MINOR.

1.—(1.) Circumstances in which parties, named trustees, and tutors and curators, under a deed of settlement, were held by their acts and deeds to have accepted; and having failed to make up inventories, were bound (notwithstanding a clause of protection) to account under the liabilities of the act 1672, c. 2.

(2.) The representative of a tutor, who has died prior to litescontestation, is not liable to the penalties of the act. Mollison, Dec. 19, 1833, p. 237.

2. Where part of the family of a deceased were minors, past pupillarity, some being abroad, and some at home; and part of the family were pupils, the Court appointed a factor loco absentis to the minors abroad, and loco tutoris to the pupils; but refused to appoint a curator bonis to the minors at home, reserving to them to choose a curator for themselves in common form. Maclean, Jan 29, 1834, p. 355.

3.—(1.) A young man who was majorrenitati proximus, having gone to an inn, and lived there for three weeks, as shooting quarters, held liable to the landlord for the account incurred by him for food and lodging.

(2.) Diligence on a bill accepted by a minor, who had curators, without their concurrence, and directed against the minor alone, without reference to the curators, suspended as irregular. Wilkie, Feb. 28, 1834, p. 506.

4.—(1.) Decree obtained in an action raised by tutors in name of their pupil, not reducible on that ground by a third party.

(2.) Averments not held relevant to infer reduction of a decree of valuation of teinds. M'Kenzie, June 26, 1834, p. 822.

5.—(1.) Circumstances in which a factor loco tutoris held justified in advancing to the widow of the deceased father of the pupils, a sum to enable her to carry on his business, although the security proved insufficient.

(2.) The mother entitled to an allowance for the board of the children. Hamiltons, July 11, 1834, p. 924.

See *Judicial Factor*, 7.

MORA. See *Contract*.

MULTIPLEPOINDING. See *Process*.

NOBILE OFFICIUM. See *Jurisdiction*, 5.

OATH.

An examination of two joint chargers under a reference to oath, in the Bill-Chamber, by the complainer, in a bill of suspension, having been commenced, and the deposition of one emitted, and the diet adjourned for a few hours to take that of the other, and the suspender's agent having excused his attendance on the ground of another engagement, and the Lord Ordinary having thereafter refused the bill, the Court adhered, and refused to remit to allow the examination to proceed. Ker, Dec. 21, 1833, p. 272.

See *Bankruptcy*, 9 (3).—*Bill of Exchange*, 4.—*Proof*, III.—*Process*, V. 1.

PACTUM ILLICITUM.

Though action has been refused to one socius against another, for a share in an illegal adventure, he may maintain a claim of accounting and repetition as to advances, which, although resulting consequentially from the adventure, were in themselves tainted by no illegal consideration. Gibson, June 6, 1834, p. 683.

See *Partnership*, 2.—*Bankruptcy*, 11.

PARENT AND CHILD.

1.—(1.) So long as a natural child is unable to maintain itself, either from ill health, or from having been prevented by previous ill health from learning a trade, the father is liable to maintain it.

(2.) He is also liable in interest on arrears of aliment.

(3.) Interim aliment awarded pending the discussion as to the father's liability.

(4.) An agreement being made between the father and mother ~~child~~ *child, by which the father bound himself to aliment it till the ag*

PARENT AND CHILD (Continued.)

and the mother bound herself to free him of all claim thereafter—held that this did not bar the child from claiming aliment against the father, after it reached the age of twelve.

(5.) The father having paid a sum to the Edinburgh kirk-treasurer, before the child was born, and having received an obligation from the kirk-treasurer, to maintain, clothe, and bring up the child—held that the father was nevertheless directly liable, at the instance of the child and the mother, to pay her a reasonable rate of aliment, so long as she had the custody of the child, deducting all sums received from the kirk-treasurer, and reserving the father's claim of relief against him.

(6.) Where a boy had reached his sixteenth year, held that the father, if called on to provide for him, was entitled to the custody of him. Pott, Dec. 7, 1833, p. 183.

2. Circumstances which, in an action of filiation, held not to amount to a semi-plena probatio of connexion. Martin, May 17, 1834, p. 604.

See *Minor*.—*Cantley*, June 12, 1834, p. 725.

PARTNERSHIP.

1. In the prospectus of a joint-stock company, it was set forth that the capital stock was proposed to be L.50,000, divided into shares of L.25 each; the company was formed, and operations commenced, without this amount having been subscribed for; and thereafter a contract was signed, containing a provision, that the capital stock should be L.50,000, but declaring the copartnership to have commenced at a period previous to the date thereof; and the amount of stock actually subscribed for did not exceed L.20,000. Held, in an action by the Company against a party who had subscribed the contract, and paid several instalments of his subscribed stock, (1.) That the stipulation as to the amount of stock, was not a condition precedent of the existence of the Company, but that he was liable as a partner to pay up the whole of his stock subscribed; and,

(2.) That alleged mismanagement by the directors was no defence in a question between him and his copartners. Caledonian Dairy Company. Feb. 4, 1834, p. 394.

2. One of the partners of a distillery company having been found liable in excise penalties, in consequence of the other partners, and the manager, having, without his knowledge, engaged in illicit distillation, verdict in an action of relief found against them. Campbell, March 22 and 24, 1834, p. 573.

3. Circumstances in which a bill of suspension and liberation of diligence on a bill of exchange accepted by a company firm, against an individual as one of the partners thereof, was refused to be passed on juratory caution. M'Farlane, March 8, 1834, p. 539.

See *Bankruptcy*, 11.—*Compensation*.—*Judicial Factor*, 8.—*Sale*, 1.—*Homologation*, 3.

PASSIVE TITLE. See *Provisions to Children*, 4.

PAWNBROKER'S ACT. See *Jurisdiction*, 3.

PAYMENT. See *Presumption of Payment*.—*Right in Security*, 4.

PENALTY. See *Lease*, 3, 13.—*Minor*, 1. (2.)

PERSONAL OBJECTION. See *Bill of Exchange*, 1.

PERSONAL OR REAL.

(1.) A disposition and deed of settlement was granted under the burden of certain provisions which were declared to be real burdens and liens on the lands, and under a clause imposing an obligation on the disponent to pay a certain additional provision, in the event of his selling the lands—held, that that additional provision did not constitute a real burden.

(2.) A purchaser found liable in the expense of a suspension to obtain a judgment on the validity of his title. Forbes's Trustees, Dec. 14, 1833, p. 219.

PERSONAL OR TRANSMISSIBLE. See *Testament*, 6.

PLEDGE. See *Jurisdiction*, 3.

POINDING.

A creditor ranked on a bankrupt's estate, used a poinding as of goods subsequently acquired by the bankrupt; the poinding was reported, and warrant of sale obtained; the bankrupt got his discharge, under § 61 of the bankrupt act—Question, whether the poinding remained entire, notwithstanding the discharge? *McLaren*, March 1, 1834, p. 515.

POINDING OF THE GROUND. See *Competition*, 1.

POOR.

The heritors and kirk-session of a landward parish resolved that the assessment for the poor should be levied "from the owners and occupiers of property in the parish, according to the real rents of lands, houses, shops, public works, and all other heritable property; one-half from the proprietor, and the other half from the tenant, in proportion to their real rents;" held that the Sheriff had no power to review this order, and that his decree, enforcing it, was not subject to advocacy. *Pollok*, Nov. 12, 1833, p. 14.

POOR'S ROLL.

1. Incompetent for the Court to review the judgment of the counsel for the poor, as to the question of *probabilis causa*. *A. B.*, Nov. 19, 1833, p. 58.
2. Senior counsel entitled, on application to them by the counsel for the poor, to act in a poor's cause without the special authority of the Court. *Bell*, Dec. 7, 1833, p. 187.
3. An objection that an applicant for the poor's roll was a married woman, and had not her husband's concurrence, stated after the lawyers had reported a *probabilis causa*—held to be competent and omitted *quoad hoc*, but that it would be open to the objector to plead it in *causa*. *A. B.*, Dec. 12, 1833, p. 197.
4. A defender in an action of damages, who was between fifty and sixty years of age, had a family, and possessed an annuity of L.24, besides 8s. per week of wages as a shoemaker; held entitled to the benefit of the poor's roll. *Gunn*, Jan. 25, 1834, p. 336.
5. A lieutenant, aged forty-three, who had a half-pay of £82, and a wife and five children, refused the benefit of the poor's roll. *A. B.*, Feb. 26, 1834, p. 489.
6. Where the minister and elders refuse to give a certificate to a party applying for the benefit of the poor's roll, the Court will cite them to give evidence as to the applicant's circumstances, at the bar. Observed, It is entirely out of the sphere of the kirk-session to take into consideration the merits of the action, in reference to which the applicant requires the benefit of the poor's roll. *Smith*, July 8, 1834, p. 890.
7. An applicant for the benefit of the poor's roll, having got his certificate signed by two parties, designing themselves elders, and also by the minister of the parish—held, that the subscription of the minister implied his attestation that the other subscribers were elders, and therefore that the petition should be remitted to the lawyers for the poor, notwithstanding an allegation that these parties had never been ordained elders. *A. B.*, Nov. 26, 1833, p. 127.

POSSESSION. See *Property*, 2.

PRESCRIPTION.—I. OF FORTY YEARS.

If payments of stipend are made under an interim decret of locality, there is an implied judicial contract, that when the legal obligations of the heritors are determined by final decret, their several interests shall be adjusted from the commencement of the process according to the true state of their rights and obligations; and therefore the claims of relief, thus arising, cannot be affected by the length of time during which the settlement of a final scheme and decret may have been delayed; nor is the plea of bona fide consumption a defence against such claims of relief. *Weatherstone*, Nov. 12, 1833, p. 1.

See *Entail*, 2.

II. SEXENNIAL. See *Bill of Exchange*.

Circumstances which held not sufficient to elide the triennial
a tradesman's account. *Mackintosh*, July 11, 1834, p. 929.

RESUMPTION OF PAYMENT.

1. A woman having become pregnant by a young man who was about to leave the country, his parents undertook to provide for the child, but without giving any legal document; the child was kept some time by its mother, and afterwards taken by the parents of the father, and subsequently resumed by the mother, who for a period of 32 years never complained that the father's parents had not fulfilled their obligation; the father having returned at the end of this period, she raised an action against him for the expense of alimenter the child while with her, but the Court assoilzied. *Arbuthnot*, May 15, 1834, p. 590.
2. Circumstances in which the Court assoilzied from a claim founded on a contract, which was dated nearly 30 years before the action was raised—the claim not having been prosecuted tempestivé, and a change of circumstances having occurred in the interim. *Black*, May 29, 1834, p. 634.

RESUMPTION OF DEATH.

1. Observed by the Court,
 - (1.) That where an absent party of middle age is shown to have been alive in 1819, and to have then had two sons, the mere lapse of time and want of farther intelligence concerning them, do not afford a presumption, per se, either that the party or his children are dead; and,
 - (2.) That a service, being an ex parte proceeding, does not raise the presumption of death in these circumstances.

Question, what title will suffice for opposing a petition by a factor loco absentis, to get up his bond of caution and to be exonerated, presented on the assumption that his constituent is dead, and that he himself is now proprietor of the subjects which fell under the factory? *Reid*, Jan. 14, 1834, p. 278.
2. Circumstances in which the Court held the presumption of the death of a party abroad to be so strong, that the next heir was entitled to uplift a fund in medio without caution. *Campbell's Trustees*, Feb. 1, 1834, p. 382.
3. A sailor, in the prime of life, suddenly disappeared at a seaport town in England, about four months prior to his father's death; twelve years afterwards his father's trustees, acting under a deed of settlement, by which, in the event of the son's survivance, he had right to a share of his father's funds, paid a debt due by the son—held, that they were entitled to take credit for that payment in accounting with the father's residuary legatees, though there was no evidence that he survived his father. *Bruce*, Feb. 25, 1834, p. 486.

PROCESS.—I. SUMMONS.

- 1.—(1.) A summons, setting forth a marriage, and concluding for declarator of marriage, which failing, damages for seduction, but stating no facts other than those connected with the marriage, held relevant as to the damages, after the conclusion of marriage had been abandoned.
- (2.) A sequestrated bankrupt (whose trustee, after sisting himself in an action of damages for seduction, pending against the bankrupt at the date of the sequestration, had afterwards withdrawn appearance) allowed to maintain his defence without finding caution for expenses. *Robertson*, Nov. 19, 1833, p. 70.
2. It is incompetent to call a summons of reduction of a Justice of Peace decree, on the grounds of malice and oppression, unless the pursuer has previously found caution for expenses, in terms of 6 Geo. IV. c. 43, § 15; (*Small Debt Act*.) *Crombie*, Nov. 23, 1833, p. 122.
3. A pursuer before enrolment entitled to abandon his action by letter, and raise a new summons, containing in gremio an abandonment of the former, without giving the defender an opportunity by enrolment of getting expenses awarded him. *Laidlaw*, March 8, 1834, p. 538.
4. The provision of Act of Sederunt, July 11, 1828, § 26, directing a summons to be lodged with the clerk, on or before the third day preceding that of the calling, is intended for the convenience of the clerks of Court, and it is jus

PROCESS.—I. SUMMONS (Continued.)

tertii for a defender to object that the summons was only lodged the day before the calling. MacQueen, May 20, 1834, p. 610.

5. An action being raised for payment of debt, on the medium that the defender continued a partner until the expiry of a contract in 1823; and he having ceased to be a partner before that date—held incompetent to discuss a claim founded on the defender's liability for debt, said to have been contracted before he ceased to be a partner. Drummond, (Fife Bank,) May 22, 1834, p. 620.

- 6.—(1.) A summons subsumed that the defender, in consequence of fraud and imposition practised on the pursuers, in relation to a security for a loan of L.8000, "was bound to make good to the pursuers all loss and damage which they may sustain by the perpetration of the said fraud," and that the defender "was bound to make good to the pursuers any loss which may arise to them in consequence of their having been fraudulently induced to lend the said sum of L.8000;" the conclusions were, that the defender should relieve the pursuers "from all loss and damage which they may sustain, in consequence of their having been induced to lend the said sum," and that, in order to ensure such relief, he should be decreed to pay the said sum to the pursuers, on being assigned to their security, or at least to pay "such sum as may, together with the sum that may be recovered by the pursuers operating upon their security, make up to the pursuers the full amount of L.8000,"—held, that as the summons contained a subsumption simply of damages, it was inept to deduce conclusions of relief where no actual damage had yet been sustained.

(2.) Question—If the agent of a borrower fraudulently represents his client's lands to be held in fee simple, knowing them to be entailed, and fraudulently states a false rental to the lender, can the lender bring a direct action against such agent, concluding to have the loan taken off his hands? or must the lender first attempt to make his security available for what it will bring in the market, and must he try the point, in a question with the heirs of entail, whether the lands are entailed? Martin, June 27, 1822, p. 830.

See *Homologation*, 1.—*Reparation*, 2.

II. DEFENCES.

1. Although a defender consign a sum, equal to the amount pursued for, yet, if he goes abroad, he must sist a mandatary. Brown, Nov. 12, 1833, p. 18.
2. A sequestrated bankrupt (whose trustee, after sisting himself in an action of damages for seduction, pending against the bankrupt at the date of the sequestration, had afterwards withdrawn appearance) allowed to maintain his defence without finding caution for expenses. Robertson, Nov. 19, 1833, p. 70.

See *Infra*, XX. 3.

III. PRODUCTIONS.

1. Where unusual delay had occurred in the preparation of a cause, and, after avizandum had been made with a view to close the record, the pursuer made production of several hundred documents, alleging that they were not previously within his power; held, that he was entitled to do so on payment of such expenses as the Lord Ordinary should consider reasonable. Fraser, Nov. 28, 1833, p. 138.

- 2.—(1.) Circumstances in which the Court allowed a defender, on paying such expenses as the Lord Ordinary should deem just, to produce documents, after closing the record, though they were found in his own house;—the pursuer having long allowed his claim to lie over—the documents being of old date, and having belonged to a predecessor of the defender—and the defender having made a diligent, though unsuccessful, search, before closing the record.

(2.) Competent for the defender to adduce the members of his own family, if necessary witnesses, and his law-agent, to prove that the documents were *res noviter veniens*, he bearing the whole expense of such proof.

PROCESS.—III. PRODUCTIONS (Continued.)

- such other expenses as the Lord Ordinary should award. Wilkie, March 4, 1834, p. 520.
- 3. Circumstances which the Court held insufficient to warrant the production, after the record had been closed, of a document which had been all along in possession of the party. Ross, May 22, 1834, p. 631.
- 4. Agent fined for lodging documents without formal leave of the Court. Fraser, July 5, 1834, p. 887.

— IV. CLOSING AND OPENING RECORD.

- 1. New record made up, in respect of facts emerging subsequently to the closing of a previous record. Farquhar, Jan. 23, 1834, p. 327.
- 2. After a record has been closed in a reduction of an inferior court decree, it is incompetent, in a relative suspension, to turn the decree and charge into a libel, though the record be not closed in the suspension, and the processes are not conjoined. Henderson, Feb. 21, 1834, p. 469.
- 5. Judgment pronounced without a closed record. Weatherstone, Nov. 12, 1833, p. 1.
- 4.—(1.) If either party refuses to close the record upon summons and defences, the Court must allow a record to be made up by condescendence and answers in common form.
- (2.) The provision of the judicature act, regarding a party's right to make up a record in ordinary actions in the Court of Session, having been expressly repeated in the relative Acts of Sederunt, which was passed to regulate the forms of process before the Commissaries—held, that either party had a right to insist on making up a record in an action of divorce which was raised in the Court of Session subsequent to the transference of the jurisdiction of the Commissaries. Warrender, July 5, 1834, p. 885.

See *Bankruptcy*, 1, (2.)—*Ante*, III. 2, 3.—*Infra*, XIV. 1.

— V. COMMISSION, DILIGENCE, &c.

- 1. A commission to take the charger's oath was dated, by a clerical error, 21st October, in place of 21st November; the suspender used the commission, and examined the charger under it, without objection—not entitled thereafter to plead that the proceedings under the commission were inept, in consequence of the erroneous date. Rutherford, Feb. 4, 1834, p. 391.
- 2. In a reduction of a service, a further proof being allowed on both sides—held that the proper course was to take it by commission, and not by Jury trial. Anderson, June 13, 1834, p. 729.
- (1.) On an issue whether the defenders in taking delivery of wheat bought by a merchant, acted as corn-factors, in the ordinary course of business—diligence granted to recover all letters between the merchant and the corn-factors, relative to the purchase or sale of grain; and all accounts between them.
- (2.) The Lord Ordinary having restricted a motion for a diligence to certain writs, and, after issues were signed, a motion for a diligence of larger extent being made in Court, their Lordships appointed the record to be printed, in order that they might dispose of the motion, in the same circumstances as those on which the Lord Ordinary had decided on it. Maxwell, July 9, 1834, p. 891.

The Court refused to allow the opinion of English counsel, on the law of England, intended to be offered in evidence on a jury trial, to be taken by commission. Maberley and Co., July 8, 1834, p. 902.

— VI. REMITS TO PERSONS OF SKILL.

- . After a remit to a man of skill to report as to the work for which a tradesman claimed payment, the Court refused to allow a jury trial. Mackintosh, March 1, 1834, p. 518.
- . Circumstances in which as to a question regarding the working of coal, the Court preferred a remit to a man of skill, with power to take proof to a Jury trial. Robertson, March 11, 1834, p. 544.
- . After a remit of consent to men of skill to report on the genuineness of a

PROCESS.—VI. REMITS TO PERSONS OF SKILL (Continued.)

subscription challenged as forged, incompetent to allow a proof. Grant, June 11, 1834, p. 717.

VII. TRIAL BY JURY.

1. The general issue, whether a deed is not the deed of the grantor, held to be not the proper issue in a reduction on grounds not inferring nullity of the deed, but only that it is reducible. Jaffray, Dec. 19, 1833, p. 241.
2. A party found not entitled to the expense of preparing for a trial postponed on the motion of the other, when he himself was not ready to have gone to trial; and the Court inferred that he was not ready, from his having moved for a prorogation of the time to report a commission to take evidence till the morning of the day fixed for trial. Robertson and Co., Dec. 19, 1833, p. 242.
3. Circumstances in which the Court refused to postpone a jury trial, though the defender offered to consign the sum in dispute, and to pay all the expenses occasioned by the delay. Ormiston, Feb. 17, 1834, p. 567.
- 4.—(1.) Under a remit from the House of Lords to ascertain and determine certain points, but which did not say whether this should be done by jury trial or otherwise—held, that it was discretionary with the Court to direct issues to be tried by jury or not.
(2.) Held, that the question whether the secretary of an insurance company, having taken a bill from their debtor, whose life was insured with the company, received it in payment of the premium, or for what other purpose, was a proper question for trial by jury. Barker, Feb. 27, 1834, p. 500.
5. The Court refused to allow an issue as to the meaning of an obligation constituted by writing. Robertson, March 11, 1834, p. 544.
6. Circumstances in which the Court refused a motion for a rule to show cause why a new trial should not be granted, on the ground of surprise. Meek, May 17, 1834, p. 603.
7. Circumstances in which the Court refused a motion for new trial, which was made on the ground that the verdict was contrary to evidence. Donaldson, May 30, 1834, p. 644.
- 8.—(1.) Where an issue has been prepared before the Lord Ordinary, and a party wishes to bring it under the review of the Inner-House, it must be done by motion, and not by reclaiming note.
(2.) Though the Lord President had been present along with the Lord Ordinary, at chambers, in preparing an issue, it is competent to bring it under the review of the Inner-House. Stewart, June 11, 1834, p. 707.
- 9.—(1.) A pursuer, in his opening speech, not allowed to read to the jury a letter, which the defender objected to as inadmissible; but allowed to aver the object and substance of the letter, as that which he undertook to prove.
(2.) In an action of damages for adultery, a letter written by the alleged adulteress after her husband's suspicions of her guilt were awakened; and addressed and despatched to the defender, but never received by him; and alleged to contain instructions to him as to the story which he ought to tell her husband regarding their conduct at certain interviews which they were proved to have recently had—held inadmissible against him, in respect that he never received it. Bell, Dec. 16, 1833, p. 554.
- 10.—(1.) Where it is averred that an agreement was made, relating to heritage, which was followed by rei interventus, the acts referring rei interventus may be proved by parole, but not the agreement itself.
(2.) Party held not barred from objecting to the competency of parole evidence at a jury trial, though the Court were of opinion, that, in the circumstances, he should have taken his objection at an earlier stage of the proceedings: and neither party found entitled to expenses. McLean, July 1, 1834, p. 865.
11. In an action by one partner of a company against the others, ~~the penalties imposed for smuggling, under a conviction in F~~
ground that the smuggling had been carried on by the defen

PROCESS.—VII. TRIAL BY JURY (Continued.)

- of the pursuer, the conviction was produced in evidence by the defenders at a jury trial, but no plea was stated at the trial, nor exception taken that it ought to be received as probatio probata of the knowledge—held incompetent to found on such plea in a motion for a new trial. Campbell, July 1, 1834, p. 870.
12. The Lord Ordinary having approved of issues to try the cause before a jury, the defender reclaimed, not being satisfied with the terms thereof. The Court directed the parties to be heard before the presiding Judge at Chambers, as the proper mode of settling the disputed terms of issues. Johnston, July 4, 1834, p. 884.
 13. Verdict found on one of two issues for the pursuer, the defender not having contested it; and on the other issue for the defender, under reference to an arranged minute. Stewart, July 16, 1834, p. 936.
 14. Under an issue whether a defender was indebted in a certain balance of the price of sheep to the pursuer, the jury found for the pursuer. Rae, July 18, 1834, p. 946.
 15. Verdict finding that a bill which had been taken by the secretary of an insurance company from a party who was indebted to the company in a bond for L.2500, and also in the premium on a life policy to that amount, was received in payment of the premium; though the bill, when tendered, was far from maturity, and was not tendered till after the lapse of the days allowed for paying the premium. Barker, July 23, 1834, p. 946.
 16. Verdict reducing a settlement on the ground of facility, lesion and circumvention. M'Clive, July 24, 1834, p. 947.
 17. Verdict finding that neither the indorsation of certain bills by a party to the bankers with whom he transacted his business, nor the payment of a sum to them, though within sixty days of bankruptcy, was reducible as being contrary to the statute 1696, c. 6. Low, July 25, 1834, p. 948.
 18. Verdict finding that the Second Fife Banking Company did not, by themselves or others, duly authorized by them, purchase the shares of certain partners in the First Fife Banking Company. Drummond, July 29, 1834, p. 949.

See *Ante*, V. 2, 3.—*Proof*, II. 4.

VIII. JUDGMENTS, INTERIM-DECREES, &c.

1. Before an interim-decree for a balance in a mutual accounting can be allowed to go out, it requires to be made certain to the Court, that whatever may be the issue of the cause in other respects, such balance must remain due. Sinclair, Nov. 19, 1833, p. 61.
2. An admission in defences held to warrant interim-decree, although a record not closed. Crawford, Nov. 22, 1833, p. 113.
3. An assignee of the pursuer of an action having taken decree in his favour against the defender without notice to the pursuer, the decree recalled, and a remit made to hear the pursuer, who alleged that the assignation did not cover the sum decerned for. Fraser, Jan. 31, 1834, p. 381.

IX. RECLAIMING.

1. A reclaiming note which has not the summons and defences appended, is incompetent, although the record has not been closed. Fraser, Nov. 13, 1833, p. 21.
2. A reclaiming note, with part only of the record in the Inferior Court appended, is incompetent. Affleck, Nov. 15, 1833, p. 50.
3. An objection to the competency of a reclaiming note on the merits, repelled, although a copy of the letters of suspension was not appended, it appearing that the omission was occasioned partly by the fault of the objector. Hasset, June 19, 1834, p. 753.

X. APPEAL.

Leave refused to appeal against a judgment repelling a preliminary defence. Magistrates of Wigton, Feb. 15, 1834, p. 459.
See *Expenses*, 20.—*Interdict*.—*Process*, XVII. 1.

PROCESS.—XI. REPOING.

Judgment having passed in absence of a defender resident abroad, and cited to an action of declarator of marriage, raised in virtue of an arrestment jurisdictionis fundandae causa, the Court while allowing him to be reponed, refused to reserve the question of expenses, although he disputed the jurisdiction, but remitted to the Lord Ordinary to repone, on payment of such expenses as he might see fit. Brackenridge, May 30, 1834, p. 654.

XII. MANDATARY.

1. Although a defender consign a sum, equal to the amount pursued for, yet if he goes abroad, he must sist a mandatory. Brown, Nov. 12, 1833, p. 18.
2. Circumstances in which the Court sisted procedure to allow a mandate to be produced for the charger in a process of suspension and liberation, who had quitted the country without leaving a mandate. Langmuir, May 23, 1834, p. 633.

See *Ante*, II. 1.—*Bankruptcy*, 5, (2.)

XIII. SISTING PARTIES, AND PROCESS.

A new party cannot compear as pursuer without consent of the defender. Taylor, Nov. 14, 1833, p. 39. See *Title to Pursue*, 2.

XIV. ADVOCATION.

1. A Sheriff Court process, instituted before the passing of the judicature act, having been thereafter advocated, and a record on the merits made up in the advocation, and the cause remitted to the Sheriff to hear parties further, and decide; and he having pronounced judgment on the record as made up in the Court of Session, and a second advocation being brought, the Court refused to allow the record to be opened up and a new one prepared. Napier, Nov. 30, 1833, p. 153.
2. Though a Sheriff found no expenses due to either party,—competent to award these expenses to the respondent in an advocation. Young, Dec. 19, 1833, p. 233.
2. In an advocation under 6 Geo. IV. c. 120, § 40, decree was pronounced without any appearance having been made for the respondent; interim extract was allowed, and diligence raised; a bill of suspension being presented, it was passed on caution, and on payment of the expenses incurred by the charger to the time the suspender might have been reponed, in terms of the A. S., with expense of extract. Steel, Feb. 25, 1834, p. 485.

XV. ADMIRALTY AND CONSISTORIAL CAUSES.

1. In maritime causes transferred from the Court of Admiralty by the 1st Will. IV. c. 69, it is imperative on the Court to ordain the pursuer to find caution de damnis et impensis, if required, though he have not insisted for caution judicatum solvi on the part of the defender. Leitch, June 3, 1834, p. 677.
2. It is necessary, in leading proof in an action of divorce, to furnish a list of witnesses to the agent of the opposite party; and this not having been done at the intimation of the diet of proof, and the depositions of the witnesses having been sealed up, the Court refused to allow them to be opened. Hutcheson, May 29, 1824, p. 643.
- 3.—(1.) If either party refuses to close the record upon summons and defences, the Court must allow a record to be made up by condescendence and answers in common form.
- (2.) The provision of the judicature act, regarding a party's right to make up a record in ordinary actions in the Court of Session, having been expressly repeated in the relative Acts of Sederunt, which was passed to regulate the forms of process before the Commissaries—held, that either party had a right to insist on making up a record in an action of divorce which was raised in the Court of Session subsequent to the transference of the jurisdiction of the Commissaries. Warrender, July 5, 1834, p. 885.

See *Jurisdiction*, 17.

XVI. MULTIPLEPOINDING.

1. Question, whether, in a multiplepounding, an interlocutor pronounced ~~pronounced~~ *compearance of a new party*, is to be held in absence of claim

PROCESS.—XVI. MULTIPLEPOINDING (Continued.)

- entered appearance in the process, but for whom there had been no attendance as against this new party. Fraser, Dec. 7, 1833, p. 188.
2. Circumstances in which the Court recalled an order for consignation pronounced against the nominal raiser of a process of multiplepoinding. Grant, May 20, 1834, p. 615.
 3. Circumstances in which the Court held it premature to decide, in a multiplepoinding, a question under a deed of settlement, as to whether a right of fee or of simple liferent was constituted by one of the bequests. Hutton's Trustees, May 23, 1834, p. 634.
 - 4.—(1.) Trustees under two separate deeds, forming a general settlement, entitled to combine the affairs of both under one process of multiplepoinding ;
(2.) Objections to a summons of multiplepoinding to be treated as preliminary defences in an ordinary action ; and, when repelled, the party liable to be subjected in expenses, on intimating an intention to reclaim. Cumming, &c. Feb. 28, 1834, p. 508.
 5. Circumstances in which the Court held,
(1.) That the raisers of a multiplepoinding were liable in expenses to a party called as a claimant ; and,
(2.) That a claim, founded on illiquid accounts by an alleged creditor of a claimant, could not be sustained ; reserving to him to assist in his claim in another form. Home, July 13, 1834, p. 727.

XVII. RANKING AND SALE.

1. Question, whether an appeal from an interlocutor in a ranking and sale, or an appeal from a warrant obtained by one creditor, in a relative sequestration of rents, prevents the Court from entertaining a petition in the process of sequestration by another creditor praying for a similar warrant. Howden, Dec. 17, 1833, p. 230.
- 2.—(1.) Circumstances in which the Court refused to authorize the common agent in a ranking and sale, to sell subjects at Glasgow under a bond containing a power to sell there.
(2.) Question, whether the Court have power to authorize a judicial sale, in a process of ranking and sale, to be held any where but in Edinburgh. Renny, Feb. 22, 1834, p. 479.

See *Jurisdiction*, 8.

XVIII. REDUCTION.

The proprietor of separate lands, all lying within the same parish, sold part absolutely, and part in real warrandice, and granted a personal obligation of warrandice: the real warrandice did not apply to future augmentations, but the personal obligation did: and in a process of locality, a decree was pronounced, localling an augmentation on the warrandice lands, in respect of the real warrandice—held, in a reduction of the decree by the representatives of the granter, that the decree must be set aside, reserving to the purchaser to make his personal obligation effectual as accords. Dykes, Feb. 18, 1834, p. 460.

XIX. SUSPENSION.

1. In an action of removing, the defender having failed to find caution for violent profits, the Sheriff “decerned against the defender in the removing, in terms of the conclusions of the summons,”—held competent to present a bill of suspension, without caution or consignation, though the reclaiming days against the Sheriff's judgment were not expired. Ross, Dec. 12, 1833, p. 200.
2. Bill of suspension and interdict, on which an interlocutor had been pronounced, allowing it to be seen, and granting interim interdict, not having been intimated till after the lapse of fourteen days—held to have fallen. Fraser, Jan. 31, 1834, p. 380.
- 3.—(1.) After the incarcerator has granted a written consent of liberation, and the party has been set at liberty, it is inept to present a bill for letters of suspension and liberation.
(2.) Circumstances in which the Court, while they refused an inept bill

PROCESS.—XIX. SUSPENSION (Continued.)

of suspension and liberation, found no expenses due to the respondent. Ben-
tham, June 28, 1834, p. 845.

See *Diligence*, 1.—*Juratory Caution*, 1.—*Ante*, V. 2.

XX. MISCELLANEOUS.

1. A proprietor, who got decree against the trustee on a sequestrated estate, qua trustee, for the rents and feu-duties payable under a lease and feu held by the bankrupt from him, found not entitled, in attempting to make good his claim against the individual creditors on the estate, to select one or two of them against whom to proceed, without calling the others. Kirkland, Feb. 21, 1834, p. 472.
2. Competent to transfer an action against the trustees and executors nominate of a defunct, on an induciæ of six days. MacQueen, May 20, 1834, p. 610.
3. A defence being rested on the existence of a deed of assignation, which had been lost—defence held established, in respect of the adminicles of evidence produced, although no proving of the tenor was led. Drummond, May 22, 1834, p. 620.
4. In an action on the statutes 1621, c. 18, and 1696, c. 5, the Lord Ordinary reduced, in terms of the libel, but explained, in a note, that he rested on the act 1696: the defender having reclaimed, the Court “recalled the interlocutor, so far as the same reduces, and decerns, upon the grounds of the act 1696, and remitted to the Lord Ordinary to proceed and do farther in the cause as to his Lordship shall seem proper:”—held that the pursuer was not foreclosed from insisting, under the remit, on the act 1621. Cranstoun and others, May 30, 1834, p. 645.
5. The Court refused, hoc statu, to turn the charge on a bill (which was under L.25) into a libel, it being alleged that, ex facie of the bill, it could not be the foundation of summary diligence. Forrest, June 13, 1834, p. 726.
6. In a multiplepinding, a party appeared, and lodged a pro forma representation, to prevent a decree of preference from becoming final, but made no claim nor stated any thing on the merits—held, that this decree did not form res judicata, so as to bar an action of reduction. Smith, May 30, 1834, p. 646.
7. The refusal of successive bills of suspension and liberation presented on the ground that a decree was null on objections to the instance, held not res judicata against an action of reduction of the decree on the same ground. Wood, Nov. 15, 1833, p. 50.
8. Held incompetent to waken a petition for sequestration of the effects of a tenant, in a Sheriff court, by a summary petition of wakening. Robertson, July 8, 1834, p. 893.
9. A Sheriff-substitute having allowed a proof, and the pursuer having reclaimed, contending he was entitled to judgment in his favour without a proof—Held competent for the Sheriff on that petition, while he recalled the interlocutor allowing a proof, to decide the cause against the party reclaiming, although there was no petition from the other side. Swan, Jan. 21, 1834, p. 316.
10. Incompetent to admit reference to oath by a motion. Campbell, July 11, 1834, p. 923.
- 11—(1.) The owner of a vessel, and two other parties, having bound themselves conjunctly and severally in a bond of caution on loosing an arrestment on the vessel, and a furthcoming having been carried on against these parties, without calling the owner, the proceedings held inept.
(2.) The defenders in the furthcoming having been allowed in the Inferior Court to call the owner, and having declined, and the cause having gone on to an issue, not precluded in a suspension from insisting on the objection in the Court of Session. M'Donald, May, 30, 1833, p. 654.

See *Expenses*.—*Oath*.—*Interdict*.—*Judicial Remit*.—*Trinds*, 1, 2.—*Ante*, V. 2.
Pursue.—*Juratory Caution*.

PROOF.—I. WRITTEN.

1. In a declarator of trust, it is not necessary to produce a probative deed by the trustee admitting the trust; a holograph writing, or a writing to which his signature is adhibited, is sufficient. Taylor, Nov. 14, 1833, p. 39.
2. Circumstances in which a copy of a codicil held sufficient proof thereof as against a son of the testator, who admitted having received the will pending the suit, but stated that he had mislaid it. Baugh, Jan. 14, 1834, p. 279.

See *Trust*, 1.

II. PAROLE.

1. A passenger on board a canal passage-boat having been injured by a blow from a crane in another boat swinging round, brought an action of damages against the owners of both boats, conjunctly and severally, who, as the cause was about to go to trial, entered into a minute with her, whereby they agreed to pay her a certain sum of damages, reserving all questions of relief as between each other. The defenders had previously raised mutual actions of relief against each other, founded on counter allegations of fault and negligence, but on a trial a verdict was returned, finding that the injury was not occasioned by the negligence or fault either of the one party or the other. The owner of the passage-boat having paid the damages—Held, in a subsequent action at his instance, founded on the minute of agreement with the original pursuer, that the owner of the passage-boat was entitled to relief from the other to the extent of one-half, and that the latter could not prove by parole an agreement as between them at settling with the pursuer, that the owner of the passage-boat was only to obtain relief in the event of his establishing fault or negligence on his part. But Observed, that this would have been the rule of law had there been no agreement. Union Canal Company, Jan. 17, 1834, p. 304.
2. Where the raiser of a multiplepinding has no patrimonial interest in the issue of the questions raised by the claimants—held that he may be competently called as a witness, by a claimant on the fund in medio. Campbell's Trustees, Feb. 1, 1834, p. 382.
3. Circumstances in which objections to a witness of interest, agency, and partial counsel, repelled. Wood, Feb. 8, 1834, p. 411.
- 4.—(1.) A witness residing in London having been examined on commission in June, and it being proved at the trial in December following that he was still in London—held that the evidence was admissible, though no application had been made to the witness in the interim to attend the trial.
(2.) An objection to the admissibility of the evidence of a bankrupt abroad, taken on commission, that he had failed to attend the statutory examinations, and to take the relative oath, and that he had therefore incurred the penalty of the bankrupt act,—“to be considered as a fraudulent bankrupt, and infamous,”—repelled, in respect that there had been no trial and conviction.
(3.) The drawer and indorser of a bill raised an action of repetition of its contents from an indorsee, alleging that he was induced to draw and indorse it through the fraudulent device of the indorsee and acceptor, and for the accommodation of the acceptor, now bankrupt—held, in the circumstances, that the acceptor was not an admissible witness for the drawer, being disqualified on the ground of interest. Armstrong's Assignees, Feb. 13, 1834, p. 440.
5. Under an issue between the trustee on a bankrupt estate and a party alleged to have obtained an undue preference through the fraudulent conduct of the bankrupt, the defender (who pleaded, that the transaction was fair and bona fide, in the ordinary course of business) tendered the bankrupt to prove it—held that he was inadmissible. Williamson, Dec. 30, 1833, p. 562.
6. A person who had acted as agent for the pursuer in a previous cause relative to the same subject, and who had also acted as agent in the cause then depending—rejected on the ground of agency and partial counsel. Campbell, March 22 and 24, 1834, p. 573. See *Partnership*, 2.
7. Where an agent, in precognosing, collected his client's witnesses in one

PROOF.—II. PAROLE (Continued.)

room; took down the statement of each in writing; read it over to him, and got it signed by him; and all this was done in the presence and hearing of the whole witnesses—the Court held such witnesses inadmissible. *Duncan*, July 16, 1834, p. 935.

8.—(1.) In a declarator of trust, in which the pursuers admitted that they pursued for behoof of all the creditors of their deceased ancestor, and under an issue as to the authenticity of the signature of the alleged trust—held, that a creditor, adduced by the pursuers, was inadmissible, though the bill constituting his debt was prescribed.

(2.) The signature of an officer of a bank, at a bank-account, not allowed to be proved by another of the officers, as the first party was alive, and not adduced. And,

(3.) Circumstances in which the authenticity of a party's signature was held to be proved. *Bryson*, July 17, 1834, p. 937.

See *Process*, III. 2, (2.)—VII. 9.

III. CONFESSION OR ADMISSION OF PARTY, (*Including Reference to Oath.*)

1. Under a reference to oath to road trustees—held incompetent to examine one of them as to matters not known to him as trustee, but with which he had previously been conversant in another capacity. *Hotson*, Nov. 16, 1833, p. 57.

2. Although a party verbally agreed with the proprietor of ground for a feu, entered into possession, and paid a certain amount of feu-duty for two years, but the proprietor denied that this was the feu-duty agreed on—held, in an action of declarator and removing, that notwithstanding the *rei interventus*, as there was no writing, the party feuing could only prove the terms to the agreement by the oath of the proprietor. *Rait*, Nov. 26, 1833, p. 131.

3. Commission having been granted to take an oath on reference, the Court refused to listen to an allegation, that the commissioner would not take down the questions put to the party examined—and to remit for a new examination to supply the omissions made by the party referring. *Anderson*, Dec. 21, 1833, p. 273.

4. Circumstances under which the Court held that though a charger, under a reference to oath, had refused to answer several questions as to the true date of a bill charged on, which was different from the apparent date, the oath was negative of the reference. *Rutherford*, Feb. 4, 1834, p. 391.

5. After a statement in a petition of sequestration for rent, which was repeated in the record, that deduction of L.30 was to be allowed from the rent of an inn, if the business was carried on till Whitsunday, 1832, the tenant referred an allegation by him to the landlord's oath, that the full rent was to be L.70, unconditionally; and the landlord swore that it was only to be allowed on condition of the tenant carrying on the business till the end of the lease for ten years (1836)—held that the landlord was not entitled to retract his admission on the record by his oath on a reference. *Thomas*, Jan. 14, 1834, p. 285.

6. Circumstances in which a general reference to oath of the whole matters at "issue in the cause" was refused to be sustained. *Phoenix Fire Insurance Company*, July 10, 1834, p. 921.

7. Incompetent to admit reference to oath by a motion. *Campbell*, July 11, 1834, p. 923.

PROOF.—IV. MISCELLANEOUS.

1. Where a mutual accounting among heritors, who had made payments of stipend under an interim decree of locality, drew back for forty-nine years, held that the parties claiming repetition must still produce reasonable evidence of their having actually made the over-payments; and question, what facts and presumptions amount to such evidence. *Weatherstone*, Nov. 12, 1833, p. 1.

2. A sister-in-law having offered to prove she had taken charge of ~~the estate~~ of her brother-in-law, on an agreement or understanding that

PROOF.—IV. MISCELLANEOUS (Continued.)

remunerated for her services—held competent to prove this agreement or understanding *prout de jure*. Smellie, Nov. 23, 1833, p. 125.

- 3.—(1.) In a proof, relative to the local usage and law of the island of Penang—held that a question put to a witness as to the law or usage of Bombay or Madras was inadmissible, there being no averment on the record relative to that law or usage.

(2.) Question, whether the holograph statement of a party, regarding the usage and law of Penang, be admissible evidence, though not taken on oath, or under cross-examination—the party being now dead, and being alleged to have possessed accurate information on the subject. Macalister's Trustees, Dec. 12, 1833, p. 198.

4. Question how far the water-mark in paper is evidence of the true date of its manufacture. Rodger, Jan. 23, 1834, p. 317.

- 5.—(1.) A proof was taken on commission in a previous process between the same parties, and relative to the same subject, which process was ultimately dismissed as incompetent; a witness formerly examined being again adduced—held incompetent to read the previous deposition to the witness.

(2.) In a reduction on the head of deathbed, the testimony of medical men, as to the nature of the disease, and the cause of death, admitted, although rested solely on the facts stated by unprofessional persons, neighbours and acquaintances of the deceased. Cogan, March 18, 1834, p. 569.

6. As part of the proof of fabrication of the books of a company, a professional accountant was examined to state his opinion, and the facts, consisting of erasures, interlineations, incongruities of accounts, &c., on which it was rested, Campbell, March 22 and 24, p. 573. See *Partnership*, 2.—*Ante*, II. 6.

7. Averment of an agreement to take payment by instalments of a debt which was afterwards constituted by a decree, proveable only by writ or oath. Watson, May 14, 1834, p. 588.

See *Trust*, 1.—*Right in Security*, 4.—*Judicial Remit*.—*Presumption of Payment*.—*Presumption of Death*.—*Lease*, 5.—*Process*, VII. 8.—*Husband and Wife*, 9.—*Writ*.

PROPERTY.

1. A feu charter which contained a description of the feu as bounded by certain marches, and set it forth as of such a measurement, held not taxative, but only designative of the quantity, and not precluding the feuar from maintaining a right under it to an extent greater than the specified measurement. Ure, Feb. 26, 1834, p. 494.

2. In a question between co-terminous heritors, whether the pursuer had enjoyed immemorial possession of certain lands—the jury found for the pursuer. Johnston, March 18 and 19, 1834, p. 572.

PROPERTY-TAX. See *Title to Pursue*, 8.

PROVING OF THE TENOR.

Circumstances in which the Court sustained the adminicles, and allowed a proof in an action of proving the tenor. Merry, June 21, 1834, p. 764.

See *Process*, XX. 3.

PROVISIONS TO CHILDREN.

1. A father, shortly after his eldest daughter had married without any contract of marriage, wrote to her husband's father, that he was willing to settle L.2000 on the young pair, payable at his death, and in the meantime to advance the interest, or L.100 per annum, as an addition to their income. He executed no deed to this effect, but ordered his agent to pay L.100 a-year to his daughter and her husband, as being the allowance he had "settled" on them, but without making any reference to the L.2000, and the L.100 was paid yearly till his death. Subsequently, on the marriage of his younger daughters, he bound himself, in their respective contracts of marriage, in a provision of L.2000, and dying without sufficient funds to satisfy the whole in full—Held that the eldest daughter could not compete with the others. Villiers, Nov. 12, 1833, p. 19.

PROVISIONS TO CHILDREN (Continued.)

2. A father, by bond of provision, settled a sum to be divided among his younger children, and at a subsequent period, by a special deed, settled a provision on a natural child, whom he afterwards legitimated by marrying her mother; held, that this child could not claim both a share of the general provision, and also the special provision settled on her while a natural child. *Nasmyth*, Dec. 19, 1833, p. 243.
3. Construction of a holograph codicil, bequeathing a special fund, under burden of the testator's "debts due by bond, bill, or account-current, and funeral expenses," by which it was held that the fund was not burdened with provisions previously constituted by bond of the testator, in favour of younger children. *Sands*, Jan. 29, 1834, p. 355.
4. A father during his life conveyed his estate to his eldest son, under the obligation of paying his debts and certain provisions to his younger children, which provisions were not payable till after his death; the son having been infert, thereafter granted an heritable bond over the estate, in favour of the younger children for their provisions, whereupon they were infert; the son predeceased the father, who afterwards died bankrupt, and the younger children received payment of their provisions from a posterior creditor of the son, holding a conveyance in security—held that the children were liable, to the extent of the provisions so received, to the onerous creditors of their father. *Poole*, Feb. 22, 1834, p. 481.

See *Fee and Liferent*, 1.—*Relief*, 2.

PUBLIC OFFICER. See *Act of Grace*.—*Removing*, 1.

PUBLIC RECORDS.

In a reduction of a service in which the proceedings required to be produced, the Court granted warrant to transmit them to the clerk of process, but not to be delivered up by him to the parties, except on special application and on cause shown. *Gifford*, Feb. 26, 1834, p. 491.

RANKING AND SALE. See *Process*, XVII.—*Jurisdiction*, 8.—*Right in Security*, 1.

RECLAIMING NOTE. See *Process*, IX.

RECORD. See *Process*, IV.

REFERENCE TO OATH. See *Oath*.—*Proof*, III.

REGISTRY ACTS. See *Ship*.

REI INTERVENTUS. See *Proof*, III. 2.

RELIEF.

1. A party sold land to another, who, before getting a title, entered to possession, whereupon the superior brought an action against both the seller and purchaser, for an alleged violation of the feu-contract, from which they were assoilzied, but the superior was not subjected in expenses—held, in the special circumstances, that the purchaser was entitled to be relieved by the seller of the expenses incurred by him in the action. *Saint Ann's Distillery Company*, Feb. 7, 1834, p. 407.
2. A father disposed an estate to a younger son, by a mortis causa deed of settlement, containing a clause of absolute warrandice; and an assignation to the rents, with warrandice from all facts done and to be done; and he bound himself to free the estate of L.800, (being the only debt then affecting it,) and of all cess, stipend, &c., up to the term of entry, being the first term after his death; on the same day he disposed a large estate, with his whole remaining heritable and moveable succession, to his eldest son, under burden of paying all his debts: and he reserved in both dispositions power of revocation by written deed; above twenty years afterwards he borrowed L.10,000, and disposed both estates in security, and soon after died without executing any written deed of revocation:—held, that the eldest son was liable to relieve the younger and his estate of the loan of L.10,000, and of all his father's debts, although he alleged that the effect of the settlement, as at its date, was to give him a large preference over his younger brother. *the effect of it, thus construed, in reference to the loan of L.*

RELIEF (Continued.)

be to deprive him of all benefit by the succession. Coventry, July 8, 1834, p. 895.

See *Proof, II. 1.—Partnership, 2.—Trends, 2.*

REMOVING.

1. Magistrates of a burgh having proceeded as in a common removing within burgh, for the purpose of taking from one of two conjoint clerks part of the accommodation in the town-house which he had been in use to occupy, chalking the door, and bringing a summons of removing before the Sheriff—action dismissed as incompetent. Magistrates and Town-Council of Dundee, Dec. 6, 1833, p. 173.
2. In an action of removing, founded on an unstamped missive, the tenant was ordered to find caution for violent profits, as a condition of giving in defences; he presented a bill of suspension, which the Lord Ordinary refused, but remitted to the Sheriff, of new, to ordain the tenant to find caution for violent profits, and if such caution were found, to receive defences; but the Court found the tenant entitled to expenses before the Sheriff and in this Court; and remitted to the Sheriff, with instructions to proceed according to the Act of Sederunt. Ross, Jan. 18, 1834, p. 308.

See *Process, XIX. 1.—Lease, 9.*

REPARATION.

1. Circumstances not warranting a breach by a builder of a building contract; and the amount of damage fixed at the difference between the contract price, and that for which the work was afterwards completed, the defender not asking any other mode of determining the amount. Magistrates of Montrose, Feb. 12, 1834, p. 429.
2. Although a pursuer libelled, that he was a creditor holding real security, with powers of sale, over a house belonging to a bankrupt; that the trustee obtained his consent to sell it by roup, on condition that the purchaser, within ten days, should, with a sufficient cautioner, grant bond for the price, failing which, to forfeit his interest, and be liable in one-fifth part of the price in name of damages, and that the price, though payable to the trustee, should be delivered to the pursuer, in extinction, pro tanto, of his debt; that the trustee sold the house, and allowed the purchaser to enter to possession, but omitted to require a bond of payment, and the purchaser became unable to pay; that the trustee and creditors had a patrimonial interest in carrying through the sale, and obtaining the pursuer's consent, and, therefore, the trustee was liable officially or individually for the price:—held, that as it was not alleged that a disposition had been granted to the purchaser, and as it was admitted that the subject was extant, and as it might still be sold by the pursuer, the trustee was liable neither officially nor individually for the price; reserving to the pursuer to bring a new action for any loss which he could qualify as arising from delay, &c. Allan and Son, Jan. 24, 1834, p. 329.
3. Circumstances in which one of two family trustees was held personally liable for a debt due by the other trustee (who became bankrupt), notwithstanding a clause of protection from liability, except from intromissions. Moffat, Jan. 31, 1834, p. 369.
4. An agent abroad drew bills on his constituent, for advances made by the constituent's directions; the bills were returned dishonoured, though the constituent was perfectly solvent; and the agent's credit and business were thereby destroyed—Question, whether such damages were consequential, and, on that account, could not competently found a claim for reparation. Dempster, Nov. 25, 1833, p. 548.
5. Under an issue, whether, at a meeting of heritors, where three persons were proposed as a committee for managing the poor's money, an heritor had stated falsely, maliciously, and calumniously, "that he would not sit with such men; that they were a disgrace to any community, and that it would be a disgrace for any honest man to sit in a committee with such men," or words to that effect—verdict found for the defender. Newlands, Dec. 2, 1833, p. 550.
6. Circumstances in which no damages were found due to a person whose name

REPARATION (Continued.)

was erroneously stated in the diligence under which she was apprehended and detained for a short time in custody of the officer. *Johnstone*, Dec. 27, 1833, p. 560.

7. Circumstances under which one shilling damages awarded for a political libel in a newspaper. *Fair*, Feb. 2, 1834, p. 565.
8. A party was imprisoned for a debt of L.21, after L.7 of that sum had, with the knowledge of the creditor and his law-agent, been paid; the Jury, in an action of damages, awarded a sum of L.20 against the creditor, and L.30 against his law-agent. *Watson*, Feb. 19, 1834, p. 567.
9. A shipping company having unwarrantably broken a contract with wharfingers in London, whose wharf they had bound themselves exclusively to frequent—held, that in estimating the damage thereby suffered, and for which the shipping company was liable, the loss of profit on the cartage by the company, in delivering the goods landed at their wharf, fell to be taken into account. *Downe*, March 6, 1834, p. 528.
10. A party having falsely and calumniously applied to a magistrate the epithets of a liar, a known and infamous liar, or words to that effect,—damages, in the circumstances, assessed at L.50. *Dawson*, March 21, 1834, p. 573.
11. A party bound himself, for an onerous cause, to uplift and retain part of a fund, and pay it over to two trustees, to be named by a husband and wife, for the use of the wife in life and her children in fee; he had power to appoint a factor, and he allowed the fund to lie over for several years in the hands of the factor, who became insolvent—held liable to the children, though no trustees had been appointed by the parents to receive the fund. *Stewart*, May 27, 1834, p. 636.
- 12.—(1.) A summons subsumed that the defender, in consequence of fraud and imposition practised on the pursuers, in relation to a security for a loan of L.8000, “was bound to make good to the pursuers all loss and damage which they may sustain by the perpetration of the said fraud,” and that the defender “was bound to make good to the pursuers any loss which may arise to them in consequence of their having been fraudulently induced to lend the said sum of L.8000;” the conclusions were, that the defender should relieve the pursuers “from all loss and damage which they may sustain, in consequence of their having been induced to lend the said sum,” and that, in order to ensure such relief, he should be decreed to pay the said sum to the pursuers, on being assigned to their security, or at least to pay “such sum as may, together with the sum that may be recovered by the pursuers operating upon their security, make up to the pursuers the full amount of L.8000,”—held, that as the summons contained a subsumption simply of damages, it was inept to deduce conclusions of relief when no actual damage had yet been sustained.
(2.) Question—If the agent of a borrower fraudulently represents his client's lands to be held in fee simple, knowing them to be entailed, and fraudulently states a false rental to the lender, can the lender bring a direct action against such agent, concluding to have the loan taken off his hands? or must the lender first attempt to make his security available for what it will bring in the market, and must he try the point, in a question with the heirs of entail, whether the lands are entailed? *Martin*, June 27, 1822, p. 830.
13. Circumstances in which an assault having been committed in contravention of lawburrows, and an action of damages, as well as an action of contravention of lawburrows having been raised and conjoined, the jury found for the pursuer. *Ball*, July 15, 1834, p. 934.
14. Action of damages for malicious defamation, in which the jury found for the defender. *Ross*, July 16, 1834, p. 936.

See *Slander*.—*Stamp*, 2.—*Agent and Client*, 8.—*Process*, I. 6.—*Lease*, 14.

REPETITION. See *Account*, 1, 2.

REPOSING. See *Process*, XI.

RES JUDICATA. See *Process*, XX. 7.

RES NOVITER. See *Process*, III. 2.—IV. 1.

RETENTION. See *Bill of Exchange*, 3.

REVOCATION. See *Husband and Wife*, 2.

RIGHT IN SECURITY.

1. A party infest in certain subjects under a bond and disposition in security, containing a power of sale, and an assignation to the rents, with power to enter into possession and uplift the rents; and who had got a decree of mailles and duties, and had exposed the subjects to sale, and no other creditor being infest—held entitled to have them struck out of a sequestration, awarded in relation to a ranking and sale of the debtor's estate. Robertson, Dec. 12, 1833, p. 203.
2. Where there was no party entitled to uplift the rents of an heritable subject belonging to a person who was dead, the Court sequestrated the subject, on the application of a party stating himself to be a creditor, holding a real burden over the subject. Smith or Thomson, Dec. 20, 1833, p. 263.
- 3.—(1.) Held that an heritable creditor, infest, is not entitled to apply for sequestration of effects, as liable to hypothec for rent.
(2.) Question, 1st, Whether, if an heritable creditor, infest, and holding a decree for mailles and duties against former tenants, give possession to a new tenant, or to the proprietor at a rent, he can obtain sequestration; and, 2d, Whether an heritable creditor, infest, who has not used poinding of the ground, can attach, by sequestration, moveables on the property belonging to the proprietor who is in the natural possession. Railton, June 20, 1834, p. 757.
4. Circumstances which held sufficient to infer that an heritable bond was extinguished without any regular discharge. Thomson's Trustees, Nov. 27, 1834, p. 842.

See *Bankruptcy*, 19.—*Competition*.—*Ship*.

RIVER. See *Acquiescence*, 1.

ROAD.

The right to a servitude road, eighteen feet wide, subject to be used for carts and led cattle, implies a right of driving loose cattle along it. Swan, Jan. 21, 1834, p. 316.

See *Jurisdiction*, 10.

ROAD ACT.

A party who lends money to road trustees, is entitled to rely on the terms of the bond granted to him, and of the statute under which they act; and he is not affected by previous resolutions of the trustees which were not communicated to him. Threshie, Nov. 21, 1833, p. 105.

SALE.

1. A party who held forty shares in the stock of a company incorporated by statute, marked in the books as Nos. 55 to 94 inclusive, after selling thirty to several purchasers, without specifying their numbers, sold ten to another, who refused to pay the price, unless the proper number of each share was specified in the transfer; held, in reference to the terms of the statute, that this was not a relevant defence. McMicking, Nov. 22, 1833, p. 113.
- 2.—(1.) A purchaser not bound to accept a title attended with doubt, and unnecessary in such case to determine whether the objections to it are truly fatal or not.
(2.) Objections which held sufficient to entitle the purchaser to reject it. Brown, Dec. 6, 1833, p. 176.
3. A sold to B the interest in certain lands in Upper Canada, assigned to him by C, by a Scotch deed, it being stipulated that the price should be repaid if B, within nine months, should show an opinion of a lawyer of Upper Canada that the conveyance to A by C was not effectual—held, that production of an opinion by a lawyer of Montreal, in Lower Canada, was sufficient implement of the stipulation to entitle B to repetition. Peebles, June 10, 1834, p. 701.

See *Entail*, 1, 3.—*Fraud*.—*Ship*.

SALMON-FISHING. See *Appeal, Execution Pending*.

SEMIPLENA PROBATIO. See *Parent and Child*, 2.

SEQUESTRATION, (IN BANKRUPTCY). See *Bankruptcy*.

SEQUESTRATION OF LAND, &c.

After a confirmation of certain parties as executors dative, qua next of kin, and a general service as heirs-portioners to a deceased lady, and possession by them of the moveable estate and of the title-deeds; other parties, who alleged that she had executed a deed in their favour, but had destroyed it while insane, and that they had raised a summons of proving its tenor—found not entitled to have the estate sequestrated, or the superiors interdicted from granting precepts of clare constat, &c. Laing, March 6, 1834, p. 527.

See *Judicial Factor*.—*Right in Security*, 3.

SERVICE. See *Entail*, 2.—*Agent and Principal*, 1.

SERVITUDE.

The right to a servitude road, eighteen feet wide, subject to be used for carts and led cattle, implies a right of driving loose cattle along it. Swan, Jan. 21, 1834, p. 316.

SHERIFF'S SMALL DEBT ACT. See *Jurisdiction*, 6.

SHIP.

The registered owner of a vessel entered into a minute of sale, not in terms of the registry acts, whereby he agreed to put the purchaser in possession on his retiring a bill granted for the balance of the price; the purchaser took possession of the vessel, and employed her as his own property, but ultimately failed to retire his bill—Held bound to relieve the registered owner of all claims for repairs and furnishings made to her while in his possession. Inglis, Nov. 19, 1833, p. 67.

SI SINE LIBERIS DECESSERIT. See *Testament*, 6.

SLANDER PRIVILEGED.

Circumstances in which the pursuer of an action of damages against a minister on account of statements made by him to an heritor and elder of the parish, the employer of the pursuer, regarding the pursuer's conduct, was held bound to take an issue, whether the statements had been made by the defender "in violation of his duty as a clergyman," and not entitled to the simple issue, whether they were "false and calumnious." Grant, Feb. 1, 1834, p. 385.

JUDICIAL.

A pursuer raised an action of damages in an Inferior Court, alleging that the defender had stated that the pursuer, a married man, had had carnal connexion with a maid-servant, and he libelled that the family peace was thereby broken; and the defender answered, that his family peace had previously been broken, by his having been accused of attempting, prior to his marriage, to have carnal connexion with a girl, and attempting to knock her down—and that on this coming afterwards to his wife's ears, he charged her with being too gracious with their man-servant. Held in an action of damages by the pursuer and his wife, in respect of these judicial statements, for malicious slander,

(1.) That they were not pertinent to the cause.

(2.) That it was not necessary to prove that the defender disbelieved their truth or pertinency, if they were, in fact, neither true nor pertinent.

(3.) That the defender was not entitled to prove that the statements had been previously current rumours in the country; and,

(4.) A verdict of L.200 awarded to the wife, but no damages to the husband. Brodie and Spouse, July 17, 1834, p. 941.

See *Reparation*, 5, 7, 10, 14.

SOCIETY. See *Incorporation*.

STAMP.

1. A defender granted a letter, by which, "in order to prevent farther litigation or expense in the process," he agreed to pay L.30 in full of the account libelled on; but having failed to pay, decree for that sum passed—held, in a bill of suspension of the decree, that an objection that the document was stamped, was irrelevant. Halley, Nov. 19, 1833, p. 58.

2.—(1.) An assignation by a company of a bill for L.25, and by

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AMP (Continued.)

another bill, in security of a debt due by the company, being written on a single deed stamp, and letters of horning raised on the bill for L.25—held, in the circumstances, that the stamp was to be considered as applicable to the assignment of the L.25 bill, and, therefore, an objection to the assignation as not duly stamped, with reference to the legality of the diligence, repelled.

(2.) A party having been incarcerated in virtue of diligence proceeding on an assignation to a debt, brought a suspension and liberation, and a reduction, on the separate grounds that the debt had been extinguished prior to the date of the assignation, and that the messenger's execution was false; and in the reduction certification contra non producta passed as to the execution, (which the messenger and his cautioners did not attempt to maintain,) while defences were ordered as to the alleged extinction of the debt, but no further procedure was had therein; and the letters in the suspension and liberation were suspended simpliciter, in respect of the decree of certification—held, in an action of relief by the creditor against the messenger and his cautioners, that he was not entitled at once to decree for the debt, but that the action fell to be sisted till the reduction was finally disposed of. Robertson, May 13, 1834, p. 580.

See *Bill of Exchange*, 8.—*Lease*, 9.—*Removing*, 2.—*Process*, XIX. 1.

STATUTE. See *Moncreiff's Tutors*, p. 459.—*M'Nab*, May 24, 1834, p. 636.—*Jurisdiction*, 4, 7.

— 1695, c. 24. See *Entail*, 4.—10 Geo. III.

— 3 and 4 W. IV. c. 76. See *Burgh*.

TIPEND. See *Teinds*, 1.—*Removing*, 2.—*Lease*, 9.

UBVALUATION. See *Teinds*, 1.

UCCESION. See *Testament*.

UMMONS. See *Process*, I.

UPERIOR AND VASSAL.

1. Period for which retour duties, and the full rents respectively, held due by a party in nonentry. Hill, Feb. 7, 1834, p. 411.

2.—(1.) A superior, after obtaining decree of declarator of tinsel of the feu, ob non solutum canonem, cannot insist in an action for arrears of feu-duties.

(2.) But he may insist for payment of composition previously incurred by entry of the vassal a singular successor; and it is not relevant to allege, in defence, that the entry was incomplete in respect of the charter and sasine being retained in the hands of the superior's agent, who was entitled under the feu-contract to expedite them, and who kept them till arrears of feu-duty should be paid. Magistrates of Edinburgh, May 16, 1834, p. 593.

See *Bankruptcy*, 10.—*Entail*, 2.—*Title to Pursue*, 2.

USPENSION. See *Process*, XIX.

ACIT RELOCATION. See *Lease*, 6.

EINDS.

1.—(1.) A decree of reduction, obtained by one of several heritors, of a final decret of locality, has the effect to convert it into an interim decret as to all the heritors.

(2.) A decree of approbation of a sub-valuation, obtained during the currency of an interim scheme of locality, and made the basis of allocation in the final scheme, has the same effect, as a rule of adjustment among the co-heritors, as a decree of valuation pronounced by the High Commission, and, in either case, it draws back to the date of the preceding final decret of locality.

(3.) A petition against a judgment by a Lord Ordinary under a remit from the Court, in a process of locality in 1794, which was not presented for more than forty days, but was ordered to be answered—held to keep the judgment open. Weatherstone, Nov. 12, 1833, p. 1.

See *Prescription*, I.—*Title to Pursue*, 1.—*Proof*, IV. 1.—*Interest*, 1.

2. Competent in a process of locality to discuss a question of relief between heritors, arising from an alleged use of payment out of certain lands, although

EINDS (Continued.)

these lands had passed from one heritor to another, under a contract of excambion. Earl of Fife's Trustees, Nov. 19, 1833, p. 59.

3. A decree of valuation of teinds in 1732, contained, inter alia, an item of 14 bolls of bear; question, whether, in respect that no bear was now grown in the parish, and no fiars prices of bear struck in the county, the titular could compel payment in barley, or its value, in place of bear or its value. Sligo, June 17, 1834, p. 733.

4. In the subvaluation of the teinds of a parish formerly a parsonage, a report in 1629, (the phraseology of which varied in reference to different lands,) contained these words, "Findis that the landis of Pittendinne and Milneboill, according to the probatioun usit and deducit yairanent, hes payit, pntlie payes, and may pay in constant rent of stok and teind, baith personage and viccarage in time com^s, by the comoditie of the mylne yrof of silver dewtie zeirlie, iij^o iij^x merkis mo^v. And Findis that the teindis of the foirsaid landis wer rental^{lit} of auld to xx bolls wic^l, twa p^{ts} meall, and third p^t bear, q^{lk} was payit to the minister and persone of Monydie, at the least to thair taksman;" —held,

(1.) That these words imported a separate valuation of the teinds of these lands at 20 rental bolls; and,

(2.) As there was no dereliction, according to this mode of interpreting the report, decree of approbation of the subdivision, pronounced in terms thereof. Thomson, June 18, 1834, p. 747.

See *Prescription, I.—Minor, 4.*

TESTAMENT.

1. Terms of a clause in a testament which held to suspend the term of payment of a legacy merely, and not the vesting. Johns, Nov. 29, 1833, p. 146.
2. Clause in a will directing the proceeds of the testator's estate to be vested in two separate estates of equal value, to be conveyed to A and B respectively, at a certain period, with a provision for the intermediate maintenance of B, which held to lay that burden not on his own share, but on the general fund Orr, Jan. 31, 1834, p. 379.
3. A testator directed his executors to purchase a certain estate, and settle it according to a particular destination; but the free fund fell short of enablin them to buy the estate—held, in the circumstances, that the fund was subje to the same destination as the estate, if bought, would have received. Ferguson, Feb. 15, 1834, p. 456.
4. A Scotsman domiciled in Scotland, who possessed slaves in Demerara, executed in Scotland a deed of settlement, whereby he directed his executor to sell the slaves, put out the proceeds to interest, pay the interest to his father and mother, and the survivor, and, at the death of both his parents, to divide the proceeds, by giving one-fifth to each of his brothers, John and Alexander, one-fifth to each of his sisters, Anne and Margaret, and one-fifth to Miss wards; and John and Alexander predeceased the surviving parent:—he
 - (1.) That the right to their respective shares vested in each of them the testator's death; and,
 - (2.) That the vested rights "were shares of funds, subject to a foreign claim, the valid taking up of which, by the representatives of the deceased, was necessary." Smith, May 30, 1834, p. 646.
5. A testator conveyed his heritable property to his eldest daughter in fee, and her son, and the heirs of his body, in fee, declaring the property to be subject to the burden of his debts, legacies, and provisions; and further conveyed his moveable estate to the son, "and his foresaids:" the son confirmed the conveyance to the testator, but died intestate, having uplifted part of the estate, and leaving a widow and a son and two daughters—circumstances which held,

(1.) That the liferent of the testator's daughter was free of any annuities or the interest of provisions;

TESTAMENT (Continued.)

(2.) That the son's whole moveable estate, including the part left by his grandfather, and never uplifted by him, fell to be divided into three portions, whereof one belonged to his widow as *jus relictæ*, and the other two as legitim and dead's part to his two daughters, to the exclusion of his son, unless he should collate the heritage; and,

(3.) That the debts and provisions left by the testator burdened equally the heritable and moveable estate left by him, in proportion to their respective values. Graham, May 31, 1834, p. 664.

6. A testator left a share of his property to a married daughter, for her *liferent* use *allenary*, and to trustees in fee for her children, and failing of children, for her other heirs and assignees whatsoever; she had four children, who all predeceased her, two of them only leaving issue, and two having assigned their interest to their husbands; held, on the death of the *liferentrix*,

(1.) That children had not failed so as to open the destination to the assignees of the *liferentrix*.

(2.) That no right of fee had previously vested in any of the children, so as to be transmissible by them; and,

(3.) That the issue of such as left issue were entitled to succeed to the whole property *per stirpes*, in such share as their respective parents would have taken had they survived the *liferentrix*. Mowbray, July 9, 1834, p. 910.

See *Clause.—Interest, 4, 5.—Faculty.*

TITLE TO PURSUE.

1. Where parties are called and appear as heritors, in a process of locality, and make over-payments of stipend under an interim-decree, it is not necessary for them, in adjusting their claims of relief, in that process, to produce the title-deeds of their lands, to entitle them to repetition from the under-paying heritors, parties to the same process; but if any of the original parties are dead, or have sold their lands, the parties who were sisted in their room must produce either a confirmation before extract, or a special assignation. Weatherstone, Nov. 12, 1833, p. 1.

2. A new party cannot compare as pursuer without the consent of the defender. Taylor, Nov. 14, 1833, p. 39.

3. An action was raised by the preses and treasurer of an unincorporated society, against a member, concluding for sums due to the society; and on an objection to the title, the other members were sisted as pursuers, on paying ten shillings of expenses, which sum the defender's agent uplifted—held, in a reduction of the decree, that the defender could not object to the original instance as null. Wood, Nov. 15, 1833, p. 50.

- 4.—(1.) A party sold a portion of his estate, and granted disposition with procuratory and precept, on the latter of which the purchaser was infest; and the heir of the seller made up titles to the whole estate, including the portion sold, under a precept of clare from the superior—held that this created no impediment to the purchaser making his holding public, and consequently that he had no title to reduce the heir's title so made up.

(2.) A party having threatened to challenge a sale by his father, found liable in the expense of raising an action to have its validity declared, though before it was called, he intimated that he would not oppose, if the conclusion for expenses were departed from. Fullarton, Nov. 22, 1833, p. 117.

5. A charge having been given on a bill, granted to a party as deacon of an alleged corporation, in satisfaction of expenses in an action for breach of corporation privileges, decerned for in absence against a third party, a bill of suspension, upon the allegation that the body was not a legal corporation, passed on caution. Trotter, Dec. 3, 1833, p. 161.

6. Although three out of four joint-tenants submitted an action of damages, raised for injury done to them in that character, and a decree-arbitral was pronounced, held competent for the fourth to waken the action for his own interest therein, and insist in it by himself. Mackintosh, Jan. 23, 1834, p. 321.

TITLE TO PURSUE (Continued.)

- 7 A party presented, in his own name only, a bill of suspension and interdict of diligence affecting goods which he alleged to belong to his son—held, that he had no title to do so. *McLaren*, March 1, 1834, p. 515.
- 8.—(1.) A bill was drawn by a pursuer on a defender to account of the amount of a decree against which the defender had appealed; the bill was protested for non-acceptance—held, on the decree being affirmed, and the pursuer having died, that an indorsee of the bill had no title to be sisted as pursuer, and to have the judgment of affirmance applied.
- (2.) Executors confirmed of a law-agent, entitled to crave the Court to apply the judgment of the House of Lords, to the effect of allowing a decree for the expenses of this Court to go out in their names. *Anderson*, March 6, 1834, p. 526.
9. The pursuer of an action of damages, against whom an interim decree was issued for a sum of expenses during the preparation of the cause, and against whom an execution of search was returned, held not entitled to proceed to trial in hoc statu, although he offered to surrender himself. *Wight*, March 8, 1834, p. 535.
10. The raiser of a multiplepointing as to a fund in his hand having claimed no deduction for property-tax, and decree of preference, primo loco, being pronounced in favour of a claimant for certain annuities, who drew the same without deduction on the annuities—held that another claimant who was preferred to the balance had neither title nor interest to reduce the decree of preference, to the effect of having the amount which the raiser might have deducted and retained as property-tax repeated and restored to the fund in medio. *Pedie*, May 20, 1834, p. 617.
11. Question whether a bankrupt, who was pursuing a process of cessio bonorum, and who raised an action of damages, was entitled to pursue without finding caution for expenses. *Hay*, May 31, 1834, p. 659.
12. Circumstances in which the Court repelled preliminary defences stated against a first adjudication, involving a question as to the title to pursue. *Shotton, Malcolm and Company*, June 11, 1834, p. 705.
- See *Act of Grace*, (2.)—*Bankruptcy*, 9, (4.)—*Trust*, 2.—*Husband and Wife*, 1.—*Heir and Executor*.—*Process*, I. 1, (2.)

TRANSFERENCE. See *Process*, XIX. 2.

TRUST.

1. Circumstances sufficient to infer that an assignation in favour of one party was truly for behoof of another, to the effect of sustaining action against the latter by the granter, to account for his intromissions with the effects assigned, under an obligation to account contained in the assignation. *Wood, Small, and Co.*, Nov. 14, 1833, p. 42.
- 2.—(1.) A deed of devolution of a trust-estate being reduced, but the reduction being under appeal, and one of the trustees having declined, when judicially called on, to state whether he meant to resume the trust—held, in an action of count and reckoning raised by the other trustees and beneficiaries under the trust, against a party alleged to have had intromissions with the trust-estate, (and who had instituted a counter-action to constitute a debt against the trust-estate,) that a defence, founded on the want of the concurrence of the trustee, was not relevant, in respect that his conduct was adopted to support the views of the defender, and to prevent justice being done between him and the trust-estate; and in respect of the nature and form of the action raised by the defender.
- (2.) Competent for the trustees, and the beneficiaries under the trust, to call the party to account for intromissions with the trust-estate, prior to the appointment of a judicial factor.
- (3.) Question, in what manner, and to what effect, a party who has accepted and acted as trustee, can effectually divest himself of the duty and responsibility of that character. *Freen*, Nov. 29, 1833, p. 141.
3. A trustee who had taken infetment under the trust, not entitled

TRUST (Continued.)

hold his name from proceedings necessary to the winding up, and obtaining the trustees denuded. *Cumming*, Feb. 28, 1834, p. 508.

4. A party, by trust-deed of settlement, conveyed his property to four trustees, and the acceptors or survivors, whereof a majority to be a quorum, with power in the event of any declining to act, or dying, to "add and assume" other proper persons in their "place;" two only accepted, and they, by deed of assumption, assumed three in place of the two who declined—held ultra vires, and that the assumption of all the three was void. *Ferrie*, May 31, 1834, p. 672.
5. Circumstances in which trustees, under a deed for behoof of creditors, having paid certain debts in full, were held not entitled to credit therefor in an accounting at the instance of other creditors. *Bell*, June 17, 1834, p. 738.
6. Circumstances as to claiming payment of a debt from a trustee under a trust for behoof of creditors, not sufficient to import an accession thereto rebis ipsis et factis. *Hamilton*, June, 21, 1834, p. 766.

See *Proof*, I. 1.—III. 1.—*Minor*.—*Jurisdiction*, 7, 9.—*Reparation*, 3, 11.—*Presumption of Death*, 3.—*Judicial Factor*, 4, 6.—*Husband and Wife*, 1.—*Attorney's Certificate*.

TRUSTEE. See *Bankruptcy*.

TUTOR AND CURATOR.

Question, whether any person but a father, when bequeathing an estate to minors, and naming tutors and curators, can exempt them from all liability, except each for his own actual intromission. *Moffat*, Jan. 31, 1834, p. 369.

See *Minor*.

VALUATION. See *Teinds*.

VESTING. See *Testament*, 1.

WARRANTICE.

A party who held lands, with the teinds, which had been originally conveyed with a warrantice right over other lands in the event of augmentation of stipend, qualified by a power of redemption on certain terms, granted a feu disposition of part of the lands with the teinds, and the usual assignation to writs, but without any conveyance of the warrantice right; and his successors, in renewing the investitures of the principal lands, omitted the qualification of a power to redeem originally attached thereto, and possession was enjoyed of the principal lands under the titles, omitting this qualification, for more than forty years, but without any claim having arisen under the warrantice; and ultimately an augmentation was imposed on the vassal—Held, in an action of relief, at the instance of the vassal against the proprietor of the warrantice lands,

(1.) That the assignation to writs in the feu disposition, did not convey any right to the warrantice; and

(2.) That the qualification of that right as to the power of redemption had not been worked off by the infeftments which omitted it standing for forty years. *Hamilton*, Jan. 28, 1834, p. 349.

See *Process*, XVIII.—*Sale*, 1.—*Husband and Wife*, 2.—*Relief*, 8.

WATER BAILIE OF GLASGOW. See *Jurisdiction*, 14.

WITNESS. See *Proof*, II.

WRIT.

(1.) The granter of a disposition mortis causa, had three natural sons, James, Thomas, and John, and no other child; the dispositive clause was in favour of "John Kedder, residing at Kirkhill, my son, for the services rendered to me ever since he was able to do any work;" the Christian name, except the first letter, was written throughout the deed on an erasure; the testing clause, which appeared to have been written after the deed was signed, bore that the deed was subscribed "in favour of the said John Kedder, my son," and these words were free of erasure; sasine followed in favour of John, and was recorded four years before the death of the granter, whose liferent was reserved; the deed contained evidence that Thomas was not the grantee,

WRIT (Continued.)

and John offered to prove that it could not be James, because James had never resided at Kirkhall, or rendered the services to his father, specified in the dispositive clause, whereas he (John) had done both:—held incompetent to allow John to prove by the writer and instrumentary witnesses, that the Christian name John was written upon the erasures, as it now appeared, in the presence of the deceased testator, and before or at the time when he subscribed the deed, and that the testing clause was then also filled up as it now stood, in his presence.

(2.) Question, whether such disposition was valid, against a reduction raised by the heir-at-law, though parole proof was disallowed of the erasures in the Christian name having been made in presence of the granter, and before signing the deed.

(3.) Question, how far a deed loses any of the usual privileges of a probative writ, if it be instructed that the testing clause has been filled up after the deed was signed. Reid, June 24, 1834, p. 781.

See *Proof, I.—Proving of the Tenor.*

WRONGOUS IMPRISONMENT. See *Act of Grace.—Reparation*, 6, 8.



